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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

OPINION OF THE CAHDI

on Recommendation 2095 (2016) of the Parliamentary Assembly
of the Council of Europe – “Parliamentary immunity: challenges to
the scope of the privileges and immunities enjoyed by members
of the Parliamentary Assembly”

52nd meeting

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Public International Law and Treaty Office Division
Directorate of Legal Advice and Public International Law, DLAPIL

OPINION OF THE CAHDI

ON RECOMMENDATION 2095 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “PARLIAMENTARY IMMUNITY: CHALLENGES TO THE SCOPE OF PRIVILEGES AND IMMUNITIES ENJOYED BY MEMBERS OF THE PARLIAMENTARY ASSEMBLY”

1. On 6 July 2016, the Ministers’ Deputies at their 1262nd meeting agreed to communicate *Recommendation 2095 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”* to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by mid-September 2016¹.
2. The CAHDI examined the above-mentioned Recommendation at its 52nd meeting (Brussels, Belgium, 15-16 September 2016) and made the following comments concerning those aspects of Recommendation 2095 (2016) which are of particular relevance to the Terms of Reference of the CAHDI.
3. From the outset, the CAHDI recalls its Opinion on *Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on “Introduction of sanctions against parliamentarians”* adopted on 4 March 2016 during its 51st meeting. The CAHDI underlines that the comments on the main legal arguments concerning the scope of the privileges and immunities enjoyed by members of the PACE made in its Opinion on Recommendation 2083 are equally relevant for the present Recommendation 2095. Furthermore, the CAHDI recalls the Reply to Parliamentary Assembly *Recommendation 2083 (2016) on “Introduction of sanctions against parliamentarians”* adopted by the Committee of Ministers on 6 July 2016 at its 1262nd meeting².
4. As the PACE underlined in paragraphs 1 and 2 of its Recommendation 2095, the CAHDI notes that the scope of privileges and immunities enjoyed by the members of the PACE is governed by Article 40³ of the *Statute of the Council of Europe*, as further elaborated in the *General Agreement on Privileges and Immunities of the Council of Europe (GAPI)* and its *Protocol*. Furthermore, the CAHDI reiterates that the rights of members of the PACE when seeking to attend an official meeting in a member State, in particular in relation to the freedom of movement, are defined in Article 13⁴ of the GAPI. The immunities enjoyed by PACE members are defined in particular in Articles 14⁵ and 15⁶ of the GAPI. Moreover, Article 3⁷ of the *Protocol* to the GAPI

¹ The Ministers’ Deputies specifically indicated in their decision that they “agreed to communicate it [Recommendation 2095 (2016)] to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 15 September 2016. However, taking into account that the 52nd meeting of the CAHDI will take place on 15 and 16 September, it was agreed to send the CAHDI opinion to the Secretariat of the Committee of Ministers on 19 September 2016.

² See the text at the following [link](#).

³ **Article 40 (ETS No.1):** “*The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.*”

⁴ **Article 13 (ETS No.2):** “*No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative Assembly and their substitutes.*

Representatives and their substitutes shall, in the matter of customs and exchange control, be accorded:

- a. *by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;*
- b. *by the governments of other members, the same facilities as those accorded to representatives of foreign governments on temporary official duty.*”

⁵ **Article 14 (ETS No.2):** “*Representatives to the Consultative Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions.*”

⁶ **Article 15 (ETS No.2):** “*During the sessions of the Consultative Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:*

- a. *on their national territory, the immunities accorded in those countries to members of Parliament;*
- b. *on the territory of all other member States, exemption from arrest and prosecution.*

extends the immunities defined in Article 15 of the GAPI to the representatives of the PACE and their substitutes attending or travelling to or from meetings of the PACE committees or sub-committees.

