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Introduction of sanctions against parliamentarians

Report¹

Committee on Rules of Procedure, Immunities and Institutional Affairs

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Summary

Parliamentarians may now clearly be held personally liable on account of State actions and decisions taken in fulfilling their duties, and nominative sanctions may be imposed on them by third States and international organisations through restrictive measures.

Moreover, members of the Parliamentary Assembly are threatened with criminal or administrative proceedings for having exercised their freedom of movement in breach of national legislation on entry into the territory of some member States, this being in contravention of the commitment undertaken by these States to guarantee the freedom of movement and immunity of Assembly members.

Parliamentarians are included on “blacklists” drawn up by States – or international organisations – which can accordingly refuse to grant them a visa or entry to their territory. In accordance with the principle of the rule of law, States shall ensure that any ban or restrictive measures targeting individuals meets the requirements of legal certainty and is accompanied by appropriate procedural and judicial guarantees. However, parliamentarians should be afforded additional safeguards so as to offset the harmful effects which travel restrictions may have on the performance of their duties.

Parliamentarians do not enjoy any specific status or protection under international law. In order to take account of the specific nature of parliamentary action at international level and to protect those performing it, national parliamentarians should be afforded adequate safeguards in relation to third countries when travelling abroad in the course of their duties and be covered by a fixed, standardised legal framework of rights and privileges.

1. Reference to committee: [Doc. 13499](#), Reference 4051 of 23 June 2014.



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A. Draft resolution²

1. In recent decades, international action has become increasingly important in the activities of national parliaments, with the growing number of interparliamentary co-operation organisations and international parliamentary forums, the development of bilateral and multilateral international parliamentary relations (friendship groups, specialised interparliamentary networks), study groups and fact-finding visits. There is furthermore an increasing demand for interparliamentary co-operation, in particular in connection with support for the democratic transition process in many States.
2. As a benchmark institution for interparliamentary co-operation in Europe, the Parliamentary Assembly refers to its [Resolution 1773 \(2010\)](#) on promoting parliamentary diplomacy, in which it welcomed the positive role played by the latter in preventing conflicts, reducing tension between countries, facilitating dialogue and mediation.
3. The Assembly is seriously concerned about the current political context in Europe, where the illegal annexation of Crimea by the Russian Federation and its intervention resulting in a military conflict in eastern Ukraine have generated a climate of mutual distrust and revived security concerns within Council of Europe and European Union member States, against a background of a “war of sanctions”. The reciprocal direct sanctions and the resulting restrictions on travel by parliamentarians are particularly harmful to parliamentary diplomacy.
4. The Assembly believes that the restrictive measures targeting parliamentarians are not compatible with the very nature of parliamentarianism, which requires relations to be maintained through dialogue. It is afraid that the spread of individual sanctions involving the sharing of responsibility between States and individuals supporting the objectives of States is leading to an excessively moralistic trend in international law and the system of international liability, whereby, in the absence of any criminal liability, individual sanctions are supplementing the traditional sanctions targeting States.
5. Moreover, the Assembly deplores the existence of national “blacklists” of parliamentarians to whom the States which have drawn them up can refuse visas or entry. It also denounces the cases involving Assembly members who are threatened with criminal or administrative proceedings for having breached countries’ legislation on entry into their territory in exercising their freedom of movement and travel. The Assembly underlines that, regardless of the legitimacy of the assertion by certain States of their sovereignty or the integrity of their territory in response to real or presumed threats, they cannot absolve themselves of compliance with international law and fundamental rights or the principle of the rule of law when they adopt restrictive measures or retaliatory measures against individuals in this connection.
6. The Assembly considers that, although international law in principle grants States full sovereignty over their territory, entry bans imposed by member States on parliamentarians amount to interference in the latter’s exercise of their right to freedom of expression enshrined in the European Convention on Human Rights (ETS No. 5). With reference to [Resolution 1894 \(2012\)](#) on the inadmissibility of restrictions on freedom of movement as punishment for political positions, the Assembly reasserts that freedom of movement as a corollary of freedom of expression must not be subject to restrictions or used as punishment for peacefully expressing political opinions. Freedom of political expression enjoys enhanced protection and should not be restricted without compelling reasons.
7. The Assembly welcomes the fact that since the adoption of its [Resolution 1597 \(2008\)](#) on United Nations Security Council and European Union blacklists, the safeguards applicable to sanction procedures or restrictive measures both at United Nations and European Union level, in particular the procedures for challenging the measures and the scope and intensity of judicial review of the measures, have been duly improved. In this connection, it welcomes the judicial supervision exercised by the Court of Justice of the European Union over decisions providing for restrictive measures against natural or legal persons adopted by the Council of the European Union and expects the Court of Justice to clarify in its case law the extent and scope of the safeguards concerning natural persons.
8. The Assembly considers that any sanction targeting individuals must meet the requirements of legal certainty and be accompanied by appropriate procedural guarantees. However, in the case of parliamentarians, even if judicial reviews of bans or restrictive measures imposed by third countries play a key part in protecting them against arbitrary decisions, they should be afforded additional safeguards in order to

2. Draft resolution adopted by the committee on 10 December 2015.

offset the harmful effects which travel restrictions may have on the performance of their duties. The Assembly calls on Council of Europe member States to provide foreign parliamentarians targeted by restrictive measures such as inclusion on entry or visa blacklists with a transparent listing and appeals procedure.

9. In this context, the Assembly calls on member States which have adopted or may adopt restrictive measures to:

- 9.1. identify exhaustively the provisions governing the restrictive measures, travel ban lists or special rules on movement which could restrict foreign parliamentarians' freedom of movement;
- 9.2. make sure that there is a close link between a restrictive measure imposed on a foreign parliamentarian and its intended purpose. In particular, national security grounds must not be used to restrict the access of a parliamentarian who is peacefully expressing certain political positions;
- 9.3. notify foreign parliamentarians who are subject to bans or restrictive measures of their existence and the reasons for them;
- 9.4. ensure that foreign parliamentarians are able at short notice to submit their observations to the body that has imposed or is threatening to impose a restriction;
- 9.5. suspend the execution of a ban or restrictive measure while it is being challenged.

10. The Assembly is seriously concerned about the restrictions or travel bans which certain Council of Europe member States have imposed on Assembly members when performing their duties, in particular in the case of election observation exercises or visits by rapporteurs duly appointed by it, whether in terms of refusals to issue visas or threats of arrest or prosecution under national legislation. The Assembly unreservedly condemns these restrictions, which are a flagrant violation of the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and the Protocol thereto (ETS No. 10) and a breach of the undertaking to co-operate with the Assembly.

11. Under the Statute of the Council of Europe (ETS No. 1) and the General Agreement on Privileges and Immunities of the Council of Europe and the Protocol thereto, to which they all are parties, Council of Europe member States have undertaken to recognise and guarantee the freedom of movement and immunity of Assembly members and to protect them against any legal proceedings or detention, thereby ruling out both entry or visa bans and prosecution for failure to comply with rules on entry or movement, for instance via legislation on occupied territories.

12. The Assembly emphasises that, in accordance with the principles of international law, no State may evade the obligations imposed on it by international law or the treaties which it has signed by relying on the provisions of its domestic legislation, of whatever kind, including its own constitution. Accordingly, no Council of Europe member State may derogate from the obligations it entered into under the General Agreement on Privileges and Immunities and the Protocol thereto by relying on provisions of its domestic law to justify its failure to comply.

13. The Assembly therefore formally asks the member States to abide by their commitment to:

- 13.1. guarantee free movement of members of the Assembly. When a member State hosts a meeting, a visit or an official event organised by the Assembly, it must facilitate the participation of members of the Assembly and issue the visas required for their entry into its territory;
- 13.2. guarantee the immunity of members of the Assembly against any legal proceedings or measures for their arrest or detention, except in cases of flagrante delicto.

14. Reiterating firmly the position which it took in [Resolution 2078 \(2015\)](#) on the progress of the Assembly's monitoring procedure, [Resolution 2063 \(2015\)](#) on consideration of the annulment of the previously ratified credentials of the delegation of the Russian Federation and [Resolution 2034 \(2015\)](#) on challenge on substantive grounds, of the still unratified credentials of the delegation of the Russian Federation, the Assembly condemns the violation by the Russian Federation of the General Agreement on Privileges and Immunities of the Council of Europe and calls on the authorities immediately to release Nadiia Savchenko, member of the Assembly.

15. The Assembly believes that it is now vital for national parliaments to introduce good governance in the area of their international activities if they wish to continue to operate legitimately through parliamentary diplomacy. It calls on the national parliaments of the member States to:

15.1. draw up guidelines on the conduct of bilateral or multilateral interparliamentary relations, setting out the aims, instruments and arrangements for interparliamentary co-operation, as well as the institutional and legal framework and the procedural or organisational aspects, or general rules of conduct, the rules applicable to visits by parliamentarians to other countries and, where applicable, the specific rights of the relevant parliamentarians;

15.2. provide appropriate training for members of parliament and the relevant secretariat staff concerning the preparation and conduct of parliamentary visits to foreign countries;

15.3. support initiatives aimed at promoting at international level the recognition of an international status for parliamentarians and any related rights and obligations, which is vital to the development of parliamentary diplomacy.

16. The Assembly also calls on the member States to:

16.1. sign and ratify the 1969 United Nations Convention on Special Missions;

16.2. study without delay the question of the rights and obligations of national parliamentarians from Council of Europe member States travelling on their territory in order to grant them adequate safeguards for carrying out their duties freely and effectively outside their own countries, including freedom of movement and expression and personal immunity;

16.3. in this connection, study the possibility of granting national parliamentarians from Council of Europe member States travelling on their territory on behalf of their parliaments the same immunities as parliamentarians from their own countries.

