Strasbourg, 12/02/04 CAHDI (2004) Inf 2

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)

27th meeting
Strasbourg, 18-19 March

COMPILATION OF INFORMATIVE DOCUMENTS ON THE PRACTICE FOLLOWED BY THE PARLIAMENTARY ASSEMBLY AS REGARDS IMMUNITY OF ITS MEMBERS AND OTHER RELEVANT DOCUMENTS

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

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Foreword

At its 837th meeting on 16 April 2003, the Committee of Ministers at Deputies' level decided to communicate Recommendation 1602 (2003) on immunities of Members of the Parliamentary Assembly to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 31 July 2003. This deadline was subsequently extended so as to allow the CAHDI to formally consider the matter at its 26th meeting, 18-19 September 2003. At this occasion, the CAHDI adopted a preliminary opinion on Recommendation 1602 (2003) and decided to revert to some issues dealt with by the Recommendation at its 27th meeting, in the light of further information.

At its 869th meeting on 21 January 2004, the Committee of Ministers at Deputies' level took note of the preliminary opinion of the CAHDI and invited the CAHDI to continue its consideration firstly of the issues raised in the Assembly recommendation and secondly of the appropriateness and necessity of adopting a position concerning the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe.

The text of the Deputies' decisions appears in Appendix I, texts and practice of the Parliamentary Assembly in Appendix II, the relevant case law in Appendix III and finally other relevant material in Appendix IV.

TABLE OF CONTENTS

Appendix I: Committee of Ministers

400th Meeting of the Ministers' Deputies (1986)

9.

STATUTE OF THE COUNCIL OF EUROPE
Amendments to Articles 14 and 25
Assembly Recommendations 1026 and 1027
(Concl(86)399/8, CM(86)44 and 127)

The Chairman recalled that at their 399th meeting (September 1986, item 8) the Deputies had had a hearing with Mr Steiner, Vice-Chairman of the Assembly's Political Affairs Committee and the Assembly's Rapporteur concerning the amendments of Articles 14 and 25 of the Statute of the Council of Europe. Mr Steiner had suggested that the amendment of the two Articles in question be considered by the Committee of Ministers at ministerial level. The Chairman further recalled that a large number of delegations were not favourably inclined towards the Assembly's proposals, but that there were others who could agree to the proposals by the Assembly.

The Representative of Austria said that there were two aspects: the procedure and the substance. As for the procedure his authorities had examined Mr Steiner's proposal and concluded that it should be raised at the informal meeting of the Ministers to be held in the evening of 19 November 1986. He wondered if the Chairman of the Committee of Ministers would be prepared to include this matter on the draft agenda of the informal meeting.

As for the substance of the matter the Representative of Austria said that he had no objection to discussing amendments of Articles 14 and 25 of the Statute at the present meeting with a view to enabling the Ministers to know what the feelings of the Deputies were on this matter.

The Representative of Malta said that this was the first time that he spoke on this matter. At the time when the two amendments had been proposed by the Assembly Malta had some internal difficulties which had perhaps been exaggerated and which unfortunately had been brought before the Council of Europe. All member States had their own internal difficulties at some stage. Although he failed to understand why the Statute of the Council of Europe should be amended, he was not opposed to a discussion on this matter at the informal meeting of the Ministers.

With reference to what had been said by the Representative of Austria, the Representative of the Netherlands said that the Deputies should submit political issues to the Ministers only if such matters could not be settled at the level of the Deputies. He thought that the question of amendment of Articles 14 and 25 of the Statute and the subsequent reply to the Assembly could be settled by the Deputies themselves with some effort.

The Representative of France agreed with the Representative of the Netherlands. His delegation was ready to adopt the reply now.

The Representative of Greece expressed his agreement with the Representatives of Malta, the Netherlands and France. The position of his delegation was that this matter had been raised by the Assembly because there had been a particular problem that concerned in particular Article 25 of the Statute. Since then this problem had been solved but as it was still fresh in everyone's mind, it was not appropriate to provoke a new discussion on it.

The Representative of Austria repeated that his Minister wanted the Ministers to give political consideration to this matter at the informal meeting of the Ministers on 19 November 1986; it was not the intention of his delegation to ask the Ministers to discuss any draft reply to Assembly Recommendations 1026 and 1027 nor to submit the matter to the formal Session of the Ministers on 20 November 1986.

The Representative of Cyprus referred to the statement he had made at the 395th meeting of the Deputies (April 1986, item 5) expressing his disagreement with the proposals of the Assembly to amend Articles 14 and 25 of the Statute. If Article 14 were to be amended, this would mean that the Assembly - and not the Committee of Ministers - would have the power to suspend relations with a member State. No member State would accept such a curtailing of its powers which, in his view, challenged the very basis of the Organisation.

The Representative of France said that the Assembly had two means at its disposal to control the composition of national delegations to the Assembly, i.e. its own rules of procedure and the verification of credentials of delegations at the opening of each Session.

It would not be appropriate for governments to tell national parliaments what to do. This was contrary to democracy.

The Representative of Belgium also thought that national parliaments were the best judges of their own representation in the Assembly. By adopting the amendment proposed by the Assembly one would give the erroneous impression that until now nothing had been done to ensure fair representation of the political forces in national parliaments.

As regards the draft reply to be adopted by the Deputies, he pointed out that his delegation had presented a proposal for a draft reply to Assembly Recommendations 1026 and 1027 set out in CM(86)127, which in his opinion should constitute the basis of the examination by the Deputies. The draft reply which had been prepared by the Secretariat during the 395th meeting should no longer be considered as the basis for discussion.

The Chairman said that if this matter were to be raised at the informal meeting of the Ministers on 19 November 1986 he feared that a large part of the informal meeting would be taken up by the discussion of this matter. He wondered if this fact could be brought to the attention of his Minister by the Representative of Austria.

The Representative of Spain expressed his agreement with the Representative of France. In his view it was the Assembly that had to take a stand on the question of the composition of national delegations. If the Austrian delegation wished to raise this matter at the informal meeting of the Ministers it could do so but it was for the Deputies to give a reply to the Assembly.

The Representative of Austria said that the Assembly had asked for the Statute to be modified. If the Committee of Ministers were to refuse their request, this had great political importance, because it would be the first time in the history of the Council of Europe that the Committee of Ministers would give a negative reply concerning the amendment of Article 25 of the Statute which was of direct concern to the Assembly. He would duly inform his Minister of the present discussion.

The Chairman said that any Minister could raise a question at the Ministerial Session but he repeated that it could lead to a long and futile debate.

Following a proposal from the Representative of Spain, the Chairman put the following proposals to an indicative vote:

Proposal No. 1: Delegations which were not in favour of accepting the amendment of Article 14 of the Statute:

The result of the indicative vote was as follows: 14 for, 2 against and 3 abstentions.

The Chairman noted that the majority of delegations was opposed, on an indicative basis, to the amendment of Article 14 of the Statute.

Proposal No. 2: Delegations which were not in favour of amendment of Article 25 of the Statute:

The result of the vote was as follows: 12 for, 5 against and 3 abstentions.

The Chairman noted that the majority of delegations had expressed itself on an indicative basis, against amendment of Article 25 of the Statute.

At a later stage during the meeting, the Representative of Austria informed the Deputies that he had spoken to his Minister who had confirmed his intention to raise this matter at the informal meeting of the Ministers.

The Chairman said that in accordance with the request made by the Austrian delegation, the Chairman would include this matter in his letter to his colleagues.

Accordingly, the reply to the Assembly on this matter would not be adopted before the matter had been discussed at the informal meeting of the Ministers on 19 November 1986.

Decision

The Deputies agreed to resume consideration of this item at A level at their 402nd meeting (November/December 1986).

8.

STATUTE OF THE COUNCIL OF EUROPE
Amendments to Articles 14 and 25
Assembly Recommendations 1026 and 1027
(Concl(86)395/5, CM(86)44 and 127)

The Chairman welcomed Mr Steiner (Austria), Vice-Chairman of the Assembly's Political Affairs Committee and the Assembly's Rapporteur concerning the amendments of Articles 14 and 25 of the Statute of the Council of Europe.

Mr Steiner expressed his gratitude to the Deputies for the invitation that had been made to him to participate in the present meeting with a view to explaining the views of the Assembly on Recommendations 1026 and 1027. He transmitted the apologies of Mr Baumel, Chairman of the Assembly's Political Affairs Committee who could not attend the present meeting of the Deputies.

He recalled that Assembly Recommendations 1026 and 1027 had been unanimously adopted by the Assembly in January 1986.

As far as Recommendation 1026 was concerned (Article 14 of the Statute), Mr Steiner said that it was not the intention of the Assembly to influence the work of the Committee of Ministers; in fact the Assembly recognised and respected the competence of the two Organs of the Council of Europe. However in the opinion of the Assembly it was necessary to amend Article 14 of the Statute so that a member State which was not represented in the Assembly would not be entitled to vote in the Committee of Ministers. Such a measure would, in the opinion of the Assembly, serve to maintain the existing links and the dialogue between the Council of Europe and the Member concerned; it did not mean the expulsion of a Member but only a reduction in its rights in the Committee of Ministers during a certain period.

As far as Recommendation 1027 was concerned (Article 25 of the Statute), Mr Steiner pointed out that the Statute of the Council of Europe, while referring to the principles of parliamentary democracy and human rights, said nothing about the representation in the Assembly of the political forces in a member State. Therefore the Assembly thought that it was necessary to amend Article 25 by adding a sub-paragraph to the effect that the delegation of each Member should fairly represent the political forces present in its parliament. This was an important matter for the Assembly which wished to ensure that all the political forces in a national parliament were represented in a democratic manner in the Assembly. The Assembly thought that instead of incorporating such a measure in its own Rules of Procedure it would be more appropriate to amend Article 25.

Finally, Mr Steiner suggested that the amendment of Articles 14 and 25 be considered by the Committee of Ministers at ministerial level.

The Representative of Belgium said that he had listened with great attention to what Mr Steiner had said.

Referring to Article 14 of the Statute, he recalled that Mr Steiner had stressed the fact that the proposed amendment of Article 14 of the Statute did not mean "expulsion" of a member State. But if a Member was deprived of its voting rights in the Committee of Ministers this would mean a quasi expulsion, the Member in question becoming an "observer".

As for Article 25 of the Statute, the Representative of Belgium said that what was at issue was the correct representation of the political forces in the member States. The preamble to the Statute of the Council of Europe made reference to the democratic principles so that even if Article 25 did not contain any clause on the representativeness of the members of the Assembly there was no doubt that it was necessary to assure this representation with due respect for parliamentary democracy.