5. The CAHDI reiterates also that the Committee of Ministers of the Council of Europe has invited on several occasions the governments of member States to adopt specific measures in order to fully implement the above mentioned privileges and immunities enjoyed by the PACE members. For instance, in its Reply to PACE *Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe* adopted on 20 October 1998 at the 645th meeting, the Committee of Ministers invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States⁸. These measures were recalled by the Chair of the Committee of Ministers in his reply to the written Question No. 501 by Lord Russell-Johnston: "Visa requirements for members of the Assembly attending Assembly committee meetings". The CAHDI further notes that since then the Committee of Ministers has replied to the PACE on different occasions on this issue (see for instance the Reply adopted at the 869th meeting of the Committee of Ministers on 21 January 2004⁹ and at its 911th meeting on 12 January 2005¹⁰ in relation to the PACE Recommendation 1602 (2003) on "Immunities of members of the Parliamentary Assembly). The most recent reply has been the *Reply of the Committee of Ministers to the Parliamentary Assembly Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"* adopted on 6 July 2016¹¹.

6. The CAHDI also reiterates that international law grants States full sovereignty over their territory. This implies that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory.

7. The CAHDI considers that many political and legal issues are raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which are governed by the applicable Council of Europe treaties. In relation to paragraph 4 of Recommendation 2095, the CAHDI reiterates its consideration that an efficient implementation of the rules currently into force would solve most of the issues highlighted by the PACE. In this respect, the CAHDI recalls that the Committee of Ministers in its recent *Reply to the Parliamentary Assembly Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"* adopted on

This immunity also applies when they are travelling to and from the place of meeting of the Consultative Assembly. It does not, however, apply when Representatives and their substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity."

⁷ **Article 3 (ETS No.10):** "The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub-committees of the Consultative Assembly, whether or not the Assembly is itself in session at such time".

⁸ In its reply to PACE Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe, the Committee of Ministers "[...] invited the governments of member States to consider taking one or more of the following measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit by full entry facilities on the territory of member States:

- i. according priority to or at least speedy treatment of requests for visas from members of the Parliamentary Assembly in connection with their official duties, in particular when supported by a Council of Europe card;
- ii. granting long-term multiple entry visas whenever possible;
- iii. when the granting of long-term multiple visas is not possible, according priority to the speedy processing of requests for single-entry visas;
- iv. authorising authorities at ports of entry, in cases of urgency when it has not been possible for the member of the Parliamentary Assembly to obtain a visa prior to departing on an official journey, and when notified of such impossibility by the appropriate domestic authorities, to grant the appropriate visas exceptionally at the port of entry;
- v. granting visas free of charge whenever possible [...]."

Reply adopted by the Committee of Ministers on 20 October 1998 at the 645th meeting of the Ministers' Deputies: See the full text at the following [link](#).

⁹ See the text at the following [link](#).

¹⁰ See the text at the following [link](#).

¹¹ See the text at the following [link](#).

6 July 2016 “reiterates its invitation to member States to honour their commitments” (see in particular paragraph 3 of the Reply¹²). The decision to further call “member States to act in strict compliance with their obligations” under the above-mentioned rules as requested by the PACE rests with the Committee of Ministers.

¹² “The Committee of Ministers recalls that it has on several occasions invited the governments of member States to adopt specific measures in order to fully implement the above-mentioned privileges and immunities. For instance, in its reply to Parliamentary Assembly Recommendation 1373 (1998) on “Freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe”, it invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States. The Committee reiterates its invitation to member States to honour their commitments”.

APPENDIX I

Recommendation 2095 (2016) of the Parliamentary Assembly of the Council of Europe – “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”¹³