17. Against this overall background of the internationalisation of national parliamentary activities and given the greater responsibility now borne by parliamentarians on account of their actions and decisions, with the possibility of their being held personally liable under international law, the lack of a specific status and protection for parliamentarians under international law means that parliamentarians' rights and privileges outside their own countries are precarious. Account therefore needs to be taken of the specific nature of parliamentary work at international level and the protection afforded to those performing it needs to be strengthened, in particular in relation to third countries. The Assembly therefore calls on:

17.1. the Inter-Parliamentary Union (IPU) to develop and promote a set of rules applicable to parliamentarians travelling abroad in the exercise of their duties so as to provide an international framework for interparliamentary co-operation;

17.2. the United Nations International Law Commission to promote, in its ongoing discussions, a comprehensive international legal framework so that parliamentarians targeted by restrictive measures are covered by a proper status in this connection, given the wide range of different safeguards afforded to individuals targeted by sanctions, which currently depend on the legal order of the international organisation or State which imposed them.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... (2016) on the introduction of sanctions against parliamentarians and, in particular, to the current situation involving a growing number of restrictions on travel by national parliamentarians from Council of Europe member States to other member States.
2. The Assembly draws the Committee of Ministers' attention to the continued failure by certain member States to honour the international commitments they have freely entered into, by hindering the Assembly's activities with obstacles to the exercise of its members' duties.
3. Moreover, the growing internationalisation of parliamentary work is highlighting the inadequacy of the international legal framework in which parliamentarians perform their duties outside their own countries. While it is clear that diplomacy is an inherently sovereign function, it is also true that parliaments have gradually become involved in it, entailing a need to recognise and protect the relevant activities on an international level. National parliamentarians should therefore be afforded adequate safeguards in relation to third countries when travelling abroad in the course of their duties and be covered by a fixed, standardised framework of rights and privileges so as to meet the requirements of legal certainty.
4. The Assembly therefore calls on the Committee of Ministers to:
 - 4.1. demand that member States honour their commitments under the Statute of the Council of Europe (ETS No. 1), the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and the Protocol thereto (ETS No. 10) and fully guarantee the immunity of members of the Parliamentary Assembly and their free movement on their territory;
 - 4.2. urge member States to grant, by means of unilateral declarations:
 - 4.2.1. members of the delegations holding observer or partner for democracy status with the Parliamentary Assembly taking part in sessions of the Assembly and meetings of its committees and, in general, in activities organised by them, the privileges and immunities afforded to members of the Parliamentary Assembly under the General Agreement on Privileges and Immunities of the Council of Europe and the Protocol thereto;
 - 4.2.2. national elected representatives from Council of Europe member States travelling to or through their territory the immunities afforded to the members of their countries' own parliaments;
 - 4.3. launch, prior to any standard-setting work and taking account of current work by the United Nations International Law Commission, a feasibility study on the creation of an international status for parliamentarians and any related rights and obligations, which could be carried out by the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).

3. Draft recommendation adopted by the committee on 10 December 2015.

C. Explanatory memorandum by Mr Díaz Tejera, rapporteur

1. Introduction

1. In April 2014, a group of Russian parliamentarians, joined by the Chairs of the Assembly's political groups and other Assembly members, tabled a motion for a resolution entitled "Introduction of sanctions against parliamentarians", which was referred to the Committee on Rules of Procedure, Immunities and Institutional Affairs for report. The motion refers to the decision by the European Union to ban a certain number of Russian parliamentarians from entering or passing through its territory. Its signatories argue that the European Union's visa ban on foreign parliamentarians interferes, amongst other things, with their freedom of expression. They therefore propose that consideration be given to the compliance of these measures, deemed discriminatory and unconstructive, with fundamental instruments of the Council of Europe, including the European Convention on Human Rights (ETS No. 5, "the Convention"), and, more generally, their compatibility with "the nature of parliamentarism which presupposes having relations through dialogue".

2. Subsequently, other cases of potential sanctions against parliamentarians were added to the initial referral in order that they might be considered in this report: these cases raise the question of national "blacklists" – lists of undesirable non-citizens, including parliamentarians, to whom a State can refuse entry or a visa –⁴ and the issue of criminal or administrative sanctions ordered by a court in one country against parliamentarians subject to a foreign jurisdiction, because they have violated the laws governing entry into its territory.

3. Lastly, the cases of Ms Nadiia Savchenko, a member of the Ukrainian parliamentary delegation facing prosecution in Russia,⁵ and Ms Khalida Jarrar, a member of the Palestinian partnership for democracy delegation, were raised during the committee's discussion of the report in connection with the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2).

4. The rapporteur would like to thank Mr Antonios Tzanakopoulos, Associate Professor of Public International Law in the Faculty of Law of the University of Oxford, and Mr Conor McCarthy, a lawyer in London, for information on a large number of legal points governing sanctions in international law. The rapporteur also received a written contribution from Mr McCarthy that he found very helpful in preparing this report.

2. Issues and scope of this report

5. The multilateral nature of international relations today and the proliferation of international parliamentary forums and organisations for interparliamentary co-operation have led to increasing foreign travel by members of national parliaments. At the same time, parliaments have expanded their international work (parliamentary friendship groups, specialist international parliamentary networks) and are also called upon to decide on foreign policy issues, which entails working relations with their counterparts in parliaments abroad and travel, both formal and informal, beyond national borders (fact-finding missions, study groups). The concept of parliamentary diplomacy shows the growing importance of international action within national parliaments, building on and complementing State diplomacy. The Parliamentary Assembly has underlined the positive role of parliamentary diplomacy with regard to preventing conflicts, facilitating dialogue and promoting mediation.⁶

6. The multilateralism of today's relations requires adequate safeguards for members of national parliaments when travelling abroad or attending international meetings. However, sanctions and threats of prosecution impose restrictions on the constituted authorities and on the means of action and expression of parliamentarians, preventing the enjoyment of certain rights and freedoms conferred on them, foremost among which are freedom of movement and freedom of expression, which are also fundamental rights protected by the European Convention on Human Rights and its protocols.

4. The motion for a resolution tabled by Mr Kox and other members of the Assembly in October 2015 on "Blacklisting of elected parliamentarians, counterproductive to parliamentary diplomacy" ([Doc. 13902](#)) argues that blacklisting of elected members of national parliaments is severely undermining the work of the members of the Parliamentary Assembly and is a serious barrier for exercising their mandate; such sanctions are seen as counterproductive.

5. Nadiia Savchenko, a Ukrainian army officer captured by pro-Russian separatists in June 2014, was elected to the Ukrainian Parliament on 26 October 2014, when she was in pretrial detention in Moscow; she was appointed a member of the Ukrainian delegation to the Parliamentary Assembly for the 2015 session.

6. See the report of the Committee on Political Affairs and Democracy on promoting parliamentary diplomacy ([Doc. 12428](#)) and Assembly [Resolution 1773 \(2010\)](#).

7. Given the unprecedented growth in the system of multilateral parliamentary co-operation since the end of the Second World War, the question whether measures sanctioning parliamentarians are consistent with the nature of parliamentarism itself extends beyond just Europe, of which our Assembly is emblematic, and constitutes a far more global issue.

8. The rapporteur recognises that while, in principle, international law accords States the sovereign right to decide whether or not to grant access to their territories, the act of refusing entry to an individual solely on the grounds that he or she champions certain political or ideological opinions might constitute an abuse of law and a form of discrimination within the meaning of Article 14 of the European Convention on Human Rights. In its [Resolution 1894 \(2012\)](#) on the inadmissibility of restrictions on freedom of movement as punishment for political positions, the Assembly condemned such discriminatory practices, which also jeopardise the concept of parliamentarism.⁷

9. The present report sets out to clarify the status of parliamentarians in relation to government actions, and the status of a national parliamentarian in relation to a third State, by studying the provisions that have made it possible to introduce sanctions despite the protected status of parliamentarians. The report therefore seeks to determine whether, ultimately, there are any statutory limits that can be imposed on the work of parliamentarians, particularly in their relations with third States, and whether there is a small core of specific rights that national parliamentarians can invoke against third countries whatever the circumstances.

10. Although the report does contain some observations on the nature and scope of sanctions against individuals who happen to be parliamentarians and the procedure followed in these cases, they are intended solely to provide a better understanding of the issues associated with the status of parliamentarian. This report intends to answer the specific questions raised with regard to individual nominative sanctions imposed by third States and international organisations through restrictive measures. It will therefore not address, of course, measures adopted by the Parliamentary Assembly against its delegations or members, individually, under its Rules of Procedure, since they are not part of a sanctions regime regulated by international law.

3. Background to the sanctions introduced against members of the Parliamentary Assembly

3.1. Restrictive measures adopted by the European Union in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

11. On 1 March 2014, Russia's Federation Council, meeting in extraordinary session, took the decision to authorise the President of Russia to deploy military forces on the territory of Ukraine. Under Article 102.1.d of the Constitution of the Russian Federation, the jurisdiction of the Federation Council includes all decisions concerning possible use of the Russian Federation's armed forces outside its borders. This decision was unanimously approved by the 90 members present.

12. The subsequent illegal annexation of Crimea by the Russian Federation and its intervention resulting in a military conflict in eastern Ukraine led the European Union to introduce a series of restrictive measures, including visa or entry bans targeting Russian parliamentarians and the freezing of certain assets.

13. Since the first list of sanctions entered into force on 17 March 2014,⁸ the European Union has made regular additions to it. In all, among the 149 individuals targeted, 27 Russian parliamentarians⁹ appear on the sanctions list, including the speakers of the two chambers of the Russian Parliament and committee chairs and vice-chairs. As far as the parliamentarians are concerned, the reasons given for their inclusion on the list refer mainly to the fact that they publicly supported the deployment of Russian troops in Ukraine, including during the debate in the Federation Council on 1 March, and, in some cases, initiated or supported the legislation facilitating the annexation of Crimea.¹⁰

7. See the report by the Committee on Legal Affairs and Human Rights ([Doc. 12943](#)) and [Resolution 1894 \(2012\)](#), in particular paragraph 5.2: "[The Assembly] stresses that freedom of movement should not be restricted or used as a sanction for the expression of peacefully held political opinions and calls on the member States of the Council of Europe to give full effectiveness to the freedom of expression under Article 10 of the European Convention on Human Rights, by refraining from denying access to their territories on such grounds."