It should be noted, moreover, that the Treaty of Rome had not been more explicit with regard to the representative nature of members of the European Parliament before the introduction of direct elections.

He concluded by saying that in the opinion of his delegation it was not necessary to amend Article 25 of the Statute.

Mr Steiner thought that the amendment of Article 25 of the Statute would avoid all sorts of complications. It would also serve as an encouragement for governments to ensure that the representation of the political forces in a given member State was truly democratic. The matter was so important that it should not be left to the interpretation of the Assembly's Rules of Procedure.

As regards Article 14 of the Statute, Mr Steiner noted that, as the Statute of the Council of Europe did not provide for observer status, the amendment of Article 14 would provide a compromise solution for a member State which was in difficulty and would allow it to stay within the "European family".

The Representative of Austria said that his delegation supported the views expressed by Mr Steiner. His delegation also supported the proposal made by Mr Steiner to submit the matter for consideration at ministerial level.

He recalled the reply given by the Director of Legal Affairs to his question (see Concl(86)395/item 5) that since 1949 no negative reply had ever been given by the Committee of Ministers to the Assembly concerning the amendment of Article 25 of the Statute. This fact constituted a further reason to support Assembly Recommendation 1027 to amend Article 25.

He expressed his gratitude to Mr Steiner for the explanations he had given in particular as regards the fact that the Assembly did not wish to amend its own Rules of Procedure but that it wanted to settle the matter by amending the Statute.

Mr Steiner said that it was true that the Assembly did not wish only to amend its own Rules of Procedure but it had wished to have the relevant Article of the Statute amended by a political decision taken by the Committee of Ministers.

The Representative of Sweden recalled that his delegation was in favour of the proposals made by the Assembly in Recommendations 1026 and 1027. However he also understood the attitudes of those delegations which had expressed reservations on the matter.

He thought that amendment of Article 25 was more important for the Assembly than amending Article 14. The latter's amendment might deprive the State in question from the possibility of continuing the dialogue with the Council of Europe.

Mr Steiner recalled that both Recommendations had been unanimously adopted by the Assembly. He hoped that, as a minimum, the Committee of Ministers would accept the amendment of Article 25.

In reply to the Chairman, Mr Steiner referring to the question of fair representation, said that the Assembly's concern was that the delegation of each member State fairly represented the political forces present in a national parliament although exact mathematical proportionality would not necessarily be possible, especially where the smaller delegations were concerned; it was not acceptable for the Assembly to have a delegation representing only the government party in a State.

The Representative of Belgium wondered if the Assembly could not settle the problem by means of examining the credentials of delegations at each session which would ensure that delegations truly and fairly represented the various political forces in national parliaments.

Mr Steiner said that according to the normal procedure the governments or parliaments of member States informed the President of the Assembly of the composition of their delegations; the examination of credentials, in particular in cases when they were contested, led to long discussions, debates etc which hindered the work of the Assembly and should therefore be avoided.

The Chairman expressed his gratitude to Mr Steiner for attending the present meeting of the Deputies and the explanations he had given on Assembly Recommendations 1026 and 1027.

Mr Steiner thanked the Chairman and the Deputies for the interest they had shown in the matter which in his opinion was an excellent sign of co-operation between the two Organs of the Council of Europe. He expressed the hope that there would be an agreement in the Committee of Ministers on the proposed amendments of the Assembly.

Following the hearing with Mr Steiner, the Chairman noted that the Committee had listened with great interest to what Mr Steiner had said. The Deputies would no doubt wish to report to their capitals the explanations given by Mr Steiner on the matter at the present meeting and it would be appropriate for the Deputies to resume consideration of this matter at A level at their 400th meeting (October 1986).

The Representative of Austria said that if no positive decision were to be taken at the 400th meeting, the Deputies would have to take a decision to submit the matter to the Ministers by reason of its political importance in conformity with Article 2(3) of the Rules of Procedure for the meetings of the Ministers' Deputies.

Decision

The Deputies agreed to resume consideration of this item at A level at their 400th meeting (October 1986).

STATUTE OF THE COUNCIL OF EUROPE
Amendments of Articles 14 and 25
Assembly Recommendations 1026 and 1027

DRAFT REPLY TO ASSEMBLY RECOMMENDATIONS 1026 AND 1027

Proposal presented by the Belgian delegation

"1. The Committee of Ministers shares the concern expressed by the Assembly in Recommendation 1027 that the political forces present in the parliaments of member States be fairly represented within the Assembly in order to abide by the principles of pluralist democracy embodied in the Statute of the Council of Europe.

However, the Committee of Ministers does not have a sufficient majority to move the amendment of Article 25 of the Statute in accordance with the Assembly's Recommendation since most delegations consider that there are other ways of implementing it, e.g. by amending the Assembly's Rules of Procedure.

2. As to Recommendation 1026 which proposes sanctioning the non-representation of a member State in the Assembly by disqualifying it from voting in the Committee of Ministers and holding its Chair, the Committee of Ministers also lacks a sufficient majority in favour of such action, which would be tantamount to expelling the member State from the Committee of Ministers.

In this instance as well, most delegations consider that there are other ways of ensuring effective involvement of member States in the proceedings of the two Organs of the Council of Europe."

5.

STATUTE OF THE COUNCIL OF EUROPE
Amendments to Articles 14 and 25
Assembly Recommendations 1026 and 1027
(Concl(86)400/9, CM(86)44 and 127)

At the request of the Representative of Austria, the Deputies proceeded to an indicative vote on the text of the draft reply presented by the Belgian delegation (CM(86)127). The result of the indicative vote was as follows:

16 in favour, none against and 3 abstentions (carried).

The Chairman noted that the Deputies were in favour of adopting the text set out in CM(86)127.

The Representative of Austria made the following statement:

"For reasons which are well known, my Minister was not able to raise this question as he had intended at the informal meeting of Ministers. Although the reply envisaged in no way reflects our thinking, my delegation, acting on instructions from my authorities, did not vote against the draft. This was merely to enable a reply to be sent to the Assembly, and we therefore abstained in the vote.

The Austrian authorities feel that such a negative response from the Committee of Ministers to a Recommendation unanimously adopted by the Assembly raises a number of problems. The Recommendation, the aim of which was to strengthen the role of the Council of Europe as a symbol and shield of democracy, should have been understood in the light of its democratic intentions".

Decision

The Deputies adopted the following reply to Assembly Recommendations 1026 and 1027:

"1. The Committee of Ministers shares the concern expressed by the Assembly in Recommendation 1027 that the political forces present in the parliaments of member States be fairly represented within the Assembly in order to abide by the principles of pluralist democracy embodied in the Statute of the Council of Europe.

However, the Committee of Ministers does not have a sufficient majority to move the amendment of Article 25 of the Statute in accordance with the Assembly's Recommendation since most delegations consider that there are other ways of implementing it, e.g. by amending the Assembly's Rules of Procedure.

2. As to Recommendation 1026 which proposes sanctioning the non-representation of a member State in the Assembly by disqualifying it from voting in the Committee of Ministers and holding its Chair, the Committee of Ministers also lacks a sufficient majority in favour of such action, which would be tantamount to expelling the member State from the Committee of Ministers.

In this instance as well, most delegations consider that there are other ways of ensuring effective involvement of member States in the proceedings of the two Organs of the Council of Europe."

STATUTE OF THE COUNCIL OF EUROPE
Amendment of Articles 14 and 25
Assembly Recommendation 1026 and 1027
(Concl(86)393/2a, CM(86)44)

The Representatives of Sweden and Austria said that their delegations were in favour of the proposals made by the Assembly in Recommendations 1026 and 1027 on the amendment of Articles 14 and 25 of the Statute of the Council of Europe.

The Representative of Greece said that his delegation was rather sceptical on this matter, being aware of the reasons in the past that had led the Assembly to adopt the two Recommendations asking for the amendment of Articles 14 and 25 of the Statute of the Council of Europe. As far as the present situation was concerned, the problems that had led to the adoption of these Recommendations had been solved. Since nobody knew what might happen in the future his delegation was rather hesitant to take a stand on the changes proposed.

The Representative of Cyprus said that his delegation too was aware of the reasons in the past that had led to the adoption of the Recommendations. As the Council of Europe had been able to carry on for so many years with its present Statute, he was not in favour of the amendment of Articles 14 and 25 of the Statute as the Assembly had asked for in Recommendations 1026 and 1027.

The Representative of the Netherlands said that the circumstances that had led to the Assembly's proposals to amend Articles 14 and 25 of the Statute of the Council of Europe were now settled and consequently there was no need to modify the Statute of the Organisation.

The Representative of Belgium agreed with the previous speakers. While understanding the concerns expressed by the Assembly he felt that practical solutions based on the existing Articles of the Statute should be found to meet the demands of the Assembly rather than modifying the Statute of the Organisation.

The Chairman recalling that a reply to an Assembly Recommendation required unanimity, noted that the Statue of the Council of Europe was an important text; therefore, amendments should reflect a universal desire for change. The discussions so far had shown that there would be no consensus to modify the Statute of the Council of Europe along the lines proposed by the Assembly in its Recommendations 1026 and 1027. He would transmit these two Recommendations to the governments of the member States for their consideration. The Assembly could be informed of this and also of the fact that there was no consensus in the Committee of Ministers on this matter.

The Representative of Belgium supported by the Representatives of Switzerland and Greece, said that the Deputies could resume consideration of this matter at their 397th meeting (26-30 May 1986) on the basis of a draft reply setting out the reasons why there was no consensus in the Committee of Ministers.

The Representative of the United Kingdom expressed a word of caution and said that it would not be advisable to tell the Assembly that there did not exist a consensus on the matter. The draft reply should be carefully worded. The Committee of Ministers could note in its reply that there did not seem to be a sufficient majority among the governments of member States to amend Articles 14 and 25 of the Statute.

The Representative of Austria thought that the matter should be given further consideration by delegations in view of the statements made and the stand taken by various delegations at the present meeting. He would therefore be in favour of postponing consideration of this item to a later meeting of the Deputies.

The Secretary General confirmed that the Assembly had unanimously adopted Recommendations 1026 and 1027 and agreed that the reply to the Assemby should be carefully worded.