1. The Parliamentary Assembly reiterates that its members are covered by rules of immunity established by a set of provisions drawn from the Statute of the Council of Europe ((ETS No.1), the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol (ETS No.2 and 10) and the Assembly’s Rules of Procedure.
2. Under the General Agreement on Privileges and Immunities of the Council of Europe, concluded in application of Article 40 of the Statute, the members of the Parliamentary Assembly enjoy three types of protection:
 - 2.1. parliamentary non-liability, guaranteed by Article 14 of the General Agreement, which makes them immune from any judicial proceedings – criminal, civil and administrative – in respect of an opinion expressed or a vote cast in the performance of their parliamentary duties, and is designed to protect the independence of members of the Assembly and ensure their freedom of judgment, expression and decision;
 - 2.2. parliamentary inviolability (Article 15 of the General Agreement), which protects them against any arrest, detention or judicial proceedings outside the national territory in the territory of any other member State, in addition to the national immunity they enjoy in their own State;
 - 2.3. free movement (Article 13 of the General Agreement).
3. As stated in Rule 67 of the Assembly’s Rules of Procedure and pointed out in its Resolution 2127 (2016) on parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly, these immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European mandate.
4. The Assembly strongly condemns the breaches by some Council of Europe member States of the status of privileges and immunities of Assembly members, and especially of the principle of free movement, and expects the Committee of Ministers to call on member States to act in strict compliance with their obligations under the above-mentioned provisions of the Statute of the Council of Europe and the General Agreement on Privileges and Immunities and its protocol and to guarantee their effective application.

¹³ *Assembly debate* on 23 June 2016 (26th Sitting) (see [Doc. 14076](#), report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Ms Liliana Palihovici). *Text adopted by the Assembly* on 23 June 2016 (26th Sitting).

APPENDIX II

Resolution 2127 (2016) of the Parliamentary Assembly of the Council of Europe – “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”¹

1. Even if it can rely on an age-old democratic tradition and stable institutions, no parliament of a Council of Europe member State can consider itself immune in absolute terms to possible attacks on its sovereignty and integrity or on the independence and freedom of expression of its members in the exercise of their mandate.

2. The Parliamentary Assembly recognises that, despite a common constitutional tradition, the system of parliamentary immunities is deeply steeped in the traditions and the political culture specific to each country and varies considerably in Europe, whether in terms of its nature, scope or existing parliamentary practices. Almost all member States grant their elected politicians parliamentary immunity deriving from the need to protect the very principle of representative democracy.

3. The Assembly reiterates that the primary purpose of parliamentary immunity, in its two forms – non-liability and inviolability –, lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary.

4. The system of non-liability is generally extremely stable in the member States. In theory and as a matter of principle, non-liability is absolute, permanent and perpetual in nature. It exempts members of parliament from legal proceedings for acts carried out, statements made, votes cast or opinions expressed in a parliament or in the discharge of their parliamentary duties.

5. Inviolability is a special form of legal protection enjoyed by members of parliament, whereby certain legal measures, such as arrest, detention or prosecution, may not be taken against them for acts unrelated to their parliamentary duties without the consent of the parliament of which they are members, except where they have been caught committing an offence or have been handed a final conviction. It is temporary in nature and applies only for the duration of the term of office, so that it can always be waived. There are significant differences regarding the nature and degree of protection granted by the rules to members of parliaments in member States.

6. Since the adoption of Resolution 1325 (2003) on immunities of members of the Parliamentary Assembly, the political situation in Europe has changed and criticism has been voiced in civil society in the name of the principle of equality before the law calling into question the legitimacy of some forms of immunity, which are condemned as granting members of parliament rules ensuring their virtual impunity.

7. The absolute protection of the acts and statements of members of parliament, especially as far as hate speech is concerned, does indeed pose a problem in the present situation in view of the rise of extremism and nationalism against the backdrop of an upsurge in terrorism and the migration crisis. The Assembly notes and welcomes the fact that in some States insulting or defamatory utterances, incitement to hatred or violence or, in particular, racist remarks are not covered by non-liability rules.

8. Similarly, parliamentary immunity may be open to misuse or the obstruction of justice, especially in connection with the fight against corruption underway in many States. The Assembly notes, like

¹ *Assembly debate* on 23 June 2016 (26th Sitting) (see [Doc. 14076](#), report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Ms Liliana Palihovići). *Text adopted by the Assembly* on 23 June 2016 (26th Sitting).

the European Commission for Democracy through Law (Venice Commission), that the existence of such a system of immunity may undermine public confidence in parliament and discredit politicians.