8. Council Decision 2014/145/CFSP and Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

9. See the list of individuals and entities subject to EU sanctions as at 15 September 2015: http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

14. In response, Russia's Minister of Foreign Affairs established a list comprising dozens of politicians banned from entering Russian territory,¹¹ including several MEPs, national parliamentarians, as well as current¹² or former members of the Parliamentary Assembly.¹³

15. On 10 April 2014, "in order to mark its condemnation and disapproval of the Russian Federation's actions with regard to Ukraine" the Parliamentary Assembly resolved to suspend until the end of the 2014 session the Russian delegation's voting rights and its right to be represented in the Assembly's governing bodies and to participate in election observation missions.¹⁴ The Russian delegation therefore took the decision to suspend its participation in the Assembly's work *sine die*.

3.2. Parliamentarians' failure to comply with entry rules

16. In addition to reciprocal direct sanctions connected with the conflict in Ukraine, mention should be made of other cases involving members of the Parliamentary Assembly who are threatened with criminal or administrative prosecution for having exercised freedom of movement.

17. In February 2015, Mr Andrej Hunko, a member of the German delegation to the Assembly, travelled to eastern Ukraine on behalf of a non-governmental organisation (NGO), entering through an unauthorised border crossing point from the Russian Federation.¹⁵ The Committee on Rules of Procedure, Immunities and Institutional Affairs, having studied the case on 24 June 2015 at the request of the Bureau of the Assembly, noted that Mr Hunko had not travelled to eastern Ukraine as a duly accredited member of the Assembly and that consequently he was not entitled to the type of protection offered by the Statute of the Council of Europe (ETS No. 1) and the General Agreement on Privileges and Immunities regarding any sanctions that he might face owing to his entry into Ukrainian territory in breach of Ukrainian law.¹⁶ It shall be noted that Mr Hunko again visited eastern Ukraine in November 2015, without the prior authorisation of the Ukrainian authorities.

18. In July 2015 a group of French parliamentarians, including three members of the Assembly (Mr Thierry Mariani, Mr Yves Pozzo di Borgo and Ms Marie-Christine Dalloz) went on a visit to Crimea, presented as private, at the invitation of the Russian authorities. The Ukrainian authorities were not informed of this visit, to which they objected as soon as they learnt about it from the media.¹⁷

10. In 2014 and 2015, several non-EU States – in particular the United States, Canada, Australia, Japan, Switzerland and some other European States – have adopted sanctions similar to those of the European Union for breaches of international law owing to violation of the integrity and sovereignty of Ukraine.

11. In September 2014, the German MEP Rebecca Harms was denied entry to Russia to attend the trial of Nadiia Savchenko. On 2 March 2015, the Latvian MEP Sandra Kalniete and the Speaker of the Polish Senate, Bogdan Borusewicz, were denied entry to Russia to attend the funeral of the opposition politician Boris Nemtsov.

12. Mr Robert Walter and Mr Karl-Georg Wellmann. After the list was published, the competent Russian authorities gave assurances that the members of the Parliamentary Assembly concerned would be able to travel to Russia officially under the General Agreement on Privileges and Immunities of the Council of Europe.

13. Such as Ms Marietta de Pourbaix-Lundin, Ms Kristina Ojula, Mr Tunne Kelam, Mr Vytautas Landsbergis and Mr Per Stig Møller.

14. [Resolution 1990 \(2014\)](#) on the reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, and [Doc. 13488](#). The "sanctions" decided in [Resolution 1990 \(2014\)](#) remained in force until the opening of the 2015 session. In January 2015, the Parliamentary Assembly decided again to suspend a certain number of the Russian delegation's rights throughout the Assembly's 2015 session, "as a clear expression of its condemnation of the continuing grave violations of international law in respect of Ukraine by the Russian Federation" ([Resolution 2034 \(2015\)](#) and [Doc. 13689](#)), namely its voting rights, its right to be represented in the Bureau, Presidential Committee and Standing Committee of the Assembly, the right to be appointed rapporteur, the right to be a member of an ad hoc committee on observation of elections and the right to represent the Assembly in Council of Europe bodies as well as external institutions and organisations.

15. Ukraine law "On ensuring the rights and freedoms of citizens and the legal regime on the temporarily occupied territory of Ukraine", 4 March 2014.

16. In contrast, the Ukrainian authorities granted Mr Hunko the necessary accreditation to visit Ukraine as part of the Council of Europe delegation to observe the local elections (25 October 2015), in full compliance with the General Agreement on Privileges and Immunities.

17. This affair has led to numerous further developments within the Parliamentary Assembly, including in regulatory terms, and to lively exchanges of correspondence between the President of the Assembly, the chair of the Ukrainian parliamentary delegation, the Speaker of the Verkhovna Rada, Mr Mariani, Ms Dalloz and the chair of the French parliamentary delegation. In connection with the subject of this report, it is worth noting that Mr Mariani, in a letter to Mr Arieu dated 6 August 2015, referred to "the French parliamentary tradition of total freedom of movement for deputies" and stated, as also at the Bureau meeting on 31 August 2015, that he had only exercised "his right as a member of parliament". See also information memorandum AS/Pro (2015) 24.

19. Access to Crimea, which is still considered part of Ukrainian territory by the international community, is governed by a decree of the Ukrainian Cabinet that provides for prosecution in the event of failure to comply with the prescribed procedure.¹⁸ Further to a request from the Ukrainian Ministry of Foreign Affairs, the French parliamentarians who visited Crimea have been included on the Ukrainian travel ban list.¹⁹

20. It should be noted that special provisions on entering and travelling within part of a national territory are nothing new. There are already a number of territorial disputes concerning, in particular, Nagorno-Karabakh, Abkhazia (Georgia) and South Ossetia (Georgia), to which Crimea and the occupied territories of the Donetsk and Luhansk regions (Ukraine) may now be added. The European Commission for Democracy through Law (Venice Commission) has had the opportunity to comment on this type of legislation, which reflects national authorities' determination to maintain the sovereignty and integrity of their territory and which it does not consider incompatible per se with international standards.²⁰

3.3. Detention of parliamentarians

21. Detention represents an extreme form of sanction against parliamentarians. By its very nature, the principle of parliamentary immunity, recognised in many European States as safeguarding the independence of the parliamentary institution, precludes the arrest, detention, loss or restriction of liberty, or prosecution of an elected representative without the consent of the parliament of which he or she is a member.

22. The case of Ms Nadiia Savchenko, a member of the Ukrainian Parliament and Ukrainian delegation to the Parliamentary Assembly, who has been held in prison in the Russian Federation since June 2014, is of particular note in this connection. For over a year now the international community has been taking action and making considerable efforts to have her freed.²¹ In January 2015, the Assembly called for her immediate release and for her parliamentary immunity as a member of the Ukrainian parliamentary delegation to be respected ([Resolution 2034 \(2015\)](#)), citing an opinion of the Committee on Rules of Procedure.²² The conclusions of the committee and the Assembly confirming Nadiia Savchenko's immunity are contested by the Russian authorities. However, the Assembly holds that since the competent Russian authorities did not send it a request to waive Ms Savchenko's parliamentary immunity, the Russian Federation has breached its obligations under international law.

23. Another detention case referred to the Committee by the Bureau of the Assembly is that of Ms Khalida Jarrar, a member of the Palestinian partnership for democracy delegation, who was arrested on 2 April 2015 and placed in administrative detention in Israel further to suspicions of involvement in the organisation of terrorist activities, with no connection to her parliamentary work. The Committee on Rules of Procedure concluded that Ms Jarrar could not rely on statutory protection, since States not belonging to the Council of Europe were not parties to either the Statute of the Council of Europe or the 1949 General Agreement on Privileges and Immunities.²³

18. Ukrainian Cabinet Decree No. 367 of 4 June 2015.

19. In addition, the Prosecutor General's Office of Ukraine has initiated criminal proceedings against the 10 French parliamentarians, who risk a five- to eight-year prison sentence for "violation of the procedure for entry into a provisionally occupied territory of the Ukraine".

20. See the three successive opinions adopted in March and October 2009 on the "Law on occupied territories of Georgia" (CDL-AD(2009)015, CDL-AD(2009)046 and CDL-AD(2009)051), in which the Venice Commission finds that it "raises several issues which should be addressed by the Georgian authorities to ensure the compatibility of the law with international law" and therefore recommends making changes to this law.

21. See, for example, the resolution of the US Senate dated 12 February 2015 (S. Res 52) and the resolution of the European Parliament dated 30 April 2015 (TA-(2015)0186) on the case of Nadiia Savchenko. The OSCE Office for Democratic Institutions and Human Rights is monitoring her situation closely.

22. See the Opinion for the Bureau of the Parliamentary Assembly on the "status of Ms Nadiia Savchenko with regard to Council of Europe immunity", document AS/Pro (2015) 04 declassified, 28 January 2015. The Committee here recalls the following: members of the Parliamentary Assembly enjoy European parliamentary immunity, based on international law, which is distinct from and independent of any national immunity; the immunity of members of the Assembly also extends to any proceedings initiated against them before the beginning of their parliamentary mandate, in connection with acts carried out by the member before the start of his or her term of office in the Assembly, with the effect that any ongoing proceedings are suspended for the duration of the term of office (it cannot, however, be invoked in the case of flagrante delicto); the parliamentary immunity of a member of the Assembly must be waived before his or her freedom can be restricted; the Assembly alone is able to waive the immunity of a member.

23. Although the military court ordered her release on bail on 21 May 2015, Ms Jarrar is still in detention, as the prosecution appealed against the decision.