He wondered if the Deputies would consider giving two separate replies to the Recommendations rather than giving one reply only. Amendment of Article 14 of the Statute required an additional Protocol to the Statute, which, under Article 41(c) would come into force when it had been signed and ratified by two-thirds of the member States. As far as Article 25 of the Statute was concerned there was no need for an additional Protocol to the Statute; if the amendment was approved it would come into force on the date of the certificate of the Secretary General, transmitted to the governments of member States, certifying that it had been approved.

The Representative of Sweden agreed with the Secretary General's approach to separate the two issues. He was also aware that the amendment of Article 25 of the Statute did not require any ratification.

He wondered if the question concerning Article 14 and Article 25 should not be submitted to the Committee of Ministers for consideration at the 78th Session (23-24 April 1986).

The Representative of Austria said that the idea put forward by the Secretary General to have two separate replies to the two Recommendations in question would, in the opinion of his delegation, require further consideration by the Deputies; he was therefore in favour of postponing consideration of the matter until the 397th meeting of the Deputies (22-30 May 1986).

He agreed with the Representative of Sweden and wondered if the matter could be discussed by the Ministers at their informal meeting on 23 April 1986.

The Representative of the United Kingdom supported by the Representative of the Netherlands, recalled that the Deputies were meeting here with full powers representing their Ministers and that they should not renounce their powers. Therefore he was opposed to submitting the matter to the Ministers for consideration at the informal meeting.

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At a later stage of the meeting the Deputies examined the following draft reply prepared by the Secretariat:

"The Committee of Ministers has examined Recommendations 1026 and 1027 of the Assembly.

1. As to Article 14, while understanding the concern underlying the amendments proposed, the Committee of Ministers had, after an exchange of views, arrived at the conclusion that there was not a sufficient majority to adopt this proposal.

2. Concerning Article 25, the Committee of Ministers arrived at a similar conclusion but wishes to point out that there are other ways of implementing the proposal, for example by incorporating it in the Assembly's own Rules of Procedure."

The Representative of Sweden wondered if the matter could be postponed until after the 78th Session of the Committee of Ministers with a view to reflecting the views of the Ministers, if any, on the matter in the draft reply. On the other hand the draft reply prepared by the Secretariat would be acceptable to his delegation.

The Representative of Austria was in favour of postponing the consideration of this item to the 397th meeting (22-30 May 1986) with a view to allowing his authorities to consider carefully the draft reply prepared by the Secretariat.

The Chairman expressed his agreement with the Representative of Austria.

The Representative of Switzerland thought that as far as Article 14 of the Statute was concerned the reply to the Assembly could contain more substantial information as to why the Committee of Ministers was not in a position to adopt the Assembly's proposal. It should be pointed out to the Assembly that the Committee of Ministers and the Assembly had their respective roles to play within the Council of Europe, that Article 14 was a matter which concerned the Committee of Ministers and that its amendment would deprive the Committee of Ministers of its right to take decisions on matters of direct interest to it.

On the other hand as far as Article 25 was concerned, he thought that the wording of the draft reply set out above was acceptable to his delegation.

The Chairman appealed to all delegations to submit their amendments, if any, to the draft reply, to the Secretariat.

Speaking as Representative of Ireland, he noted that the Committee of Ministers was the master of its own procedure and that it did not have to explain its reasoning on matters falling within its own competence. However, if the Assembly were to pursue this matter further then explanations could be given in a brief and courteous manner.

The Representative of Austria, referring to the draft reply set out above, said that as far as Article 14 was concerned he thought that it would not be necessary to use the phrase "... while understanding the concern underlying the amendments proposed," as the majority of the delegations were not in a position to share the concern of the Assembly.

As far as Article 25 was concerned he noted that since 1951 this Article had been modified on three different occasions. Regarding the proposal to include these measures in the Rules of the Assembly, he inquired if this possibility had been studied by the Assembly, and if so, with what result. He also wished to know if, in the opinion of the Directorate of Legal Affairs, these measures could be included - from a legal point of view - in the aforementioned Rules.

The Director of Legal Affairs, in reply to the Representative of Austria, said that the Assembly had not envisaged solving the problem raised in Recommendation 1027 by incorporating the changes proposed in its own Rules of Procedure. While the Assembly could opt for this solution, it would not have the same weight and value as amending Article 25 itself.

The Representative of Belgium reiterated the view that the Deputies required more time to give further consideration to this matter.

The Deputies might wish to clarify their position regarding Article 25, i.e. they could say that they shared the concern of the Assembly that the composition of each national delegation from member States should reflect the political forces present in parliaments on the basis of pluralist democracy etc. and that the Committee of Ministers, following the discussions held, was not in a position to accept the proposal made by the Assembly in Recommendation 1027 to amend Article 25 of the Statute and that there existed other ways of implementing the proposal contained therein.

The Representative of Austria asked the Director of Legal Affairs if any amendment proposed by the Assembly to modify Artice 25 of the Statute had ever been refused by the Committee of Ministers since 1949.

The Director of Legal Affairs said that since 1949 no negative reply had ever been given by the Committee of Ministers to the Assembly concerning the amendment of Article 25 of the Statute. The last amendment made to this article had taken place in 1970.

Decision

The Deputies agreed to resume consideration of this item at A level at their 397th meeting (22-30 May 1986).

STATUTE OF THE COUNCIL OF EUROPE

Amendment of Articles 14 and 25
Assembly Recommendations 1026 and 1027 (1)

Secretariat memorandum
prepared by
the Directorate of Political Affairs

1. In Recommendation 1026, the Assembly recommends that the Committee of Ministers, in accordance with Article 41 of the Statute of the Council of Europe, amend the Statute as follows (2):

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(1) Assembly debate on 29 January 1986 (25th sitting). See Doc. 5497, report of the Political Affairs Committee. Text adopted by the Assembly on 29 January 1986 (25th sitting).

(2) Articles 14 and 41 of the Statute of the Council of Europe read as follows:

Article 14

"Each Member shall be entitled to one Representative on the Committee of Ministers, and each Representative shall be entitled to one vote. Representatives on the Committee shall be the Ministers for Foreign Affairs. When a Minister for Foreign Affairs is unable to be present or in other circumstances where it may be desirable, an alternate may be nominated to act for him, who shall, whenever possible, be a member of his Government".

Article 41

"a. Proposals for the amendment of this Statute may be made in the Committee of Ministers or, in the conditions provided for in Article 23, in the Consultative Assembly.

b. The Committee shall recommend and cause to be embodied in a protocol those amendments which it considers to be desirable.

c. An amending protocol shall come into force when it has been signed and ratified on behalf of two-thirds of the Members.

d. Notwithstanding the provisions of the preceding paragraphs of this Article, amendments to Articles 23 - 35, 38 and 39 which have been approved by the Committee and by the Assembly, shall come into force on the date of the certificate of the Secretary General, transmitted to the Governments of Members, certifying that they have been so approved. This paragraph shall not operate until the conclusion of the second Ordinary Session of the Assembly."

Add to Article 14 of the Statute a second paragraph as follows:

"However, during the period in which a Member is not represented in the Assembly he shall not be entitled to vote in the Committee of Ministers and may not chair the Committee".

2. As far as Article 14 of the Statute of the Council of Europe is concerned, the Committee of Ministers, sitting at ministerial level, may adopt the amendment to Article 14 by a majority of two-thirds of the votes cast and a majority of the representatives entitled to sit on the Committee (see Article 20(d) of the Statute). If, on the other hand, such an amendment is submitted to the Ministers' Deputies, its adoption requires a unanimous vote of the Ministers' Deputies and of a majority of the Ministers' Deputies entitled to vote (see Article 9.1(e) of the Rules of Procedure for the meetings of Ministers' Deputies).

3. If the proposed amendment is adopted it is then incorporated in a Protocol to the Statute, which, under Article 41(c) will come into force when it has been signed and ratified by two-thirds of the member States.

4. In its Recommendation 1027, the Assembly recommends that the Committee of Ministers, in accordance with Article 41 of the Statute of the Council of Europe, amend the Statute as follows: (1)

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(1) Article 25 of the Statute of the Council of Europe reads as follows:

"a. The Consultative Assembly shall consist of representatives of each Member, elected by its parliament from among the members of that parliament, in such manner as it shall decide, however, to the right of each Member Government to make any additional appointments necessary when the parliament is not in session and has not laid down the procedure to be followed in that case. Each representative must be a national of the Member whom he represents, but shall not at the same time be a member of the Committee of Ministers.

The term of office of Representatives thus appointed will date from the opening of the Ordinary Session following their appointment; it will expire at the opening of the next Ordinary Session or of a later Ordinary Session, except that, in the event of elections to their Parliaments having taken place, Members shall be entitled to make new appointments.

If a Member fills vacancies due to death or resignation, or proceeds to make new appointments as a result of elections to its Parliament, the term of office of the new Representatives shall date from the first Sitting of the Assembly following their appointment.

b. No Representative shall be deprived of his position as such during a session of the Assembly without the agreement of the Assembly.

c. Each Representative may have a substitute who may, in the absence of the Representative, sit, speak and vote in his place. The provisions of paragraph (a) above apply to the appointment of substitute."

Add to Article 25 of the Statute a paragraph (d) as follows:

"The delegation of each member must fairly represent the political forces present in its parliament".

5. In the case of Article 25 of the Statute provision is made in Article 41(d) of the Statute whereby the proposed amendment is approved by the Committee of Ministers (sitting at ministerial level) by a majority of two-thirds of the votes cast and a majority of the Representatives entitlted to sit on the Committee, in accordance with Article 20(d) of the Statute or by the Ministers' Deputies, by a unanimous vote of the Ministers' Deputies' casting vote and of the majority of those entitled to vote, in accordance with Article 9.1(e) of the Rules of Procedure for the meetings of Ministers' Deputies, and by the Assembly in accordance with its own voting rules. If the amendment is approved it shall come into force on the date of the certificate of the Secretary General, transmitted to the Governments of Members, certifying that they have been so approved.

6. In the light of the information submitted above by the Secretariat, following consultation with the Directorate of Legal Affairs, the Ministers' Deputies might wish to examine at their 395th meeting (April 1986) Assembly Recommendations 1026 and 1027 on the amendments of Articles 14 and 25 of the Statute of the Council of Europe.