9. The Assembly welcomes the development and consolidation of the rule of law and democratic societies in Europe, which have reduced the need for parliamentary inviolability, which is now no longer considered an imperative form of protection and is restricted in scope by some member States. The establishment of the pan-European system of human rights protection combined with the effectiveness of the judicial system is today supposed to protect a member of parliament from any harassment, undue pressure or wrongful accusation.

10. The Assembly is concerned about the interpretation which could be given to the position taken by the Venice Commission in 2014 in which it called on States “that have rules on parliamentary inviolability” to revise them “in order to evaluate how they function and whether they are still justified and appropriate in a present day context, or whether they should be reformed”. It wishes to emphasise that the entrenchment of a genuine and stable culture of democracy throughout the European continent presupposes the consolidation of a culture of political alternation, the transparency of political life and respect for the rights of the political opposition in all States. This stage has not yet been reached in some of the youngest democracies in Europe that “are not yet wholly free from their authoritarian past” and where “there is real reason to fear that the government will seek to bring false charges against political opponents and that the courts may be subject to political pressure”. Moreover, in the above-mentioned context, the desire of incumbent governments to stay in power is reflected in successive changes in the electoral laws and amendments to the constitution aimed at weakening the opposition.

11. The Assembly notes that parliamentary inviolability continues to fulfil its original fundamental role in countries that do not provide their parliamentarians with adequate means of protection, especially because their judicial and criminal justice system provides insufficient safeguards. In general terms, protecting members of parliament against any judicial action based on the intention to harm their political activities constitutes an important safeguard for the political minority and a means of protecting the opposition. Therefore, the Assembly condemns methods of exerting political pressure that take the form of opening or re-opening proceedings against members of parliament with no connection to their parliamentary mandate whatsoever, such as taxation matters, or instituting criminal proceedings against members of their family. Accordingly, it reaffirms the need to maintain a system of inviolability that, as the European Court of Human Rights has pointed out, makes it possible to prevent “any possibility of politically motivated criminal proceedings (*fumus persecutionis*) and thereby protects the opposition from pressure or abuse on the part of the majority”.

12. The Assembly calls on member States that are considering reviewing the system of immunities that protect members of parliament, or have already begun to review it in response to criticism, to take into consideration the following general principles:

12.1. immunity is a fundamental democratic safeguard born of the need to preserve the integrity and independence of parliaments, their operation and their acts as institutions; it is not a personal attribute available to the elected representative and its aim is not to protect his or her individual interests;

12.2. parliamentary immunity protects the free exercise of the parliamentary mandate and, whether it covers acts strictly bound up with or unrelated to their parliamentary duties, it must not be open to misuse or the obstruction of justice; the exercise of elective office involves compliance with ethical behaviour and the obligation to account for one's acts; immunity is not a system of impunity;

12.3. the basic rules of parliamentary immunity must be enshrined in legal provisions with constitutional status, at least as far as its most important aspects are concerned, such as its

scope and extent and the rules for waiving it; its recognition at the top of the hierarchy of legal rules enables the integrity of parliaments and the independence of their members in the exercise of their mandate to be permanently guaranteed in the case of political instability or any attempt by the executive to interfere;

12.4. a revision of the scope and extent of parliamentary immunity must be carefully examined with regard to its objectives, its criteria and its impact, be based on a rational approach free from any demagoguery or populism, be debated objectively and be open to wide-ranging public discussion; such a revision should avoid any disruptive change in the system of immunity by switching, for example, from a set of rules that provide a great deal of protection to the total elimination of parliamentary safeguards;

12.5. in this context, account must be taken of the crucial need to preserve the rights and integrity of members of the political minority during and after the end of the parliamentary mandate;

12.6. freedom of speech is an intrinsic part of parliamentary work and elected politicians must be able to debate without fear many different issues of public interest, including controversial or divisive subjects or matters relating to the operation of the executive or the judiciary; however, remarks and statements inciting hatred, violence or the destruction of democratic rights and freedoms can be excluded from the scope of non-liability; members of parliament who misuse the public forum could render themselves liable to internal disciplinary action in accordance with a transparent and impartial regulatory procedure, or even the withdrawal of their parliamentary mandate if they commit a serious and persistent violation;

12.7. the procedure for waiving parliamentary inviolability must comply with the principles of transparency, legal certainty and foreseeability and respect procedural safeguards relating to the rights of the defence, in order to prevent any possibility of a selective or arbitrary decision.