24. The rapporteur notes that the case of Ms Jarrar is being monitored by the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians, together with some thirty other cases of members of the Palestinian Legislative Council belonging to the same political organisation as Ms Jarrar. Our committee might draw on the experience and observations of this body – which has been active since 1977 in protecting parliamentarians from abuse and investigating and ruling on any human rights violations that they may have suffered, either individually or collectively – to consider jointly with it how to improve protection for parliamentary action.

4. “International sanctions”: general observations

4.1. Definition and basis of sanctions in international law

25. Although the term has punitive connotations, a “sanction” refers to a legal system's response to an illegal situation or to conduct failing to comply with standards which is beyond criminal law. In international law, the term “sanctions” is reserved for measures taken by the United Nations under Chapter VII of the United Nations Charter to maintain or restore international peace and security.

26. However, the term is commonly used in a general sense to mean what should actually be described as countermeasures or retaliatory measures.

27. In international law, “countermeasures” cover all diplomatic, economic, military, cultural and other measures taken unilaterally or collectively by one or more States or an international organisation in response to an internationally wrongful act by another State in order to stop a violation of international law or to ensure compliance with a law or fulfilment of an obligation by that State.

28. A countermeasure is a sanction which would be inconsistent with the international law obligations of the State imposing the measures in question but which is justified, when taken in accordance with the requirements of the international legal regime for countermeasures. This regime is set out in Chapter II of the Articles on the Responsibility of States for Internationally Wrongful Acts, commended by the United Nations General Assembly in Resolution 56/83 of 12 December 2001.²⁴

29. Countermeasures must be distinguished from acts which merely amount to “retorsion”. Retorsion refers to sanctions which are inconsistent with the imposing State's international obligations. As the International Law Commission Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts states: “Countermeasures are to be contrasted with retorsion (i.e. ‘unfriendly’ conduct) which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of, or limitations upon, normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes.”

30. “Retaliatory measures” therefore means acts that are certainly unfriendly, or even injurious, but definitely permitted under international law, in response to a previous act that may also have been unfriendly but permitted or else was internationally wrongful.

31. A detailed consideration of the international regime on countermeasures is beyond the scope of the present report. For present purposes, the importance of the distinction between “countermeasures” and acts of mere “retorsion” is that it means that the international legal regime on countermeasures will often not be relevant in respect of many sanctions.

32. Indeed, this will often be the case in respect of a travel ban (including a travel ban on an MP), adopted either within a set of restrictive measures or occasionally, since there is no general obligation under international law to admit into a State's territory a foreign national, save in certain limited circumstances.²⁵

24. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Article 22 (“Countermeasures in respect of an internationally wrongful act”) provides that in certain circumstances the taking of a countermeasure by a State injured by the commission of an internationally wrongful act against it by another State in order to obtain its cessation and achieve reparation for the injury is not wrongful (even if not in conformity with an international obligation towards that State) if and to the extent that this countermeasure is taken in accordance with Chapter II (“Countermeasures”: Articles 49 to 54), namely that it must be non-forcible, directed at the responsible State and not at third parties, temporary in character and as far as possible reversible in its effects in terms of future legal relations between the two States. Countermeasures must be proportionate and not involve any departure from certain basic obligations, in particular those under peremptory norms of general international law.

States, in general, retain discretion over their borders as an elementary aspect of State sovereignty. A travel ban will therefore only amount to a “countermeasure” under international law (and require justification as such) where the receiving State is under some particular obligation under international law to admit that person to its territory or to permit that person to travel through its territory.

33. Lastly, we should note that countermeasures cannot affect obligations for the protection of fundamental human rights and diplomatic rights.²⁶

4.2. Legality of sanctions in international law: an obligation *erga omnes*

34. All the measures taken by the European Union against Russia could be described as countermeasures.²⁷ Implemented collectively by States that are not directly affected by the violation, they take on a rather different outlook since they are aimed not just at obtaining restitution, compensation or satisfaction in relation to the right infringed but at protecting the international order as a whole,²⁸ securing respect for fundamental rights²⁹ and protecting society’s ethical principles.³⁰

35. A countermeasure can be taken by an injured State against an aggressor State, but the fact that it is not taken directly by the injured party does not affect its legality, since it is an obligation *erga omnes*.³¹ An obligation *erga omnes* entitles the international community to demand compliance with a hard core of specific human rights.³² It should be noted that the International Law Commission’s aforesaid Articles on Responsibility of States for Internationally Wrongful Acts contain no reference to an obligation *erga omnes*, since at that time, in 2001, the Commission left the decision up to individual States as to whether and how such measures should be used. Nowadays, all the legal authorities agree that their use is legitimate.

4.3. Restrictive measures adopted by the European Union

4.3.1. Legal framework

36. Political sanctions adopted by the European Union are known as restrictive measures and are adopted exclusively within the context of the Common Foreign and Security Policy (CFSP).³³ These measures may derive from implementation of United Nations sanctions or be imposed on the European Union’s own initiative (autonomous sanctions). It should be noted that the European Union’s Common Foreign and Security Policy is based on the principle of solidarity and convergence of action to which member States have subscribed in order to safeguard the common values, fundamental interests, independence and integrity of the Union and preserve peace and international security.

25. Thus, at present, international law does not prevent third States from restricting access to their territory for foreign parliamentarians whom they believe to be a threat to public security, including because of their opinions. For example, in 2006, Ukraine imposed an entry ban on the deputy speaker of the Russian Duma Vladimir Zhirinovsky, known for challenging the integrity and sovereignty of Ukraine. Some years earlier (1994-1998), Zhirinovsky and other members of the Russian parliamentary delegation were systematically refused visas by the German authorities for transit to sessions of the Parliamentary Assembly and were given only limited-entry visas for France, restricted to the airport and city of Strasbourg. In 2009, the Netherlands parliamentarian Geert Wilders, known for his anti-Islamic statements, was refused entry to the United Kingdom when invited by the House of Lords to present his controversial film on Islamic terrorism.

26. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Articles 50.1.b and 50.2.b.

27. Apart from the visa ban, which is basically a retaliatory measure.

28. As in the case of the sanctions introduced by the United Nations Security Council in response to old and new threats to international peace and security, such as terrorism or the proliferation of weapons of mass destruction.

29. The role of States in the protection of fundamental rights is not free of uncertainty and is part of a wider debate on the role of the State from the standpoint of positive and natural law. See Jacques Chevallier, “Propos introductif” in Danièle Lochak (ed.), *Mutations de l’Etat et protection des droits de l’homme*, CREDOF, 2007, in which he asks the question “Does the State safeguard human rights or are human rights a safeguard against State expansionism?”

30. As in the case of the European Union’s autonomous sanctions against third countries such as Myanmar.

31. International Court of Justice, *Barcelona Traction, Light and Power Company*, judgment of 5 February 1970. The Court drew an essential distinction between the obligations of a State towards the international community as a whole – which, by their very nature, are the concern of all States – and those arising vis-à-vis another State in the field of diplomatic protection. All States can be held to have a legal interest in their protection (paragraphs 33 and 34).

32. Mention may here be made of collective action such as the measures taken against Argentina (1982), Iraq (1990) and the Federal Republic of Yugoslavia (1998).

33. The term “sanction” is not used for similar mechanisms aimed at reducing aid or suspending preferences under the Cotonou Agreement, the European Neighbourhood Policy or the European Union’s generalised system of preferences. Clara Portela, *The EU’s Use of “Targeted” Sanctions: Evaluating effectiveness*, CEPS Working Documents, No. 391, March 2014.

37. Before resorting to restrictive measures, European diplomacy employs a range of methods and instruments such as confidential approaches, political dialogue, declarations, economic and financial assistance, humanitarian action and human rights clauses. Restrictive measures come into play when positive steps (both preventive and constructive), to which the European Union gives priority, are defeated by persistent and particularly serious human rights violations.³⁴

38. In the matter which concerns us here, the restrictive measures adopted on 17 March 2014, to which additions have since been made, have their legal basis³⁵ in Article 29 of the Treaty on European Union (TEU), which empowers the Council to “adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature”, and the implementing regulations adopted by the Council on the basis of Article 215 of the Treaty on the Functioning of the European Union (TFEU), which empowers the Council to adopt restrictive measures against natural or legal persons whilst requiring it to provide for the necessary legal safeguards.³⁶ What we have here is an intergovernmental approach (common position) backed up by an EU-level approach designed to ensure uniform implementation (regulations).

39. In EU case law, if restrictive measures are directed against a third country, they may include the country’s leaders and individuals associated with them. The Court of Justice of the European Union sees to it that there is a sufficient link between the individual concerned and the regime targeted.³⁷

40. The rules on restrictive measures provide a number of safeguards for the persons concerned, including the right to an effective remedy and an impartial tribunal, protection of personal data, information on the reasons for listing them, the possibility of submitting observations, and the possibility of review.

41. The Council notifies persons and entities targeted by an asset freeze or travel ban of the measures taken against them. At the same time, it brings the available legal remedies to their attention: they can ask the Council to reconsider its decision by providing observations on the listing. They can also challenge the measures before the General Court of the European Union.³⁸

4.3.2. Effective judicial protection

42. In both the United Nations and the European Union, the machinery of sanctions and restrictive measures is constantly evolving, as are the safeguards surrounding them. The situation now is very different from the context in which the Parliamentary Assembly debated the report on the “United Nations Security Council and European Union blacklists” in 2008.³⁹

43. If we look at the case law relating to an individual’s inclusion on or removal from the European Union’s lists of restrictive measures, we see that it has moved significantly towards respect for procedural guarantees.⁴⁰

44. The rapporteur notes that, generally speaking, the controversial issue was not the denial of access to justice⁴¹ but rather the non-existence of a separate procedure for removal from “blacklists” and, secondly, the scope and intensity of judicial review.⁴² Furthermore, before the Treaty of Lisbon, decisions taken by States’ representatives in the CFSP field were not subject to judicial review in the European Union; only the

34. Josiane Auvret-Finck, “Les procédures de sanction internationale en vigueur dans l’ordre interne de l’Union et la défense des droits de l’homme dans le monde”, *Revue trimestrielle de droit européen*, 2003, pp. 1-21.