Appendix II: Parliamentary Assembly

Recommendation

Recommendation 1027 (1986)

on amendment of Article 25 of the Statute of the Council of Europe

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The Assembly,

1. Recalling the paramount importance assigned by the Statute of the Council of Europe to the principles of pluralist parliamentary democracy;

2. Convinced that pluralism is therefore an essential feature of the Assembly's composition,

3. Recommends that the Committee of Ministers, in accordance with Article 41 of the Statute of the Council of Europe, amend the Statute as follows :

> Add to *Article 25* of the Statute a paragraph *d* as follows :
>
> ‘‘The delegation of each Member must fairly represent the political forces present in its parliament."

_____

1. *Assembly debate* on 29 January 1986 (25th Sitting) (see Doc. 5497, report of the Political Affairs Committee).

Text adopted by the Assembly on 29 January 1986 (25th Sitting).

Resolutions

Resolution 1325 (2003)

Immunities of members of the Parliamentary Assembly

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1. The Parliamentary Assembly stresses that parliamentary immunity is one of the most ancient parliamentary guarantees in Europe. Its purpose is to preserve the integrity of parliaments and to safeguard the independence, but not the impunity, of its members in exercising their office. Immunity provides specific protection against the accusations to which parliamentarians are more exposed than other citizens. Moreover, in new democracies, in the initial stages of constitutional development the presence of immunities is highly important, particularly when the independence of the judiciary is still being consolidated.

2. The Assembly recalls that it was the first international parliamentary institution in Europe to incorporate provisions in its Rules of Procedure for waiving the immunity of its members, giving practical expression to Article 40 of the Statute of the Council of Europe and the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2, 1949) and its Additional Protocol (ETS. No. 10, 1952).

3. It notes that it has received very few requests to waive the immunity of members and also that few of its members have asked it to confirm their immunity in respect of proceedings against them at national level. It concludes that, on the one hand, knowledge of the system of immunity for Assembly members is lacking and, on the other hand, certain notions of the system are subject to narrow interpretations in member states.

4. It points out that the provisions relating to parliamentarians in the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol and those of the Protocol on the privileges and immunities of the European Communities of 8 April 1965 are identical. Furthermore, the European Parliament has developed a concept of European parliamentary immunity and disposes of extensive case-law concerning the practical application of that immunity. The Assembly notes that negotiations are currently taking place on the status of members of the European Parliament, which will also include immunities.

5. As regards non-accountability/non-liability (parliamentary privilege), provided for in Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe, the Assembly believes that such immunity should include the opinions expressed by the Assembly' s Representatives and Substitutes when carrying out official functions in member states with the approval of the competent national authorities. It also believes that the possibilities of sanctioning Assembly members (Rule 20 of the Rules of Procedure of the Parliamentary Assembly) should be reinforced in the event of their expressing opinions containing defamation, insults or slander.

6. The Assembly also notes that in its judgment of 17 December 2002 in the case of A. v. the United Kingdom (Application No. 35373/97), the European Court of Human Rights stated, *inter alia*, that "In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein" and that "a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory states, [of the European Convention on Human Rights], the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of

access to court as embodied in Article 6 paragraph 1 [of the European Convention on Human Rights]".

7. The Assembly notes that in another judgment of 30 January 2003 (Cordova v. Italy (No. 2) – Application No. 45649/99), the European Court of Human Rights noted that the statements of a parliamentarian, having been made during an electoral meeting and thus outside a legislative assembly, were not related to the performance of parliamentary duties in the strict sense. In the Court' s opinion, the absence of an obvious link with any kind of parliamentary activity meant that the notion of proportionality between the aim pursued and the means employed had to be interpreted narrowly. That was particularly true where restrictions on the right of access had resulted from a resolution passed by a political body.

8. Concerning parliamentary inviolability, guaranteed by Article 15 of the general agreement, the Assembly emphasises that the procedure for waiving parliamentary immunity at the Parliamentary Assembly is separate from that of national parliaments. A national authority lodging a request to waive the immunity of a Parliamentary Assembly member in respect of their own national parliament must also therefore lodge a request with the Assembly. Moreover, the notion "during the sessions of the Assembly" should be defined. The Assembly further considers that the general principles of European parliamentary immunity, which were developed after the adoption of the General Agreement, should be taken into account for the purpose of defining the scope of its Article 15, in so far as they are compatible with the nature of the Assembly and its practice.

9. Like other international parliamentary institutions, the Parliamentary Assembly will have to incorporate a provision in its Rules of Procedure whereby its members may request the Assembly to confirm their European immunity in respect of national proceedings.

10. Finally, the Assembly believes that Rule 64 of its Rules of Procedure must be more precise where the handling of requests to waive immunity is concerned and be adapted to new developments.

11. Consequently, the Assembly decides to amend Rule 64 of its Rules of Procedure as follows:

"64.1. The members of the Assembly enjoy the privileges and immunities provided for in the General Agreement on Privileges and Immunities of the Council of Europe (of 2 September 1949) and its Additional Protocol (of 6 November 1952). These immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European office.

64.2. Any request addressed to the President by a competent authority of a member state for the waiver of immunity of a Representative or Substitute as guaranteed under Article 15 of the General Agreement shall be announced in a plenary sitting or Standing Committee meeting and then referred to the Committee on Rules of Procedure and Immunities.

64.3. The Committee shall immediately consider the request. It may issue an opinion on the competence of the requesting authority and on the formal admissibility of this request. It shall not make any examination of the merits of the case in question. In particular, the Committee shall not, under any circumstances, pronounce on the guilt or otherwise of the member, or on whether or not the opinions or acts attributed to him or her justify prosecution. At the earliest opportunity, it shall hear the member concerned by the request, or another member of the Assembly representing the former, who may submit any document which he or she deems relevant. It may ask the competent national authorities to provide it with any information and details it considers necessary to determine whether or not immunity should be waived. The report of the Committee shall conclude with a draft resolution for the retention or the waiver of immunity. No amendment to that decision will be admissible.

64.4. The report of the Committee shall be the first item of business of the Assembly on the first sitting day after the report has been tabled. The debate on the report shall be confined to arguments for or against the waiver of immunity. In the event of the request to waive immunity relating to more than one accusation, each of these may be the subject of a separate decision.

64.5. The President shall immediately communicate the decision of the Assembly to the authority which submitted the request.

64.6. In the event of a member of the Assembly being arrested or deprived of freedom of movement in supposed violation of his or her privileges and immunities, the President of the Assembly may take the initiative of confirming the privileges and immunities of the member concerned, where applicable following consultation of the competent Assembly bodies. A member may petition the President to defend his or her immunity and privileges. At the request of the President, the Bureau may, subject to ratification by the Assembly, refer the case to the relevant committee."

12. The Assembly also invites national parliaments and the competent national authorities to take into account, for interpreting the concepts of non-accountability/non-liability and inviolability, as well as the corresponding provisions of the General Agreement on Privileges and Immunities of the Council of Europe the criteria appended to the present report.

13. It decides that the new provisions shall enter into force following their adoption.

14. The Assembly, referring to Article 40 of the Statute, which specifies that "the Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions", invites the Secretary General of the Council of Europe to take the necessary measures with a view to the introduction of a laissez-passerfor Council of Europe staff which is officially recognised by the member states.

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[1]. *Assembly debate* on 2 April 2003 (13th Sitting) (see Doc. 9718 rev., report of the Committee on Rules of Procedure and Immunities, rapporteur: Mr Olteanu).

Text adopted by the Assembly on 2 April 2003 (13th Sitting).

Resolution 932 (1989)

on the composition of national delegations (Amendment of Rule 6 of the Rules of Procedure)

The Assembly,

1. Having regard to its Recommendation 1027 (1986) on amendment of Article 25 of the Statute of the Council of Europe, aimed at ensuring the representativeness of national delegations to the Assembly;

2. Considering that, in its reply to that recommendation, the Committee of Ministers observed ‘‘that there are other ways of implementing it, for instance by amending the Assembly's Rules of Procedure'',

3. Resolves to amend paragraph 5.*a* of Rule 6 of the Rules of Procedure as follows :

> ‘‘Credentials which give rise to an objection or are contested shall be referred without debate to the Committee on Rules of Procedure. In every case where there is an objection or credentials are contested, the reasons shall be stated and shall be based upon one or more of the relevant provisions of the Statute (in particular Articles 3, 25 and 26), including the democratic principles set out in the preamble to the Statute,[2] notably the principle that national parliamentary delegations should reflect the various currents of opinion within their Parliaments.''

1. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 16 November 1989.

See Doc. 6101, report of the Committee on Rules of Procedure, Rapporteur : Sir Geoffrey Finsberg.

2. Preamble of the Statute, third paragraph : ‘‘Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.''

Immunities of Members of the Parliamentary Assembly (2003)

Doc. 9718 revised

25 March 2003

Report

Committee on Rules of Procedure and Immunities

Mr Olteanu, Romania, Socialist Group

Summary

The basic texts relating to the immunities of members of the Parliamentary Assembly date from 1949 and 1952 respectively. Since then, the rules governing parliamentary immunities have undergone significant development at both the national and the European level.

This report concerns the extent to which the Assembly's procedure and practice regarding the immunities of its members should be adapted, amplified or reinterpreted.

It essentially seeks the following aims:

(1) to clarify the parliamentary non-accountability enjoyed by members of the Assembly, bearing in mind the recent case-law of the European Court of Human Rights in this respect;

(2) to remind national authorities lodging a request with a national parliament to withdraw its own parliamentary immunity from a Parliamentary Assembly member that they must make the same request with the Assembly;

(3) to determine the criteria to be taken into consideration when the Assembly is to rule on a request to have parliamentary immunity waived;

(4) to specify that the parliamentary immunity enjoyed by its members covers the entire parliamentary year.

I Draft Resolution

1. The Parliamentary Assembly stresses that parliamentary immunity is one of the most ancient parliamentary guarantees in Europe. Its purpose is to preserve the integrity of parliaments and to safeguard the independence but not the impunity of its members in exercising their office. Immunity provides specific protection against the accusations to which parliamentarians are more exposed than other citizens. Moreover, in new democracies, in the initial stages of constitutional development the presence of immunities is highly important, particularly when the independence of the judiciary is still being consolidated.

2. The Assembly recalls that it was the first international parliamentary institution in Europe to incorporate provisions in its Rules of Procedure for waiving the immunity of its members, giving practical expression to Article 40 of the Statute of the Council of Europe

and the General Agreement on Privileges and Immunities of the Council of Europe (1949) and its additional protocol (1952).

3. It notes that it has received very few requests to waive the immunity of members and also that few of its members have asked it to confirm their immunity in respect of proceedings against them at national level. It concludes that, on the one hand, knowledge of the system of immunity for Assembly members is lacking and, on the other hand, certain notions of the system are subject to narrow interpretations in states.