13. Finally, the Assembly reminds its members that they are covered by specific rules of immunity that they share with the members of the European Parliament. This immunity is autonomous in nature as it is distinct from and independent of national parliamentary immunity, which members of parliament may enjoy in the territory of their own State. The Assembly recognises the validity of the criteria developed in the last few years by the European Parliament when considering requests for members' immunity to be waived.

14. The Assembly emphasises that the immunities provided for its members by the Council of Europe Statute and Articles 13, 14 and 15 of the General Agreement on Privileges and Immunities extend to an Assembly member immediately on becoming a member of the Assembly and cover the whole period of his or her activity as a member of the respective national delegation to the Assembly during the sessions of the Assembly.

15. The Assembly invites member States to take all necessary measures to ensure compliance with obligations under the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol, on which they have not expressed reservation or made an interpretative declaration. It is concerned about the changes to national systems of parliamentary immunity, in particular by means of amending or suspending constitutional provisions, which lead, in practice, to render ineffective Article 15.a of the General Agreement on Privileges and Immunities, and to remove de facto protection accorded to members of the Assembly on the territory of their own State, as defined by the Assembly in its [Resolution 1490 \(2006\)](#).

16. The Assembly reminds member States that it must decide on the lifting of the immunity of its members in cases where national law requires authorisation from a national parliament prior to the criminal prosecution of its members. It considers that the need to ensure respect for the rule of law

and to prevent any disguised attempt to cause political damage to a member (*fumus persecutionis*) requires the Assembly to consider lifting the immunity which members enjoy under Article 15.a of the General Agreement on privileges and immunities, regardless of the procedure that could take place at national level.

17. In this connection, the Assembly urges member States to act in strict compliance with their obligations under Article 40 of the Statute of the Council of Europe (ETS No.1) and Articles 13, 14 and 15 of the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol (ETS Nos. 2 and 10) and to guarantee their effective application. It strongly condemns the breaches by some States of the immunity status of Assembly members and, in particular, of the principle of free movement, and reiterates that a violation of these statutory provisions falls within the scope of Rule 8 of the Assembly's Rules of Procedure (challenge of still unratified credentials on substantive grounds).

18. The Assembly decides to request the opinion of the Venice Commission on the suspension by a provisional clause of Article 83 of the Constitution of Turkey, which guarantees the parliamentary inviolability of members of the Grand National Assembly.

APPENDIX III

OPINION OF THE CAHDI

ON RECOMMENDATION 2083 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “INTRODUCTION OF SANCTIONS AGAINST PARLIAMENTARIANS”

1. On 10-11 February 2016, the Ministers’ Deputies at their 1247th meeting agreed to communicate Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on “Introduction of sanctions against parliamentarians” to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 11 May 2016. The text of this Recommendation and the Resolution 2087(2016) associated with it appears in Appendix I and Appendix II respectively to this document.

2. The CAHDI examined the above-mentioned Recommendation at its 51st meeting (Strasbourg, 3-4 March 2016) and made the following comments concerning those aspects of Recommendation 2083 (2016) which are of particular relevance to the Terms of Reference of the CAHDI.

A. Comments in relation to the general question of the rights of members of the PACE

3. From the outset, the CAHDI notes that the legal situation of members of the PACE travelling in an official capacity to and in Council of Europe member States is governed by Article 40¹ of the *Statute of the Council of Europe*, as further elaborated in the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol*. Furthermore, the CAHDI notes that the rights of members of the PACE when seeking to attend an official meeting in a member State, in particular in relation to the freedom of movement, are defined in Article 13² of the GAPI. The immunities enjoyed by PACE members are defined in particular in Articles 14³ and 15⁴ of the GAPI. Moreover, Article 3⁵ of the *Protocol* to the GAPI extends the immunities defined in Article 15 of the GAPI to the representatives of the PACE and their substitutes attending or travelling to or from meetings of the PACE committees or sub-committees.