35. See “Basic Principles on the Use of Restrictive Measures (Sanctions)”, adopted by the Council of the European Union in 2004.

36. Article 215.2 TFEU reads as follows: “2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.”

37. See the judgments of the Court of Justice of the European Union in the cases of *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P), 2008, and *Tay Za v. Council* (C-376/10 P).

38. Factsheet on EU restrictive measures, 2014. On 22 May 2015, an action by Mr Dmitry Kiselev, a Russian journalist targeted by EU restrictive measures, was brought before the General Court of the European Union (Case T-262/15).

39. See the report of the Committee on Legal Affairs and Human Rights (Rapporteur: Mr Dick Marty, Switzerland, ALDE), [Doc. 11454](#), and [Resolution 1597 \(2008\)](#). In this report, the Assembly considered the issue of targeted sanctions against individuals or specific groups (“blacklists”) imposed by the United Nations Security Council and the Council of the European Union that had a direct impact on individual human rights such as personal liberty and the protection of property. It concluded that these targeted sanctions should respect minimum standards of procedural protection and legal certainty, as guaranteed by the European Convention on Human Rights and United Nations human rights instruments.

40. For instance, the individuals concerned are informed of the possibility of challenging the decision before the Court under the conditions laid down in Article 275, second paragraph, TFEU and Article 263, fourth and sixth paragraphs, TFEU.

regulations for implementing common positions were open to challenge. If restrictive measures were adopted independently by the European Union, the list of targeted individuals and entities was appended to the CFSP decision.⁴³ In practice, if the Court of Justice annulled the regulations in so far as they concerned a listed individual, the Council of the European Union revised its decision accordingly. However, although this mechanism made it possible to achieve the desired aim, it did not satisfy the principle of legal certainty. Today, decisions taken in pursuit of CFSP objectives no longer escape scrutiny by the courts of the European Union.⁴⁴

45. In the *Kadi II* appeal,⁴⁵ the Court of Justice held that “the Courts of the European Union must ... ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order”. Those fundamental rights include respect for the rights of the defence and the right to effective judicial protection, recognised in the Charter of Fundamental Rights of the European Union. If judicial review is to be effective, the lawfulness of the grounds for the listing decision must be reviewed.⁴⁶

46. The Court of Justice went on to rule that “the essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered”.⁴⁷

47. The rapporteur notes that this case law is consistent with the judgments delivered recently in connection with autonomous EU sanctions, which recommend the same approach for all types of EU sanctions.⁴⁸

48. In the light of the foregoing, the rapporteur considers that, since the adoption of Assembly [Resolution 1597 \(2008\)](#), the safeguards surrounding the procedure for contesting restrictive measures, including those concerning individuals, have been duly improved regarding respect for human rights and the rule of law. Certain questions nevertheless remain.

4.4. The question of individual responsibility

49. One of the key questions that the Committee on Rules of Procedure has had to consider for this report is the responsibility of parliamentarians (and more generally the personal responsibility of individuals belonging to State institutions), through their membership of a corporate body, for legal acts presumed to be lawful. In the case giving rise to this report, the incomprehension of the Russian members of the Assembly targeted by EU sanctions for having performed their constitutional role calls for some clarification.⁴⁹

41. From the standpoint of the European Convention on Human Rights, the right to an effective remedy involves first of all determining whether inclusion on the sanctions list is a civil or criminal matter in order to establish the applicability of Article 6 and the right to a judicial remedy. If Article 6 is not applicable, the guarantee of an effective remedy under Article 13 might apply, provided, however, that a violation of a right secured by the Convention is invoked. It should be noted that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6.1 of the Convention (see *Maaouia v. France*, Application No. 39652/98, paragraph 40).

42. For example, in the case of sanctions introduced by an EU regulation to give effect to Security Council resolutions, the question was whether review was limited to the rules relating to jurisdiction and legality, or manifest error of assessment, or whether, to be effective, judicial review should concern the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union. See, *inter alia*, Court of Justice of the European Union, *Kadi II* case: *Yassin Abdullah Kadi v United Kingdom, Council, Commission* (C-584/10 P, C-593/10 P and C-595/10 P), 2013.

43. *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le Traité de Lisbonne*, edited by Catherine Flaesch-Mougin and Lucia Serena Rossi, Bruylant.

44. The above-mentioned Article 275 makes an exception for restrictive measures: “the Court shall have jurisdiction ... to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

45. Court of Justice of the European Union, *Kadi II* judgment, op. cit.

46. *Ibid.*, paragraph 97 et seq.

47. *Ibid.*, paragraph 134.

48. General Court of the European Union, *Iran Transfo v. Council*, 16 May 2013, T-392/11.

4.4.1. Responsibility owing to an internal legal act presumed lawful but in breach of international law

50. The Russian parliamentarians acted pursuant to a provision in the Constitution referring decisions on use of armed forces of the Russian Federation in third States to the Council of the Federation.⁵⁰

51. It is a long-established principle of international law that a State may not avoid or circumvent international responsibility on the basis of a rule of domestic law, whatever its character.⁵¹ Under international law, the conduct of any State organ (and any person, group of persons or entity which has that status in accordance with the internal law of the State) shall be considered as an act of that State regardless what function – legislative, executive, judicial or any other – the organ exercises, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.⁵²

52. In this sense, the legality or illegality of an act, measure or conduct under domestic law is irrelevant (insofar as international law is concerned) to the question of whether international law has been breached. This principle is set out in Article 32 of the aforementioned ILC's Articles on the Responsibility of States for Internationally Wrongful Acts. Article 32 states that "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part".

53. This rule is fundamental to the international legal system and is reflective of customary international law. Without this rule, a State would often be able to defend conduct inconsistent with international law on the basis that the acts in question were consistent with (or required by) domestic law, thereby enabling the rules of international law to be circumvented.⁵³ This principle applies regardless of the character or status of the domestic law in question. It therefore also applies where a State's actions are dictated by constitutional norms which are inconsistent with international law. The precedence of international law over constitutional law was expressly stated by the Permanent Court of International Justice ("according to generally accepted principles, ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"), as well as by its successor the International Court of Justice.⁵⁴

54. A State's obligations under international law remain unaffected by rules or principles of domestic law, including, for instance, a domestic rule providing immunity to parliament or creating a presumption of legality as to the conduct of parliament.

49. The issue of using military force in conflicts outside the country is obviously not specific to the Russian parliament: it has already been debated in other national parliaments in Europe, even if the national constitution does not require the explicit consent of elected representatives. In 2008, the French National Assembly, after a heated debate, came out in favour of France keeping its troops in Afghanistan, by 343 votes to 210. In 2013, the House of Commons voted by 285 votes to 272 to reject David Cameron's motion backing military intervention in Syria.

50. It should, however, be noted that operational deployment of Russian armed forces beyond the borders of the Russian Federation, in the form authorised by domestic law, has been criticised by the Venice Commission as likely to pose a problem in terms of both international law and democratic control. Opinion No. 572/2010 on the Federal Law on the Amendments to the Federal Law on Defence of the Russian Federation.

51. Article 27 of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ..."

52. International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 4.

53. See the case law of the Permanent Court of International Justice, which recalls the existence of "a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken" (Advisory Opinion of 21 February 1925 on the exchange of Greek and Turkish populations). In its Advisory Opinion of 3 March 1928 on the jurisdiction of the courts of Danzig, the Court dismissed Poland's contention that the Danzig courts could not apply the provisions of the agreement because they were not duly inserted in the Polish national law, which would amount to Poland's relying upon the non-fulfilment of an obligation imposed upon it by an international engagement. The International Court of Justice, in its Advisory Opinion of 26 April 1988 on the applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, recalls "the fundamental principle of international law that international law prevails over domestic law".

54. See the Advisory Opinion of 4 February 1932 from the Permanent Court of International Justice on treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory. The International Court of Justice repeated this in 2004 in *the Avena and Other Mexican Nationals (Mexico v. United States of America)*, which concerned the imposition of the death penalty on Mexican nationals in the absence of access to consular assistance as required by the Vienna Convention on Consular Relations 1963. The ICJ stated that "[t]he rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under the United States constitutional law".

4.4.2. The individual's position in the system of international responsibility

4.4.2.1. The dual mechanism of State responsibility and individual responsibility

55. In traditional legal theory, the State is held to be one and indivisible under international law, which accepts that a State can commit an internationally wrongful act but takes no account of the division of responsibility within its internal system. State responsibility therefore exists, even where a Constitution confers specific decision-making powers on a particular organ of State, but it does not translate to individual responsibility on the part of the members constituting it.

56. However, more recent legal theory – supported by developments in international law, especially international humanitarian law, and the extensive case law of the international courts – holds that this view of the sovereign State as the sole subject of international law is now out of date: individuals have become subjects of international law, which means that this same law not only gives them rights (which they can ask the courts to protect and acknowledge) but also imposes obligations that it is able to enforce.⁵⁵ Serious violations of such obligations – extreme cases such as attacks, genocide and crimes against humanity – render an individual criminally responsible under international law, irrespective of the domestic law of the State concerned.⁵⁶

57. Several legal regimes targeting individuals coexist in international law: a special United Nations regime on sanctions; a “sharing” State responsibility, when individual behaviour involves acts or omissions by the State; and individual criminal responsibility, whereby individuals having committed international crimes, particularly in the context of armed conflict, are punished.⁵⁷

4.4.2.2. The problem of shifting responsibility from the State to the individual

58. The present case – sanctions adopted individually against parliamentarians because of an internationally wrongful act committed by a State – gives rise to yet another issue.