4. It points out that the provisions relating to parliamentarians in the General Agreement on Privileges and Immunities of the Council of Europe and its additional protocol and those of the Protocol on privileges and immunities of the European Communities appended to the Treaty of 8 April 1965 are identical. Furthermore, the European Parliament has developed a concept of European parliamentary immunity and disposes of extensive case-law concerning the practical application of that immunity. The Assembly notes that negotiations are currently taking place on the status of members of the European Parliament which will also include immunities.

5. As regards non-accountability/non-liability (parliamentary privilege) provided for in Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe, the Assembly believes that such immunity should include the opinions expressed by the Assembly's Representatives and Substitutes when carrying out official functions in member states with the approval of the competent national authorities. It also believes that the possibilities of sanctioning Assembly members (Rule 20 of the Rules of Procedure of the Parliamentary Assembly) should be reinforced in the event of their expressing opinions containing defamation, insults or slander.

6. The Assembly also notes that in its judgment of 17 December 2002 in the case of A. versus the United Kingdom (application no. 35373/97), the European Court of Human Rights stated, inter alia, that *"In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein"* and that *"a rule of parliamentary immunity which is consistent with and reflects generally recognised rules within signatory states (of the European Convention on Human Rights), the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 par. 1 (of the European Convention on Human Rights)".*

7. Concerning parliamentary inviolability, guaranteed by Article 15 of the General Agreement, the Assembly emphasises that the procedure for waiving parliamentary immunity at the Parliamentary Assembly is separate from that of national parliaments. A national authority lodging a request to waive the immunity of a Parliamentary Assembly member in respect of their own national parliament must also therefore lodge a request with the Assembly. Moreover, the notion *"during the sessions of the Assembly"* should be defined. The Assembly further considers that the general principles of European parliamentary immunity, which were developed since the adoption of the General Agreement, should be taken into account for the purpose of defining the scope of Article 15 of that Agreement, insofar as they are compatible with the nature of the Assembly and its practice.

8. Like other international parliamentary institutions, the Parliamentary Assembly will have to incorporate a provision in its Rules of Procedure whereby its members may request the Assembly to confirm their European immunity in respect of national proceedings.

9. Finally, the Assembly believes that Rule 64 of its Rules of Procedure must be more precise where the handling of requests to waive immunity is concerned and be adapted to new developments.

10. Consequently, the Assembly **decides to amend Rule 64 of its Rules of Procedure as follows**:

"1. The members of the Assembly enjoy the privileges and immunities provided for in the General Agreement on Privileges and Immunities of the Council of Europe (2.9.1949) and its additional protocol (6.11.1952). These immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European office.

2. Any request addressed to the President by a competent authority of a member state for the waiver of immunity of a Representative or Substitute as guaranteed under Article 15 of the General Agreement shall be announced in a plenary sitting or Standing Committee meeting and then referred to the Committee on Rules of Procedure and Immunities.

3. The Committee shall immediately consider the request. It may issue an opinion on the competence of the requesting authority and on the formal admissibility of the request. It shall not make any examination of the merits of the case in question. In particular, the Committee shall not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution. At the earliest opportunity, the Committee shall hear the member concerned by the request, or another member of the Assembly representing the former, who may submit any document which he/she deems relevant. It may ask the competent national authorities to provide it with any information and details it considers necessary to determine whether or not immunity should be waived. The report of the Committee shall conclude with a draft resolution for the retention or the waiver of immunity. No amendment to that decision will be admissible.

4. The report of the Committee shall be the first item of business of the Assembly on the first sitting day after the report has been tabled. The debate on the report shall be confined to arguments for or against the waiver of immunity. In the event of the request to waive immunity relating to more than one accusation, each of these may be the subject of a separate decision.

5. The President shall immediately communicate the decision of the Assembly to the authority which submitted the request.

6. In the event of a member of the Assembly being arrested or deprived of freedom of movement in supposed violation of their privileges and immunities, the President of the Assembly may take the initiative of confirming the privileges and immunities of the member concerned, where applicable following consultation of the competent Assembly bodies. A member may petition the President to defend their immunity and privileges. At the request of the President, the Bureau may, subject to ratification by the Assembly, refer the case to the relevant committee."

11. The Assembly also invites national parliaments and the competent national authorities to take into account for interpreting the concepts of non-accountability/non-liability and inviolability, as well as the corresponding provisions of the General Agreement on Privileges and Immunities of the Council of Europe the criteria appended to the present report.

12. It decides that the new provisions shall enter into force following their adoption.

II. Draft Recommendation

1. The Parliamentary Assembly refers to its Resolution ….(2003) on immunities of the members of the Parliamentary Assembly.

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.

3. The Assembly points out that according to Article 15 (b) of the General Agreement on Privileges and Immunities of the Council of Europe, members of the Parliamentary Assembly enjoy on the territory of all other member states than their own state, exemption from arrest and prosecution. This immunity may only be lifted by the Parliamentary Assembly following a request submitted to it by a competent national authority.

4. The Assembly further recalls that under Article 15 of the General Agreement, Representatives to the Assembly and their Substitutes continue to enjoy the immunities secured by this provision when they are no longer members of their national parliament, and do so until their replacement as members of the Assembly.

5. The Assembly recommends that the Committee of Ministers invite member states:

i. 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;

ii. to remind the competent authorities of member states having a system of parliamentary inviolability and which wish to waive the immunity of a national parliamentarian who is at the same time a member of the Parliamentary Assembly, that they should also request the Assembly to waive the European immunity of that member which is granted to him/her under Article 15 (a) of the General Agreement;

iii. to also remind their authorities that at all stages when parliamentary immunity is waived the presumption of innocence must be maintained;

iv. to ask the competent authorities to notify the President of the Parliamentary Assembly in the event of measures to detain or prosecute a member of that Assembly.

TABLE OF CONTENTS

vi. Other procedural issues

D. BRIEF SUMMARY OF THE SITUATION CONCERNING PARLIAMENTARY IMMUNITY AT NATIONAL LEVEL

i. General remarks

ii. Current trends regarding parliamentary immunities in the Council of Europe member states

(a) Statistics on requests to waive immunity in national parliaments

(b) Parliamentary non-accountability/non-liability

(c) Parliamentary inviolability

iii. Plans to reform parliamentary immunity regimes

iv. The attitude of the media and the public towards parliamentary immunity

v. Opinion polls on parliamentary immunities

E. PRECEDENTS AND FACTS TO BE TAKEN INTO ACCOUNT BY THE PARLIAMENTARY ASSEMBLY FOR DEVELOPING A DOCTRINE CONCERNING REQUESTS FOR THE WAIVER OF MEMBERS' IMMUNITY

For maintaining immunity

For waiving immunity

F. CONCLUSIONS

APPENDIX I: Criteria for interpreting the concept of non-accountability/non-liability (parliamentary privilege) and inviolability (general principles of European parliamentary immunity)

APPENDIX II: Provisions concerning immunities contained in the Statute and the Assembly's Rules of Procedure

APPENDIX III: State of ratification of and accession to the General Agreement on Privileges and Immunities of the Council of Europe (1949) and its Protocol (1952)

III. Explanatory memorandum by the rapporteur

A. INTRODUCTION

1. In April 2001, for the first time in its history, the Assembly referred to the Committee on Rules of Procedure and Immunities a request for the waiver of the immunity of one of its members, who, however, subsequently resigned in June 2001. For that reason, the file was closed. However, at its meeting on 27 June 2001, the Committee felt that this episode should be used as an opportunity to lay down general guidelines for considering any future requests for the waiver of immunity. It should be borne in mind that:

- the Assembly's Rules of Procedure contain few references as to how questions relating to immunity should be dealt with;

- there are no precedents shedding light on the principles or practice in the Parliamentary Assembly regarding immunity questions;

- the legal basis for the immunity of members of the Assembly, i.e. the 1949 General Agreement and its 1952 Protocol, is now somewhat inadequate;

- the situation concerning parliamentary immunities is evolving at both European (European Parliament) and national levels.

2. On 29 May 2002 the Standing Committee referred to the Committee on Rules of Procedure, for a report, a motion for an order on the immunities of members of the Parliamentary Assembly (Doc. 9439).

3. It should be borne in mind that parliamentary immunity constitutesone of theoldest parliamentary guarantees in Europe. It serves to preserve the integrity of parliaments and toensure the independence of its members in the discharge of their office (see Article 11 of the General Agreement and Article 5 of the Protocol thereto) and not their impunityin respect of the charges to which parliamentarians are more exposed than other persons amenable to justice. In other words, it is a matter of protecting parliamentarians from penal or judicial actions instigated by other State powers or by the citizens with a view to depriving the elected assemblies of a member's co-operation or freedom of action.

4. As rapporteur, I shall first of all outline the institutional provisions relating to the immunity of the Assembly members. I shall then describe the procedure to be adopted within the Assembly with regard to requests for the waiver of immunity and provide some information on the practice followed by national parliaments in such matters. Lastly, I shall indicate the factors to be taken into account in establishing Assembly doctrine in the field of immunity.

5. In May 2002, the Committee on Rules of Procedure and Immunities sent a questionnaire to Assembly national delegations in order to obtain further information on parliamentary immunity systems. As at 15 February 2003, 32 replies had been received from member states. Note also that in January 2003 the Belgian delegation presented a memorandum on this draft report (cf. AS/Pro (2003) – French only).

B. TYPES OF IMMUNITIES GRANTED TO MEMBERS OF THE PARLIAMENTARY ASSEMBLY

6. A list of the Council of Europe's texts governing the immunity of the Representatives of the Assembly and their Substitutes is reproduced in the Appendix. The basic principle, established in Article 40 (a) of the Statute of the Council of Europe, is that Assembly members shall enjoy in the territories of the Council's member states such privileges and immunities as are reasonably necessary for the fulfilment of their functions. The General Agreement on the Privileges and Immunities of the Council of Europe, which was concluded on 2 September 1949 in conformity with Article 40 (b) of the Statute and its additional Protocol of 6 November 1952, supplement Article 40 (a) of the Statute. The state of ratification of and accession to the treaties is appended to this report.

7. Under the Agreement, there are three types of immunities for members:

- they are 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 (Article 14 of the General Agreement on Privileges and Immunities);

- they enjoy:

  • on their national territory the immunities accorded in the country concerned to members of parliament (Article 15 (a) of the General Agreement);

  • on the territory of all other member states, exemption from arrest and prosecution (Article 15 (b) of the General Agreement).