4. The CAHDI recalls that the Committee of Ministers of the Council of Europe has invited on several occasions the governments of member States to adopt specific measures in order to fully

¹ **Article 40 (ETS No.1):** “*The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.*”

² **Article 13 (ETS No.2):** “*No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative Assembly and their substitutes.*

Representatives and their substitutes shall, in the matter of customs and exchange control, be accorded:

- c. *by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;*
- d. *by the governments of other members, the same facilities as those accorded to representatives of foreign governments on temporary official duty.*”

³ **Article 14 (ETS No.2):** “*Representatives to the Consultative Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions*”.

⁴ **Article 15 (ETS No.2):** “*During the sessions of the Consultative Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:*

- c. *on their national territory, the immunities accorded in those countries to members of Parliament;*
- d. *on the territory of all other member States, exemption from arrest and prosecution.*

This immunity also applies when they are travelling to and from the place of meeting of the Consultative Assembly. It does not, however, apply when Representatives and their substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity.”

⁵ **Article 3 (ETS No.10):** “*The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub-committees of the Consultative Assembly, whether or not the Assembly is itself in session at such time*”.

implement the above mentioned privileges and immunities enjoyed by the PACE members. For instance, in its Reply to PACE Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe adopted on 20 October 1998 at the 645th meeting, the Committee of Ministers invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States⁶. These measures were recalled by the Chair of the Committee of Ministers in his reply to the written Question No. 501 by Lord Russell-Johnston: “Visa requirements for members of the Assembly attending Assembly committee meetings”. In this regard, the CAHDI recalls, as does the PACE itself in its Resolution 2087 (2016), that international law grants States full sovereignty over their territory. This implies that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory.

5. Furthermore, the CAHDI recalls its Preliminary Opinion on Recommendation 1602 (2003) of the Parliamentary Assembly of the Council of Europe on “Immunities of members of the Parliamentary Assembly” adopted at its 26th meeting in September 2003 (see Appendix III to this document). In this Preliminary Opinion “the CAHDI considered that the issues dealt with by this Recommendation, in particular paragraphs 2⁷ and 5.1⁸ required an in depth analysis which it could not carry out during the present meeting, and therefore it reserved its consideration of these issues and to return to them at its next meeting in the light of further information” (document CAHDI (2003)14, Appendix III). The Committee of Ministers took into account this CAHDI Preliminary Opinion when replying to the PACE in relation to Recommendation 1602 (2003) on 21 January 2004 (Reply adopted at the 869th meeting of the Committee of Ministers)⁹. The CAHDI pursued its consideration of PACE Recommendation 1602 (2003) at its 27th and 28th meetings, and agreed “to propose to the Committee of Ministers to ask member states, where national legislation permits, to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly “(document CAHDI (2004) 27 paragraph 27). At their 904th meeting (17 November 2004), the Committee of Ministers decided to follow the CAHDI’s proposal and instructed the Secretary General to transmit the invitation to member States¹⁰. The CAHDI notes that the Council of Europe Protocol will be issuing this year a Council of Europe laissez-passer to:

⁶ In its reply to PACE Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe, the Committee of Ministers “invited the governments of member States to consider taking one or more of the following measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit by full entry facilities on the territory of member States:

- vi. according priority to or at least speedy treatment of requests for visas from members of the Parliamentary Assembly in connection with their official duties, in particular when supported by a Council of Europe card;
- vii. granting long-term multiple entry visas whenever possible;
- viii. when the granting of long-term multiple visas is not possible, according priority to the speedy processing of requests for single-entry visas;
- ix. authorising authorities at ports of entry, in cases of urgency when it has not been possible for the member of the Parliamentary Assembly to obtain a visa prior to departing on an official journey, and when notified of such impossibility by the appropriate domestic authorities, to grant the appropriate visas exceptionally at the port of entry;
- x. granting visas free of charge whenever possible”.