59. Here we abandon the legal debate on State responsibility derived from individuals, and the question of complicity, to enter the relatively unexplored realm of ethical inquiry seeking to discover how the responsibility of the State and its organs – legal abstractions – is passed on in practice to tangible subjects, namely individuals.⁵⁸

60. This inevitably takes us beyond the strictly legal framework of our discussion – and therefore beyond the scope of this report. The question nevertheless arises of the utility and effectiveness of international “sanctions” against individuals assigned responsibility for an internationally wrongful act: international law sees the State solely as a single entity, and the position within the State hierarchy of the organ that took the decision in breach of international law does not affect attribution of responsibility to the State.

55. As stated by the Nuremberg International Military Tribunal: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

56. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Article 58 “Individual responsibility”.

57. See, for example, Article 25 of the Rome Statute of the International Criminal Court (“Individual criminal responsibility”): “[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. ...” (Rapporteur’s emphasis)

Article 25 covers not only commission of the crime itself but also inducement or incitement to commit it, for example through statements in parliament. Article 27 of the Statute specifies that it shall apply to members of parliament and that the existence, under national or international law, of immunity for opinions expressed or votes cast in the performance of their duties shall in no case exempt them from criminal responsibility before the Court.

58. As the Permanent Court of International Justice observed in its 1923 advisory opinion on German settlers in Poland, “States can act only by and through their agents and representatives”. PCIJ, Collection of Advisory Opinions, Series B, No. 6.

61. Nevertheless, studying the decision-making process behind the internationally wrongful act in more political terms makes it possible to identify the actual instigators and, prior to any “sanctions”, single out the perpetrators – those individuals who, below the constitutional surface, exercise the real power.

62. Some observers see individual sanctions as a moralistic tendency in international law. Is not the contention that those citizens who commit themselves to the objectives of the State share responsibility for the State’s actions to further them⁵⁹ indicative of a change in the system of international responsibility in which, in the absence of any criminal responsibility, individual “sanctions” form an adjunct to standard sanctions such as economic pressure or suspension of treaties?

4.4.2.3. What about individual safeguards?

63. In view of these questions, the rapporteur is inclined to think that the conventional system of law relating to international responsibility might require a few adjustments in order to produce a more democratic approach.

64. For example, conventional standard-setting in international law takes no account of the principle of legal certainty, since States, its only subjects, do not require the same safeguards as individuals. The same is true of the European Union’s primary legislation, which also forms the basis for “sanctions” against individuals. It is only EU secondary legislation and domestic laws affecting individuals’ rights and obligations that are required to satisfy this principle.

65. However, the rapporteur takes the view that if a “sanction” (whether countermeasure or retaliatory measure, national or international) affects an individual, it must satisfy the demands of legal certainty. This principle covers four related requirements: a basis in law, accessibility, wording that is precise enough to enable individuals “– if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct”,⁶⁰ and protection against arbitrariness in the form of adequate procedural safeguards.

66. The law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled in a democratic society.⁶¹

67. It is clear that “sanctions” based on unfettered power pose a problem in terms of legal certainty. In the *Al-Nashif v. Bulgaria* case, concerning deportation of an individual on grounds of national security, the Court held that “it would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference”.⁶²

68. In the present case, it should be noted that the legal provisions underpinning visa and travel bans by both the European Union and its member States are couched in very general terms, the latter referring to national security and failing to specify conduct likely to result in an individual “sanction”, particularly when arising from wrongful conduct by a State.

69. Admittedly, the requirement of “foreseeability” does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a travel ban. By the nature of things, threats to national security may vary in character and be difficult to define in advance.⁶³ For this reason, the European Court of Human Rights assesses the legal regime as a whole in order to ascertain whether the other elements of legal certainty have been observed, thus compensating for the lack of precision in the wording.

59. “Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility”, Mark Chinen, *The European Journal of International Law*, Vol. 25, No. 3, 2014.

60. European Court of Human Rights, *Gorzelik and others v. Poland*, Application No. 44158/98, judgment of 17 February 2004 (Grand Chamber), paragraph 64.

61. European Court of Human Rights, *Ostrovar v. Moldova*, Application No. 35207/03, judgment of 13 September 2005, paragraph 98.

62. *Al-Nashif v. Bulgaria*, Application No. 50963/99, judgment of 20 June 2002, paragraph 119.

63. *Ibid.*, paragraph 121.

70. The EU regulation lists the individuals subject to restrictive measures, gives the grounds and provides for a number of procedural safeguards including judicial review. Are such safeguards, laid down in a regulation, enough in themselves or is a broader international legal framework required to ensure that an individual affected by sanctions is entitled to proper status in this regard? This is a question that the Assembly should definitely continue to consider in a separate report.

5. Promoting a sanctions-exempt status for parliamentarians

71. Parliamentarians have no specific status under international law. They enjoy no international protection and are not covered by the Vienna Convention on Diplomatic Relations and other similar treaties. On the contrary, as the above analysis shows, there are both national and international rules likely to restrict any parliamentary role beyond the national level. This situation is frustrating for the parliamentarians themselves, who see it as a barrier to their work in the field of parliamentary diplomacy. It is undoubtedly necessary to consider ways of improving protection for parliamentary work in the international context. The rapporteur has thus identified two elements that might constitute the beginnings of a system of international protection upon which parliamentarians could rely in the course of their international duties: freedom of expression and (possible) immunity (whose scope could be extended).

5.1. Freedom of expression for parliamentarians

5.1.1. Freedom of movement for parliamentarians as a corollary of their freedom of expression

72. Parliamentarians' right to freedom of expression is so broad in scope that it is able to confound restrictions, including retaliatory measures.⁶⁴ In fact, Article 10 of the European Convention on Human Rights can render a State liable under the Convention for both visa and travel bans and for threats of prosecution for violation of a travel ban, since the European Court of Human Rights has developed the concept of a "chilling effect", whereby some legal provisions may have an inhibiting effect on the exercise of legitimate rights.⁶⁵

73. The European Court of Human Rights held, in a series of cases concerning MPs or other public figures who are refused admission to a member State, that their right to free expression is engaged by any such refusal. One example arises in the case of *Piermont v. France*, which concerned the imposition of a travel ban by French authorities on a German MEP.⁶⁶

74. This member of the European Parliament had been expelled from a French territory (Polynesia) and banned from re-entering it after having participated in an independence and anti-nuclear public demonstration. She was subsequently refused leave to enter another French territory (New Caledonia). The Court, noting that Ms Piermont "was not travelling on business for the European Parliament", held that there had been a breach of Article 10 of the Convention, since her statement was a contribution to a democratic debate, and that the prevention of disorder and the upholding of territorial integrity did not justify such an interference with her freedom of expression. The Court's recognition of a special status for freedom of political expression, which enjoys reinforced protection and cannot be restricted without compelling reasons, informs the debate about freedom of movement, since the Court held that the measure prohibiting her from entering the territory constituted "an interference with the exercise of the right secured by Article 10 as, having been detained at the airport, the applicant had not been able to come into contact with the politicians who had invited her or to express her ideas". With this judgment the Court added a new dimension to freedom of expression, whereby it necessarily entails freedom of movement so as to express and defend one's ideas.

75. Similarly, in the case of *Adams and Benn v. the United Kingdom* (where the first applicant, a former parliamentarian, had been prohibited from travelling to the Westminster Parliament to speak to a group of parliamentarians at the invitation of one of them), the European Commission of Human Rights held that "[t]he exclusion order imposed on the first applicant prevented him from attending a specific meeting in the House of Commons to which he had been invited by the second applicant. In these circumstances, the first applicant

64. In its [Resolution 1965 \(2013\)](#), the Parliamentary Assembly emphasised "its commitment to the right to freedom of expression, which is the most important parliamentary privilege and an essential precondition for the independence of elected representatives of the people".

65. European Court of Human Rights, *Klass and others v. Germany*, Application No. 5029/71, judgment of 6 September 1978; European Court of Human Rights, *Kennedy v. the United Kingdom*, Application No. 26839/05, judgment of 18 May 2010.

66. European Court of Human Rights, *Piermont v. France*, Applications Nos. 15773/89 and 15774/89, judgment of 27 April 1995, paragraph 81.

has been subject to a restriction on his freedom of expression and to impart information and ideas and the second applicant to a restriction on his right to receive information and ideas, within the meaning of the first paragraph of Article 10".⁶⁷

76. As a result, the imposition of a travel ban on MPs (even from a foreign jurisdiction and even in circumstances where they have no independent right to enter the jurisdiction in question) is likely to engage the right to free expression of both the MP on whom the travel ban has been imposed as well as any MPs to whom the banned MP proposed to speak or engage in dialogue.

5.1.2. Towards more safeguards against interference with parliamentarians' freedom of expression?

77. However, parliamentarians would not be automatically protected by Article 10 if they wanted to travel, to a third State, a conflict area or an occupied territory, including at the invitation of their counterparts. For the right to freedom of expression is not unconditional. Even if a travel ban on a foreign MP "engages" free expression (e.g. falls within the scope of his or her right to free expression), in itself this does not mean that it is impermissible. It simply means that the travel ban in question must be "justified" by a State by reference to the requirements set out in Article 10.2 of the European Convention on Human Rights. Among these requirements, the most relevant for present purposes are the requirements of (1) legality (e.g. the requirement of legal certainty and the related requirement of non-arbitrariness) and (2) the requirement of proportionality (e.g. that the travel ban must not amount to a disproportionate interference with an individual's right to free expression).

78. Ultimately it is thus usually up to the courts to review bans and restrictions imposed on parliamentarians and to decide, for example, whether there has been a violation of their right to freedom of expression. At the national level, inclusion on a travel ban list may be reviewed by the courts, as it may in the European Union, which has an extensive judicial review system for restrictive measures (see section 4.3.1 above).