8. Article 15 of the General Agreement and Article 3 of the Protocol specify that these immunities cover Assembly members when:

- travelling to or from the venue of the Assembly meeting;

- attending a meeting of an Assembly committee or sub-committee, or travelling to or from the meeting venue.

9. Immunity cannot be invoked when a member is found committing, attempting to commit or just having committed an offence, nor can it obstruct the Assembly's right to waive a member's immunity (Article 15 of the General Agreement).

i. Immunity under Article 14 of the General Agreement (non-liability/non-accountability)

10. The first type of immunity (Article 14 of the General Agreement), i.e. non-liability/non-accountability is intended to ensure a climate of independence in the Assembly and enable its member to express their opinions and criticisms freely in the performance of their functions. Thanks to this guarantee, the factors possibly leading to pressure of any kind or risk of deterrence in the debates are neutralised. Moreover, in Council of Europe member States having absolute non-liability of members of parliament, it is considered that to give the judiciary authority over what members of parliament say in their deliberations would be regarded as an unacceptable transgression of the separation of powers. The immunity deriving from Article 14 is special in that no judicial authority could at any time, even after expiry of the term of office of a member, validly hand down a conviction on the evidence of opinions expressed or votes cast in the Assembly. Owing to its absoluteness, this immunity does not admit of a procedure to have it lifted. However, in the event of an Assembly member being implicated at the national level, it is for the competent national authorities to decide whether Article 14 of the General Agreement is applicable by interpreting the

provisions in question, namely the terms “votes”, “words” and “in the exercise of their functions”. As early as 1951 (Doc. 91 (1951), Resolution 8 (1951), the Assembly proposed to reduce the risk of divergent interpretations of Article 14 at national level, through the Assembly’s adoption of a recommendation defining the scope of this provision, which would be transmitted by the Committee of Ministers of the Council of Europe to the member states. This idea was moreover broached in the questionnaire on immunities sent to

the Assembly’s national delegations. Most delegations that have replied so far were in favour of such a resolution (or recommendation). One reply pointed out that there was a long and established national tradition regarding the interpretation of the fundamental terms in the field of non-liability/non accountability.

11. It should be pointed out that the general view held (cf. the European Parliament’s *“Donnez report”* - doc. A2-121 (1986)) is that the non-liability/non-accountability of members of European parliamentary assemblies applies not only to criminal but also to civil and administrative proceedings.

12. The terms “words spoken” comprise both oral and written statements given by members in the exercise of their functions in or on behalf of the Parliamentary Assembly. The concept of “words spoken” does not take in abusive language used by a parliamentarian towards a person on the galleries. Non-liability/non accountability covers the literal reproduction of parliamentary speeches in the records, or in the press. Conversely, a parliamentarian’s repetition, at a press conference, of terms which he/she used in plenary session or in committee does not come under the non-liability/non accountability rule. Votes cast within the meaning of Article 14 of the General Agreement are those prescribed by the Rules of Procedure of the Assembly and their ancillary texts. Obviously the words *“in the exercise of their functions”* apply to plenary sessions and to meetings of Assembly committees, sub-committees and other subsidiary bodies of the Assembly in France and the member states. Non-liability/non accountability should also extend to the official activities performed by Assembly members in connection with meetings and conferences of other Council of Europe entities. The question arises whether duties carried out by a member on the basis of a decision by an Assembly body (e.g. election observation; missions accomplished as part of the monitoring procedure) fall within the ambit of protection of Article 14 of the General Agreement. Due to the international character of the Parliamentary Assembly, it is important that non-liability (non-accountability) be defined in relation to the typical activities of its members and not by reference to a notion of geographical location. Since the upheavals that occurred between 1989 and 1991, the Assembly and its members have been more involved on the ground: observation of elections, visits to the scene in the event of crises and in the course of parliamentary diplomacy, members’ negotiations with national officials as part of the accession procedure for countries requesting Council of Europe membership, and the monitoring procedure.

13. A questionnaire on the immunities of Assembly members sent to national delegations asked whether the expression *“in the exercise of their functions”* covered the activities of Assembly Representatives and Substitutes. About 15 national delegations which replied expressly recognised that the immunity accorded under Article 14 of the General Agreement applied to members during visits to member states pursuant to an official decision by a competent Assembly body and approved by the competent authorities of the countries in question. Other delegations did not take a position on the matter either because of its political nature or because of a lack of precedent. One reply expressed reservations. It should be noted that the Austrian reply suggested that the Assembly give notice of an official journey by a delegation or by one of its members to the state concerned to enable the latter to grant the necessary immunities.

14. The Parliamentary Assembly made earlier reference to the problem of protection for its members on official business in member states in a 1986 information report (Doc. 5605) noting among other points that Assembly members are often issued with diplomatic

passports by the member states and thus enjoy the same protection as senior officials of the Foreign Affairs Ministries.

15. The Committee on Rules of Procedure and Immunities deems it indispensable that the immunity deriving from Article 14 of the General Agreement should cover the opinions expressed by Assembly members in the course of official duties discharged in the member states on the basis of a decision by an Assembly body and with the consent of the appropriate national authorities. It would therefore be advisable that the Parliamentary Assembly invite the Committee of Ministers to adopt a recommendation to member states explicitly extending the immunity accorded by Article 14 of the General Agreement to the opinions expressed by Assembly members during official duties in member states. Another possibility would be for the Committee of Ministers to allow the Assembly to amend its Rules of Procedure accordingly. This method has already been used in the past (cf. paragraph 2 of Assembly Resolution 932 (1989).

16. It should be borne in mind that the explanatory report (par. 174) to Resolution (69) 29 of the Committee of Ministers on privileges and immunities of international organisations even then drew attention to the fact that Assembly members on official business in a member state are not covered by Articles 14 and 15 of the General Agreement, nor by Article 3 of the first Protocol.

17. However, I am of the opinion that this form of immunity should not cover parliamentary activities such as public talks, press conferences, radio and television debates and publications (cf. pp. 174 of "Parliamentary Immunity in the Member States of the European Union and the European Parliament", Doc. W8 rev (1999) of the European Parliament).

18. The conclusions presented publicly on behalf of a parliamentary delegation following an election monitoring mission constitute a special case. Indeed, this involves an official disclosure forming part of the delegation's official programme and representing the views of the delegation's members.

19. The decisive factor for the scope of the immunity under Article 14 of the General Agreement is therefore reference to the activities of the Parliamentary Assembly, bearing in mind its competences both explicit (Statute of the Council of Europe, Rules of Procedure and other legal texts) and implicit (Assembly practice, implied powers).

20. Interestingly, several parliamentary delegations stated quite categorically in their reply to the Committee's questionnaire that they would not authorise any exception to the non-accountability/non-liability of members of the Assembly (Article 14) should they be held liable for opinions expressed,. Other delegations commented that thus far their national authorities had not been required to interpret the provisions of this article or that the reply would be given by members of the delegation themselves.

21. Finally, let us observe that members are responsible, under the arrangements for maintaining order, for the expression of their opinions before the Parliamentary Assembly. Under Rule 20 of the Assembly's Rules of Procedure, certain words or conduct by members are deemed to be inadmissible and are therefore not covered by the principle of non-liability. Members who do not comply with the conditions of Article 20 are liable to the sanctions provided for therein (for example, censure or exclusion from the Chamber for up to 5 days). In the opinion of the Committee on Rules of Procedure and Immunities, the system of penalties should be revised and reinforced.

22. Supreme Courts and the European Court of Human Rights have brought significant clarifications to the rules governing parliamentary non-accountability. For instance, in a leading decision now firmly established, the Italian Constitutional Court observed that

parliamentary office could not cover the entire political activity of a Deputy or a Senator, for such an interpretation would carry the risk of transforming a guarantee into a personal privilege. The Constitutional Court held, in a case in point, that *"no link could be established between numerous allusions made during meetings, press conferences, television programmes (...) and a parliamentary question subsequently directed at the Minister of Justice (....) To conclude otherwise (would be tantamount to accepting) that no statement may be censured, even where gravely defamatory and (...) altogether unconnected with parliamentary office or activity"*.

In recent judgments, the Italian Constitutional Court has specified that where opinions expressed outside Parliament are at issue, the possible existence of a link with parliamentary activities must be verified. In particular, there must be substantial correspondence between the opinions at issue and a prior parliamentary act (judgments nos. 50. 51, 52, 79 and 207 of 2002).

ii. Parliamentary privilege (Article 14 of the General Agreement) and the European Court of Human Rights

23. During the Conference of Speakers and Presidents of European Parliamentary Assemblies in Zagreb (9-11 May 2002), the Deputy Speaker of the House of Commons (United Kingdom) drew to the attention of participants a decision of 5 March 2002 in which the European Court of Human Rights declared Application No. 35373/97 (A. v. the United Kingdom) admissible. Amongst other things, this application concerned the fact that the applicant was unable to have access to a court to initiate defamation proceedings in respect of statements made by a member of the House of Commons before the whole House. Within the House, opinions expressed by a member in plenary session are protected by absolute immunity. No exception can therefore be made, even where the speech of a member of parliament is openly defamatory and injurious; as such, the statements in question cannot be challenged before a United Kingdom court. However, abuse of the freedom of expression is nevertheless subject to the self-regulation of the United Kingdom Parliament. The above-mentioned Court decision and the address by the Deputy Speaker of the House of Commons are reproduced in document AS/Pro (2002) 11 (available in English only).

24. On 17 December 2002 the European Court of Human Rights rendered its judgement in this case[1]. The Court stated inter alia that:

- *"In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein".*

- *"… a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States (of the European Convention on Human Rights), the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 par. 1 of the Convention (see, mutatis mutandis, the above-mentioned Al-Adsani judgment, par. 56). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity (ibid)".*

- *"… the application of a rule of absolute parliamentary immunity cannot be said to exceed the margin of appreciation allowed to states in limiting an individual's right of access to court".*

25. It is to be noted that in a separate concurring opinion appended to the judgment of 17 December 2002, Judge Costa said that *"the reasoning in this judgment may be summarised as follows: "the absolute nature of immunity enjoyed by members of parliament in respect of their statements serves an interest that is so important as to justify the denial of access to court to seek redress".* While having no reservations abut the approach followed by the Court so far, Judge Costa raised, inter alia, the question if this principle should not be tempered since the relation between parliament and the outside world would have changed. Parliaments no longer were solely or chiefly concerned with protecting their members from the Sovereign or the Executive. Their concern should now be to affirm the complete freedom of expression of their members, but also perhaps to reconcile that freedom with other rights and freedoms that are worthy of respect.