Reply adopted by the Committee of Ministers on 20 October 1998 at the 645th meeting of the Ministers’ Deputies: See the text at the following [link](#).

⁷ Recommendation 1602 (2003) paragraph 2: “It recalls that in the light of the ongoing work of the Assembly and its bodies throughout the year and the concept of European parliamentary immunity developed by the European Parliament, the notion “during the sessions of the Assembly” covers the entire parliamentary year”.

⁸ Recommendation 1602 (2003) paragraph 5: “It recommends that the Committee of Ministers invite member states: 5.1. to interpret the immunities accorded under Article 14 of the general agreement in such a way as to include the opinions expressed by Assembly members within the framework of official functions they carry out in the member states on the basis of a decision taken by an Assembly body and with the approval of the competent national authorities; [...]”

⁹ See the text at the following [link](#).

¹⁰ See the text at the following [link](#).

- members of Council of Europe institutions (Parliamentary Assembly and Congress of Local and Regional Authorities);
- judges of the European Court of Human Rights and the Administrative Tribunal;
- members of monitoring bodies, including the European Committee for the Prevention of Torture (CPT) and the European Committee of Social Rights (ECSR);
- staff members of the Council of Europe.

This document will replace the so-called "blue passport" issued by Council of Europe Protocol since the 1970s which will be discontinued.

B. Comments in relation to specific questions raised in Recommendation 2083 (2016)

6. Concerning the reference contained in paragraph 4.3 of the PACE Recommendation 2083 (2016) in relation to the "current work by the United Nations International Law Commission (ILC)" on this subject, the CAHDI underlines that the ILC is currently examining the subject of "Immunity of State officials from foreign criminal jurisdiction". The ILC defined "State official" in its provisionally adopted "Draft articles" as "any individual who represents the State or who exercises State functions" (see draft Article 2(e))¹¹. Even if this definition includes "the legislative (...) functions performed by the State"¹², it must be underlined that the ILC has excluded "persons connected with (...) international organizations" from the scope of the "Draft articles" (see draft Article 1.2)¹³. Furthermore, the ILC is only dealing with immunity from foreign criminal jurisdiction.

7. The CAHDI considers that many political and legal issues are raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which are governed by the applicable Council of Europe treaties. The CAHDI recalls the rules currently in force and considers that an efficient implementation of these rules would solve most of the issues highlighted by the PACE. Consequently, the CAHDI considers that at present the drafting of any standard-setting work would not be the best way forward.

8. The CAHDI further considers that the responsibility for imposing restrictive measures on particular individuals, be they foreign parliamentarians or not, rests with the States or the international organisations that have adopted them. It is up to those States or international organisations to meet the requirements of legal certainty and to accompany the said measures by appropriate procedural guarantees taking into account *inter alia* the relevant jurisprudence of the European Court of Human Rights. The CAHDI notes that with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provides judicial protection to persons addressed in such measures. With respect to restrictive measures adopted by the United Nations, the procedures for listing and delisting have been improved.

9. The CAHDI consequently considers that the proposal of the PACE concerning the possibility of the CAHDI carrying out "a feasibility study on the creation of an international status for parliamentarians and any related rights and obligations" would require, in an area which falls to a large extent under the national sovereignty, a prior evaluation of the needs in this field. Accordingly, the question of creating a specific status for parliamentarians goes beyond the sole competence of the CAHDI. Furthermore, recalling its Terms of Reference wherein the CAHDI is instructed by the Committee of Ministers to deal with immunities of States and international organisations, the CAHDI considers the specific immunities, rights and obligations of parliamentarians to be outside its purview.

¹¹ Text of draft article 2(e) provisionally adopted by the ILC, see A/69/10, para. 131, p. 231.

¹² See Commentary to article 2 (e), see A/69/10, para.11 p. 235.

¹³ Text of draft article 1.2 provisionally adopted by the ILC A/68/10, p.51; and see also commentary in particular paragraphs (1) (9) (10) (14) and (15), pp. 52, 55, 56 and 57.