79. Nevertheless, the rapporteur is not persuaded that the mere existence of judicial review will protect parliamentarians from arbitrary decisions. Given the detrimental effects of travel restrictions on the work that parliamentarians carry out, adequate safeguards must be provided for parliamentarians wishing to exercise their right to freedom of expression beyond their national borders. In particular:

- cases in which restrictive measures, the provisions governing travel ban lists, or special rules on movement may restrict freedom of movement of members of foreign parliaments must be identified, if not exhaustively at least specifically;
- members of foreign parliaments subject to sanctions in a third State must be notified of the existence of these measures, together with the reasons for them;
- there must be a close association between a restrictive measure imposed on a member of a foreign parliament and its intended purpose. For example, national security grounds must not be used to restrict the access of a parliamentarian who is peacefully expressing certain political positions;
- members of foreign parliaments must be able at short notice to submit their observations to the organ that has imposed or is threatening to impose a restriction (particularly if the authority in question has the power to waive the restriction);
- a restriction must be suspended while it is being challenged.

5.2. Parliamentary immunity

80. To protect their independence, guarantee their freedom of judgment, expression and decision and guard against abuses of the State's power of coercion, parliamentarians in most member States of the Council of Europe enjoy specific immunity, which is of two kinds: "non-liability", meaning immunity from legal proceedings brought for opinions expressed or votes cast in connection with their parliamentary work; and "inviolability", which is of a personal nature and protects parliamentarians from arrest, imprisonment and prosecution for offences relating to actions taken by them as ordinary citizens. The safeguards offered by both types of parliamentary immunity stem from the same need to ensure the independence of parliament in performing its task and seek to guarantee the integrity and smooth functioning of parliament.

67. Decision, Applications Nos. 28979/95 and 30343/96.

81. The existence of immunity as an exception to the general law, and the ethos of freely exercising their office, together with their control over the executive, give parliamentarians the impression that they will continue to enjoy the same privileges beyond national borders. This impression is all the stronger in Europe, where States have long been bound by obligations to guarantee freedom of movement, whether through accession to treaties within the European Union or under general obligations relating to basic human rights. However, the reality is more complicated, and the safeguards on which parliamentarians can if necessary rely for their “international missions” derive not from their status of national elected representatives but entirely from special arrangements.

5.2.1. Immunity for members of national parliaments in another State

82. Generally speaking, national legislation on parliamentary immunity is not considered by any of the member States to apply abroad. Conversely, no member State has specific provisions to protect the immunity of foreign parliamentarians other than those arising out of customary international law or a State's accession to international treaties. Consequently, in a foreign country national parliamentarians cannot rely on their national immunity as protection against arrest, imprisonment or prosecution for offences not connected with their parliamentary functions. Basically, they are entitled only to the protection attaching to any other citizen of their country.

83. However, travel in a foreign country by members of national parliaments is not devoid of a certain number of rights and safeguards. These differ depending on the circumstances.

5.2.2. Travel as a State official

84. If national parliamentarians travel as State officials within the meaning of the relevant conventions or customary international law, they are entitled to extensive protection, including personal inviolability, immunity from legal process (criminal proceedings and, in some cases, civil and administrative proceedings), immunity of premises and freedom of movement. Here the status of State official is superimposed on that of parliamentarian. In other words, it is the status of State official rather than parliamentarian that determines conferment of diplomatic privileges and immunities. In such cases, individuals who happen to be parliamentarians are, by engaging in ad hoc diplomatic missions, acting on behalf of a subject of international law.

85. For example, a parliamentarian may be a special envoy, an observer or a delegate to an international conference or be on an official, ceremonial or any other mission. However, all travel abroad by parliamentarians does not automatically benefit from such protection.

86. The 1969 United Nations Convention on Special Missions lays down strict criteria for what is termed a “special” mission: it must be sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task, it must be temporary and it must represent the State (Article 1). A special mission must be described as such by the receiving State and the sending State. Although the convention has not had a great number of accessions, it is based on the rules of customary international law, which continue to govern questions not regulated by this convention.⁶⁸

87. It should be added that parliamentarians who are members of a permanent mission to a foreign State or international institution cannot be considered part of a special mission.⁶⁹

88. On a different note, mention may also be made of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, which covers nine named United Nations specialised agencies and refers to “representatives of members at meetings convened by a specialized agency”. Thus, if national parliamentarians are sent as experts by their governments to attend a meeting of a specialised agency, they will be given a status modelled on diplomatic status to guarantee their independence while carrying out their functions in connection with the agency. These individuals will be entitled to immunity from personal arrest or detention, inviolability for all papers and documents, immunity from legal process and tax exemption for their work for the agency.

68. Preamble, last paragraph.

69. International Law Commission, “Draft articles on special missions”, *Yearbook of the International Law Commission*, 1967, Vol. II, p. 348.

89. The diplomatic rights to which parliamentarians are entitled cannot be affected by any countermeasures taken against a State (and covering parliamentarians).⁷⁰ It should, however, be noted that the receiving State may, without having to explain its decision, declare *persona non grata* any representative of the sending State for the purposes of the mission or declare any other member of staff of the mission not acceptable either before or after the mission has arrived.⁷¹

90. To return to practicalities, it should be noted that fact-finding missions and parliamentarians' missions at the invitation of private entities, including political groups and parties, would not be entitled to special mission status.

91. A parliamentarian's status of State official determines the applicability and extent of immunity from foreign criminal jurisdiction. At present it seems too early to comment on this subject, since the International Law Commission has undertaken a wide-ranging study⁷² with the purpose of providing answers in all the various fields of controversy and identifying the extent of this immunity and the circle of individuals entitled to it. However, it is unlikely that parliamentarians on private visits would be entitled to immunity from foreign criminal jurisdiction.

5.2.3. *Travel at the invitation of an organisation having a headquarters agreement*

92. This is another situation in which the status of official guest takes precedence over the status of parliamentarian. A number of international organisations have headquarters agreements requiring the host State not to impede access to the organisation's headquarters by its members or invited experts.

93. The Council of Europe and the United Nations Educational, Scientific and Cultural Organization (UNESCO) possess such agreements.⁷³ There is currently some discussion as to whether such a clause also guarantees immunity from prosecution and detention for wanted persons or subjects of arrest warrants. However, it undoubtedly rules out travel bans by States.⁷⁴

5.2.4. *Clarification concerning the diplomatic passport*

94. It is common for possession of a diplomatic passport to be confused with entitlement to various kinds of immunity, including immunity from legal process. But immunity is based on the position held by the individual possessing it. A diplomatic passport is a travel document that facilitates travel for its holder. The fact that this document does not confer certain privileges is owing to the wide range of rules governing its issue and the variable scope of individuals entitled to it, which, at present, are entirely at the State's discretion.

95. As far as parliamentarians are concerned, some countries have strict rules, including the United States, where diplomatic passports are issued to national elected representatives only if they are attending international conferences as official government representatives. In other countries, automatic issue is conditional on holding a special office within parliament, such as Speaker or Deputy Speaker, or Chair of the Foreign Affairs Committee (Austria, Belgium, Cyprus, Denmark, France, Spain and Sweden), being a member of a delegation to an international institution (Switzerland) or being a member of government (Finland). Other parliamentarians can usually request a diplomatic passport if they can produce proof of an official mission. Lastly, in a large number of European countries the right to a diplomatic passport is granted to all national elected representatives (Andorra, Czech Republic, Georgia, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Republic of Moldova, Netherlands, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine).

70. International Court of Justice, judgment on United States diplomatic and consular staff in Tehran, 24 May 1980.

71. UN Convention on Special Missions, Article 12; Vienna Convention on Diplomatic Relations, Article 9.

72. "Immunity of State officials from foreign criminal jurisdiction", summary of work: http://legal.un.org/ilc/summaries/4_2.shtml#a12.

73. Under Article 9 of the Agreement between the Government of the French Republic and UNESCO regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, "the competent French authorities shall not impede the transit to or from Headquarters of any persons having official duty at Headquarters or invited there by the Organization". Article 5 of the Special Agreement relating to the Seat of the Council of Europe contains similar provisions.

74. For example, in April 2014, Mr Naryshkin, Speaker of Russia's State Duma and covered by the EU visa ban, attended a UNESCO meeting to mark the sixtieth anniversary of the USSR's accession to that organisation. Conversely, Ms Matviyenko, Speaker of Russia's Council of the Federation, did indeed receive a US visa to visit the United Nations headquarters to attend the World Conference of Speakers of Parliament at the beginning of September 2015, but it was limited strictly to the duration of this United Nations event, thus preventing her from attending any other events or meetings organised in conjunction with it by other non-UN organisations.

96. It should be noted that it is the capacity in which a parliamentarian is travelling rather than his or her travel document that will be considered when determining the scope of guarantees.

5.2.5. Unofficial travel as a parliamentarian at the invitation of the host country

97. Parliamentarians may sometimes have occasion to travel to a foreign country without their journey being regarded by their home country as official or representing an institution or the government. However, by issuing an official invitation or accepting a visit, the authorities are implicitly agreeing to guarantee a parliamentarian's legal and physical protection. In such cases, the parliamentarian's status will depend not on any particular treaty but on the practices adopted by the country concerned. Usually a parliamentarian will be entitled to personal immunity at the very least, or even the same treatment as the host country's members of parliament.