In a dissenting opinion appended to the judgment of 17 December 2002, Judge Loucaides said, inter alia, that:

- *"there should be a proper balance between freedom of speech in parliament and protection of the reputation of individuals. … Such balancing implies that neither of the two rights should be allowed to prevail absolutely over the other, there should be a harmonious reconciliation, through appropriate qualification, so that the necessary protection is given to both rights".*

- *"… absolute immunity is a disproportionate restriction of the right of access to a court".*

- *"… the absolute privilege which protected the MP's statements in parliament about the applicant, in my opinion, violated her right to respect for her private life under Article 8 of the Convention, because it amounted to a disproportionate restriction of that right.*

26. In a judgment of 30 January 2003 (case of Cordova (No. 2) v. Italy – application no. 45649/99), the European Court of Human Rights noted that the statements of an Italian parliamentarian, having been made during an electoral meeting and thus outside a legislative assembly, had not related to the performance of parliamentary duties in the strict sense, but appeared to have been made in the context of personal disputes. In a case like this, the Court held that a denial of access to a court could not be justified solely on the ground that the dispute might be of a political nature or might relate to a political activity. In the Court's opinion, the absence of an obvious link with any kind of parliamentary activity meant that the notion of proportionality between the aim pursued and the means employed had to be interpreted narrowly. That was particularly true where restrictions on the right of access had resulted from a resolution passed by a political body.

To conclude otherwise would amount to restricting, in a manner incompatible with Article 6 § 1 of the Convention, the right of individuals to apply to a court in any case where the comments in issue had been made by a member of parliament. Elsewhere in the judgment, the Court adverted to the preservation of the fair balance that should be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

iii. Immunity under Article 15 of the General Agreement ("parliamentary inviolability")

27. Inviolability protects parliamentarians in respect of acts not part of typical parliamentary activity. Unlike non-liability/non-accountability, which is a privilege of an objective kind, the inviolability granted under Article 15 of the General Agreement is accordingly designed to secure the personal protection of members and constitutes a procedural guarantee established to ensure that the work of the Assembly is not hampered. Thus immunity is also a guarantee of the Assembly's independence and of that of its

members vis-à-vis other institutions or authorities. Inviolability is intended to guard against situations where detention or laying of charges is manipulated in order to remove parliamentarians from active office and, by this expedient, parliament is wrongfully denied the co-operation or assistance of its members. Inviolability under Article 15 will only be granted if there is a link between the offences attributed to the parliamentarian and his/her political activities. It should also be noted that Article 5 of the Protocol to the General Agreement specifies that *"privileges, immunities and facilities are accorded to the Representatives of member states not for the personal benefit of the individuals concerned, but in order to safeguard the independent exercise of their functions in connection with the Council of Europe"*. It follows that inviolability does not seek to establish a field of exemption for possible unlawful acts committed by a parliamentarian, but rather to obtain an assurance that a criminal charge does not conceal a political or party attempt to remove a member from parliament[2].

28. In a report published in 2002 (Doc. A5-195-/2002), the European Parliament emphasised that Article 10 of the 1965 Protocol on the Privileges and Immunities of the European Communities (which uses the same terms in French as Article 15 of the General Agreement on the Privileges and Immunities of the Council of Europe) seemed insufficient as it established two different regimes – the one national and the other European – and did not in any way address the question of procedure. In the case of Wybot v. Faure before the Court of Justice of the European Communities (Case 149/85; ECR (1986) p. 2398) it was quite rightly pointed out that Article 10 of the 1965 Protocol established a system of immunity which varied according to the nationality of the member when proceedings were brought against him or her in his or her own country, but was common to all members in respect of proceedings brought in other member states.

(a) Article 15 (a) of the General Agreement and concept of European parliamentary immunity evolved by the European Parliament

29. Article 15 (a) of the General Agreement states that Assembly members shall enjoy on their national territory the immunities accorded in their country to members of Parliament. The Assembly is faced with a specific problem resulting from the fact that the extent of immunities varies considerably in the Council of Europe member states. The consequence of this is that differences in treatment as regards immunities between the members of one and the same parliament – the Parliamentary Assembly of the Council of Europe – are accentuated because of the nationality of its members. Let us remember that several member states do not have a system of parliamentary inviolability.

30. In its application of Article 15 (a) of the General Agreement, the Assembly may also have to deal with certain issues – which are not always straightforward to address – raised by the legislation and practices in the country concerned relating to the immunities of members of the national parliament.

31. As far as international parliamentary institutions in Europe are concerned, the provisions regarding parliamentary immunities are identical for the Parliamentary Assemblies of the WEU[3] and the Council of Europe and the European Parliament. This fact has favoured the creation of a European parliamentary law concerning immunities. The European Parliament is a sovereign parliament, which has very significant autonomous legislative and budgetary powers. It has acknowledged the problem of differences in treatment (as regards immunities) between their members depending on their nationality. Furthermore, the European Parliament takes the view that what might be the rule for members of national parliaments in their own countries does not and cannot constitute a precedent for members of the European Parliament in a member state other than their own. Bearing these considerations in mind and on the basis of the Protocol on the Privileges and Immunities of the European Communities, the European Parliament has developed a consistent concept of European parliamentary immunity.

32. This concept is based primarily on the following principles:

- the purpose of immunity is to guarantee the independence of the European Parliament and its members vis-à-vis other authorities; it is not designed as a privilege for the personal benefit of the individual members;

- in order to avoid any accentuation of the differences in treatment between members of the European Parliament arising from their nationality, immunity within the European Parliament is independent of that applied in the national parliaments of member states.

In this connection, the European Parliament holds that whereas *"parliamentary immunity is the same for national and European members of parliament, the waiving of immunity is the prerogative of each individual parliament".*

33. In particular, the European Parliament does not waive immunity if the offences alleged to have been committed by one if its members fall under the heading of political activity.

34. The European Parliament refuses to accept that the alleged acts of a member fall into the category of political activity if[4]:

- the allegations are of a particularly serious nature; the European Parliament takes into account whether the acts at issue resulted in violence, material damage or caused prejudice to a third party;

- the acts are deemed to constitute a threat to individuals or to democratic society;

- the acts involve a clear-cut breach of criminal law or administrative rules or provisions, where there is no connection whatsoever with a member's political activity;

- the acts constitute defamation of people in an individual capacity and not as Representatives of an institution.

35. It should be noted that the European Parliament takes account of the concept of *"fumus persecutionis"*, i.e. the presumption that behind the criminal proceedings there is an intention to interfere with the political activities of the member (for example, where anonymous denunciations are at the basis of the inquiry or where the request is submitted a long time after the alleged facts have taken place, etc).

36. In particular, the European Parliament has taken into consideration any apparent link between the date of the denunciation and the date on which the member concerned was elected, the fact that only the MEP in question was being prosecuted whereas other persons could also have been charged, and whether the MEP was being prosecuted for decisions for which he or she was not responsible or where there was no evidence of his or her involvement in the events at issue.

37. In several reports concerning requests for the waiver of parliamentary immunity, the European Parliament has also taken into account the fact that for the same offence attributed to an MEP, one EU member country may provide for stronger sanctions than another, or may even provide for no sanction (see, for example, paragraph 8 of EP document A5-0123/2001 of 17 April 2001).

38. Examples of cases where the European Parliament has accepted and rejected requests to waive a member's immunity are given in a study published by the European Centre for Parliamentary Research and Documentation[5].

39. In view of the lack of precedents in the Parliamentary Assembly concerning the scope of immunity provided for in Article 15 (a) of the General Agreement of Privileges and Immunities of the Council of Europe, the Assembly might wish to take into account for its approach on the principles developed by the European Parliament. It should be remembered that prior to 1979, when the European Parliament was first directly elected, it was composed of delegations of national parliaments, exactly as is the Parliamentary Assembly. Furthermore, it happens, albeit more and more seldom, that members of the European Parliament are at the same time members of their national parliament (i.e. they have a "dual mandate"). The situation as regards the immunities of these members of the European Parliament is therefore, at least in part, comparable to that of the Representatives to the Parliamentary Assembly and their Substitutes. Clearly, and this was emphasised by some of the members of the Assembly's Committee on Rules of Procedure and Immunities at their meeting on 27 September 2001, these European Parliament principles cannot be transposed wholesale to the Assembly; it is essential not to lose sight of the differences between the European Parliament and the Assembly, and of the particular institutional features of the Council of Europe.

40. The reply of the Czech parliament to the questionnaire on parliamentary immunity rightly observes that the formulation of the concept of European parliamentary immunity is a means to change by interpretation the content of the problematic Article 15 (a) of the General Agreement. However, that reply also stresses that it would be legally purer to negotiate at Council of Europe level the change of Article 15, so as to provide all Parliamentary Assembly members with the same treatment. It is to be noted in this connection that such change, to be applicable in all Council of Europe countries would require prior ratification by the forty-four member States and their parliaments. Even in the circles of the European Parliament, which for the time being only covers fifteen member States, it is considered that "the updating of the Protocol on privileges and immunities poses a real problem, if only because it requires agreement from all national parliaments" (see *Agence Europe* of 4 December 2002 (No. 8353). This opinion is fully justified, so the difficulties associated with an amendment of the fundamental texts guaranteeing the immunity of their members must be the reason why the European Parliament and also the Parliamentary Assembly have hitherto preferred an extensive interpretation of these texts to their revision.

41. Where an Assembly member no longer holds a national parliamentary mandate, what is his position regarding immunity under the terms of Article 15 (a) of the General Agreement, when for example his former national parliament has been dissolved because of parliamentary elections? It has to be emphasised firstly that this immunity applies to the members of the Assembly, whether or not they are parliamentarians. Concerning the practical arrangements at national level, it is hoped for one thing that the national authorities will observe the general principles of European parliamentary immunity as set out in the operative part of this report.

Further, as suggested in the Belgian delegation's memorandum to the Parliamentary Assembly (cf. AS/Pro (2003) 3), any national rules that exist should be applied *mutatis mutandis*.