5.2.6. Unilateral declarations

98. Under international law, States have a tool known as "unilateral declarations", which enable them to accept or create rights or obligations or, conversely, limit or exclude them. Regardless of their wording or designation, such unilateral declarations create for States which voluntarily accept them international legal obligations in relation to one or more States or other international entities. This tool therefore makes up for the lack of a statutory framework or the inability to draw one up on time. For instance, under the European Union's Common Security and Defence Policy, unilateral declarations are used to safeguard the immunities and privileges of the staff of missions in host States pending the negotiation and conclusion of the agreements on the status of the relevant missions. If applied to the case of foreign elected representatives, including delegations holding observer or partner for democracy status with the Parliamentary Assembly, this practice would make it possible both to strengthen the protected status of parliamentarians on official journeys without having recourse to the negotiation of new treaties or the revision of existing ones and also to take account of the internal context specific to the Council of Europe.⁷⁵

5.2.7. Travel as a member of an international assembly

99. In 1939, only three international parliamentary institutions were in existence: the Inter-Parliamentary Union, the Nordic Inter-Parliamentary Union and the Commonwealth Parliamentary Association. There are now over a hundred formal and informal parliamentary forums,⁷⁶ with differing legal forms, structures and remits. Some are governed by national private law while others were set up under international treaties concluded by the States concerned. The greater the extent to which a body is integrated into the international intergovernmental context, the more it benefits from diplomatic immunities and privileges, which will be recognised in a headquarters agreement,⁷⁷ a treaty⁷⁸ or its protocol.⁷⁹

100. Privileges and immunities, including the free movement of members of assemblies in fulfilling their duties, cannot be guaranteed without the explicit consent of the State or group of States concerned. This privilege derives from the discretionary power of States to control their borders, as enshrined in public international law,⁸⁰ although this discretionary right could be restricted by the imperatives of humanitarian law and fundamental rights.⁸¹

101. A discussion of the Protocol on the Privileges and Immunities of the European Union is perhaps less pertinent to this report given the special arrangements for movement that exist between member States of the European Union. The General Agreement on Privileges and Immunities of the Council of Europe is relevant, on the other hand, since the extensive guarantees offered by signatory States concerning free movement of

75. See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, International Law Commission, 2006.

76. Claudia Kissling, *The Legal and Political Status of International Parliamentary Institutions*, 2011.

77. Agreement between the Swiss Federal Council and the Inter-Parliamentary Union of 28 September 1971; President Clinton's Executive Order No. 13097 of 7 August 1998 on the Inter-Parliamentary Union.

78. Institutionalisation Treaty of the Latin American Parliament; Benelux Parliament.

79. Protocol concerning the Privileges and Immunities of the Parliamentary Assembly of the Black Sea Economic Cooperation.

80. The following wording is used in all international texts, not least the Charter of the United Nations, Article 2.1: "The Organization is based on the principle of the sovereign equality of all its Members."

81. European Convention on Human Rights, Article 8, "Right to respect for private and family life".

members of the Parliamentary Assembly and their protection from arrest and prosecution thwart both visa and travel bans as well as prosecution for failure to comply with rules on entry and movement, such as the legislation on occupied territories.

102. The Committee on Rules of Procedure has already been called upon to examine cases of restriction on movements of members of the Parliamentary Assembly and has here emphasised the existence of an obligation by member States to recognise and protect both the immunity and freedom of movement of members of the Assembly.⁸² in the case of members duly accredited by the Assembly, under the Statute of the Council of Europe and the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol, all Council of Europe member States have undertaken to guarantee free movement of members of the Assembly; consequently, when a member State hosts a meeting or an official event organised by the Assembly, it must facilitate the participation of members of the Assembly, issue the visas required for their entry onto its territory and also guarantee the immunity of members of the Assembly against any legal proceedings or measures for their arrest or detention in keeping with its obligations under public international law.

103. Thus, by means of this Council of Europe agreement, the members of the Russian delegation included on the EU sanctions list are nevertheless able to participate in the Assembly's work: Mr Naryshkin and Mr Slutsky were able to travel to Paris in September 2014 to attend a Monitoring Committee meeting and to Strasbourg for the opening of the Assembly's 2015 session.

104. However, although the exceptional arrangements provided for in this type of agreement enable parliamentarians subject to bans to take part in international events and thus maintain dialogue with their interlocutors, the rapporteur deplores the fact that the European Union's restrictive measures, together with entry ban lists and threats of prosecution for having exercised freedom of movement, are inevitably, and regrettably, restricting a number of interparliamentary contacts, which may undermine the effectiveness of parliamentary diplomacy, encourage division and be an impediment to seeking a solution to the problem that gave rise to the sanctions in question. It should also be pointed out that other parliamentary forums do not have treaty instruments of this sort and all bilateral and multilateral dialogue with them has been suspended.

105. In conclusion, the rapporteur believes that debate should continue, on the basis outlined above, in both the Council of Europe and other international spheres to ensure that the specific nature of international parliamentary work is taken into account and that those who perform it are given adequate rights and safeguards.

6. Expanding the code of conduct for members of the Parliamentary Assembly?

106. The rapporteur takes note of the growing number of disputes involving members of the Parliamentary Assembly laying claim to their freedom of movement at the risk of national criminal or administrative proceedings, whether or not these members were accredited by the Assembly for travel (or attempted travel) in a member State of the Council of Europe. It is clear that these cases are directly connected with travel by these parliamentarians in areas of "frozen" conflict, namely occupied or seceding territories not recognised by the international community.

107. Doubtless an international organisation such as the Council of Europe, and an interparliamentary forum such as its Assembly, may be expected to offer a more appropriate framework for debate than national parliaments themselves in order to determine the rights, obligations and conduct of parliamentarians – and the obligations of States – in this very specific context in which arguments are made in good faith, on both sides, for compliance with international law. At the same time, the commitment of member States to co-operating with the Assembly is called into question when these States impose travel restrictions on members of the Assembly travelling officially for the latter.

82. Cases of Mr Sergey Markov, who was unable to travel to Georgia to attend a meeting of a Parliamentary Assembly committee in September 2010 following the refusal of the Georgian authorities to issue a visa for him (see the committee's opinion for the Bureau, AS/Pro (2010) 16 def), of Mr Vassiliy Likhachev, who was unable to participate in the pre-electoral observation mission for the presidential election in Georgia in September 2013 owing to the Georgian authorities' threat to arrest and prosecute him if he entered Georgian territory (see the committee's opinion for the Bureau, AS/Pro (2013) 20 def), and of Mr René Rouquet, who was unable to attend Parliamentary Assembly meetings at Baku in May 2014 because his visa was cancelled by the Azerbaijani authorities.

108. The rapporteur also wishes to raise the role and limitations of the code of conduct for members of the Parliamentary Assembly in the handling of recent cases involving members of the Assembly who had infringed national legislation in connection with their parliamentary work but unrelated to their duties in the Assembly.

109. It is therefore necessary to continue the debate, doubtless beyond the ambit of this report, in order to study the advisability of, on the one hand, expanding the code of conduct as far as obligations of members of the Assembly are concerned, and, on the other, producing guidelines on official travel by members of the Assembly in Council of Europe States as far as member States' commitment to co-operate is concerned. This was the remit given to the committee on 31 August 2015 by the Bureau of the Assembly, which asked it to prepare an opinion on challenges to member States' co-operation with the Assembly regarding freedom of movement for members of the Assembly.

7. Proposals

110. Under international law, sovereign power is vested solely in the State, and this affects the ability of members of parliament to act beyond the national framework. Nevertheless, the internationalisation of parliamentary work over the past few decades has impelled States gradually to abandon the traditional conception of diplomacy. This fact, discussed above, highlights the inadequacy of the international legal framework within which national parliamentarians are working, owing, in particular, to the lack of an international status for parliamentarians and the fragmented nature of their rights and freedoms outside national borders. This is prejudicial to the principle of legal certainty and fuels uncertainty as to the existence and extent of parliamentarians' rights and privileges in relation to third States.

111. Now that parliamentarians are increasingly accountable for their acts and decisions, with the possibility that they may be individually responsible under international law, it is time to discuss the introduction of an international status for parliamentarians in international public law. The discussions being held by the United Nations International Law Commission on immunity of State officials from foreign criminal jurisdiction, for example, are undeniably a step in this direction.

112. The rapporteur recognises that such discussions could come up against the basic objection that this special status might override other considerations such as the principles of non-discrimination and equality before the law. Why introduce special protection for parliamentarians? Firstly, because conferment of such international status is based on the need to guarantee the independence of every national parliament in performing its role. Secondly, if a parliament's actions can create State responsibility, should that parliament not in turn benefit from the immunity of the State to protect its members more durably?

113. In the light of the foregoing, the rapporteur would propose that the Assembly:

- recommends that member States:
 - a. study the question of the rights and obligations of a foreign country's national elected representatives travelling in their countries in order to grant them adequate safeguards for carrying out their duties freely and effectively beyond their national borders, including freedom of movement and expression and personal immunity, as required by the European Convention on Human Rights and the case law of the European Court of Human Rights;
 - b. guarantee members of foreign parliaments subject to restrictive measures, such as inclusion on a visa or travel ban list, effective judicial protection by making provision for a transparent listing and appeal procedure;
- encourages the Inter-Parliamentary Union to develop and promote a set of rules applicable to parliamentarians travelling abroad on a professional basis so as to foster interparliamentary international co-operation and support the engagement of national elected representatives in parliamentary diplomacy;
- calls on national parliaments to:
 - a. step up advice and support for the conduct of journeys by parliamentarians outside their own countries by putting in place guidelines and, where applicable, appropriate training for members of parliament and the departments concerned;

- b.* continue internal discussions on ways of making institutional policy more consistent and implementing strategy in the area of the development of parliamentary diplomacy.
- 114. The rapporteur also believes there is a need to invite the Committee of Ministers to:
 - a.* remind Council of Europe member States of their commitments under the General Agreement on Privileges and Immunities and the Protocol thereto (ETS No. 10), and their active role in facilitating travel by members of the Parliamentary Assembly;
 - b.* launch a feasibility study on the creation of an international status for parliamentarians, which could be carried out by the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI);
 - c.* urge member States, in order to make up for the shortcomings in the international regulations, to make use of unilateral declarations so as to expand the immunities and privileges of foreign elected representatives on official journeys in their territories.

115. Lastly, the Committee on Rules of Procedure might consider the advisability of expanding the code of conduct for members of the Parliamentary Assembly and producing guidelines on official travel by members of the Parliamentary Assembly in Council of Europe member States. The rapporteur believes that these very specific issues should not be developed further in this report but should, at least initially, be addressed in an opinion for the Bureau of the Assembly in conjunction with the Bureau's request to examine challenges to member States' co-operation with the Assembly regarding freedom of movement for members of the Assembly.