(b) Article 15 (b) of the General Agreement

42. This provision stipulates that Assembly members shall enjoy on the territory of all member states other than their own exemption from arrest and prosecution. This is genuine European immunity as it is independent of any national legislation or practice, unlike Article 15 (a) of the General Agreement. The word "prosecution" is generally interpreted broadly to include any measure provided for in national criminal law preventing a member of parliament from discharging the functions inherent in his or her term of office in the Parliamentary Assembly (cf the above-mentioned European Parliament study (1999), page 177). On the other hand, Article 15 (b) is not applicable to civil proceedings (cf. report by the House of

Lords Select Committee on the European Communities, *"Privileges and immunities of the members of the European Parliament"*, 18 March 1986, par. 29). This is also the position of the European Parliament with respect to the meaning of the similar article of the Protocol on Privileges and Immunities of the European Communities.

iv. Immunity under Article 15 of the General Agreement, while members are travelling and "flagrante delicto"

43. Immunity also applies when members are travelling to and from the venue of the Parliamentary Assembly's meeting[6]. Article 3 of the Protocol to the General Agreement on Privileges and Immunities explicitly extends this immunity to Representatives of the Assembly and their Substitutes attending or travelling to or from meetings of Assembly committees or sub-committees. In 1998 the Assembly adopted Recommendation 1373 to the Committee of Ministers on freedom of movement of and the issue of visas to members of the Parliamentary Assembly, drawing attention to certain problems in connection with its members' journeys in the member states. The Committee of Ministers responded by inviting governments to take a number of measures to ensure that members of the Parliamentary Assembly could enjoy all facilities for entry into the member states. A question still pending is that of issuing a laissez-passer to Assembly members and Council of Europe staff, which is acknowledged by the member states of the Organisation.

44. Article 15 of the General Agreement specifies that immunity does not apply when Representatives or their Substitutes are found committing, attempting to commit or just having committed an offence ("flagrante delicto"). It is generally accepted that the concept of "flagrante delicto" is occasionally interpreted very broadly (cf the study published in 2000 by the Interparliamentary Union, entitled "The Parliamentary Mandate", by Marc van der Hulst, page 87 and the aforementioned study by the European Centre for Parliamentary Research and Documentation, page 13). According to the reply by the Belgian parliamentary delegation to the questionnaire on parliamentary immunities, the concept of flagrante delicto presupposes that not more than 24 hours should have elapsed between the offence and the commencement of prosecution. The English version of the General Agreement on Privileges and Immunities defines flagrante delicto as offences which Representatives of the Assembly or their Substitutes are found committing, attempting to commit or just having committed. I consider that it is not necessary to go any further. Useful additional information concerning the flagrante delicto are to be found in a note from the Belgian delegation on this report (AS/Pro (2003) 3). While it must be acknowledged that the concept of "flagrante delicto" is a logical restriction on parliamentary inviolability, it should be stressed that it also entails certain dangers. As illustrated in the aforementioned Interparliamentary Union publication (page 88), it can be an ideal loophole for arresting a member of parliament protected by parliamentary immunity. By way of example, the study cites the case of two members of parliament from the opposition, found guilty by a court for taking part in an anti-government demonstration, which had started out peacefully but which had degenerated into acts of violence. Simply by taking part in the demonstration, the two members of parliament were deemed to be co-perpetrators of the offences and were convicted of having been found *in flagrante delicto*, despite the fact that their parliamentary immunity had not been waived beforehand.

v. Immunity under Article 15 of the General Agreement granted to members "during the sessions of the Assembly"

45. Article 15 of the General Agreement specifies that the respective immunities are granted during the sessions of the Assembly. Under Article 3 of the Protocol to the General Agreement they also apply at any time when Representatives and their Substitutes are attending and travelling to and from meetings of Assembly committees and sub-committees, whether or not the Assembly is itself in session at that time.

46. The words *"session of the Assembly"* also appear in Article 25 (b) of the Statute of the Council of Europe, which specifies, *"No Representative shall be deprived of his position as such during a session of the Assembly, without the agreement of the Assembly"*. It is the Assembly's standing practice to interpret the terms *"during a session of the Assembly"* as covering the parliamentary year from the end of January to the end of the following January. This interpretation also corresponds to the Assembly's practical needs, since when the General Agreement was concluded in 1949 and its additional Protocol in 1952, the Assembly held respectively one and two sessions per year. Its major committees did not meet each month and the intervals between the meetings of the Assembly's steering bodies (the Bureau and the Standing Committee) were then much longer than is currently the case. Prior to 1989 it was very rare for the Assembly to observe national elections or carry out on-the-spot visits. Today, however, the Assembly and its various organs are active virtually all year round.

47. In some Council of Europe member states, however, national parliamentary immunity is granted to members of parliament only during meeting days of the plenary and of committees (see for more details the report by Robert Myttenaere on the immunities of members of parliament, published in *"Constitutional and Parliamentary Information"* No. 175, 1998).

48. The European Parliament, where the relevant legal texts concerning immunities are identical to those of the Council of Europe, decided in 1963/64, when it was not yet directly elected but composed of national parliamentary delegations, like the Parliamentary Assembly, that the words *"during the sessions"* covered the whole parliamentary year. The precise nature of the concept covered by the phrase *"during the sessions"* was interpreted by the European Court of Justice in two judgements handed down, respectively, in May 1964 and July 1986. These confirmed the European Parliament's decision. In the July 1986 judgment, the Court held that the term *"during the sessions"* should be interpreted exclusively in the light of Community law and not in relation to national legislation. The Committee on Rules of Procedure and Immunities feels that similar considerations apply to the situation in the Parliamentary Assembly.

49. Given that certain replies to the questionnaire sent by the Committee on Rules of Procedure and Immunities to national delegations in May 2002 showed that there remained some uncertainty over the precise meaning of "during the sessions of the Assembly", the Committee on Rules of Procedure and Immunities believes it important to make the requisite clarifications in the Assembly's Rules of Procedure.

vi. Beginning and end of Parliamentary Assembly members' immunity, incompatibility with the office of Assembly member

(a) Beginning of the immunity

50. The above immunities are granted to Assembly members from the moment their credentials are ratified. In case the credentials are challenged, the immunities are guaranteed provisionally till the Assembly or the Standing Committee has reached a decision. Moreover, the immunities also apply when new Assembly members travel to the Assembly part-session during which their credentials will be ratified.

(b) Immunity in respect of acts perpetrated by members of the Parliamentary Assembly before the beginning of their term of office

51. Does the immunity also cover acts which were perpetrated by the member before the beginning of his/her term of office in the Assembly, particularly if proceedings had already been instituted? According to the comparative study quoted above *("The parliamentary mandate"* (p. 83) by Marc Van der Hulst, 2000, published by the Interparliamentary Union),

immunity is not suspended in cases where proceedings against a member of parliament are already in progress at the time the immunity is granted. The European Parliament (see *"Parliamentary immunity in the member states of the European Union and the European Parliament"*, October 1999, Doc. W 8 rev., p.172) has taken the view that immunity applies not only to actions during a member's term of office but also retrospectively. This is based on the premise that the primary purpose of immunity is to protect the normal functioning of the parliamentary institution, a principle which might otherwise be jeopardised by actions occurring both before and after the commencement of a member's term of office.

52. In some national parliaments that accept the extension of inviolability to acts committed by members before taking office, this immunity has the effect that prosecution of or criminal proceedings against the member are suspended during the term of office, as are the limitation periods.

53. The replies to the questionnaire on parliamentary immunities demonstrate that the national delegations are divided as to the expediency of also extending immunity under Article 15 of the General Agreement to acts with which a member is charged before the term of office in the Parliamentary Assembly commences.

54. The rapporteur considers that with a view to

- developments of European parliamentary law since the Council of Europe was founded,
- the "raison d'être" of European parliamentary immunity,
- the experience made so far in cases involving immunity at European level(see the examples mentioned in paragraph 74 below),

Article 15 of the General Agreement should also be applied to acts with which a member of the Parliamentary Assembly is charged before the term of office in the Assembly.

The decisive argument is that the practical situation for the Parliamentary Assembly is the same if an Assembly member is prosecuted or arrested for acts he is charged before or during the term of office in the Assembly. In both cases the member will not be (or risks being not) "available" for Assembly activities. That is why the Assembly should have the occasion in both cases to examine whether the conditions for a waiver of the immunity are fulfilled or not.

(c) End of the immunity – members of the Assembly whose national parliamentary mandate has expired - incompatibilities

55. Clearly, immunity no longer applies if a member of the Assembly resigns or if there is some incompatibility with the office of member. It must be recalled that as long as they are members of the Parliamentary Assembly and until their replacement as such, Representatives and their Substitutes retain their immunities in accordance with the General Agreement and Protocol of 1952, as prescribed by Article 15 of the General Agreement, because this is independent of national parliamentary office *("whether they be members of Parliament or not")*. Rule 10, paragraph 3 of the Assembly's Rules of Procedure reads: "*Following parliamentary elections, the national parliament concerned or other competent authority shall make appointments to the Assembly within six months of the election. The credentials of the existing delegation shall expire at the opening of the first sitting of the Assembly or meeting of the Standing Committee following the appointment of the new delegation by the national parliament or competent authority.*"

56. With regard to incompatibilities, Article 25 (a) of the Council's Statute states that *"each Representative must be a national of the Member whom he represents, but shall not*

at the same time be a member of the Committee of Ministers." The Assembly and its Committee on Rules of Procedure and Immunities have had cause to interpret this provision on several occasions. In 1992 the Committee noted (see Doc. 6656) that the words *"member of the Committee of Ministers"* in Article 25 of the Statute of the Council of Europe should be very narrowly interpreted, excluding only Foreign Ministers from Assembly membership, and that this was also in line with the *"travaux préparatoires"* for the Statute of the Council of Europe. Now, ten years later, it would be useful to know if this interpretation is maintained by the Steering bodies of the Parliamentary Assembly.

57. After the 1992 report, both Ms Suchocka (Poland) and Mr Vasile (Romania) remained members of the Assembly during their whole terms of office as Prime Ministers of Poland (1992/93) and Romania (1998/99) respectively. Mr Vasile addressed the Parliamentary Assembly in his capacity as Prime Minister on 20 April 1998. After Mr Nastase's appointment as Prime Minister of Romania following the elections of 26 November 2000, he remained a member of the Assembly until the renewal of the Romanian delegation on 22 January 2001.

58. A further incompatibility is explicitly mentioned in Article 36 (d) of the Statute: *"No member of the (Council of Europe) Secretariat shall hold any salaried office from any Government or be a member of the [Parliamentary] Assembly or of any national legislature or engage in any occupation incompatible with his duties."* Moreover, in certain cases, the Parliamentary Assembly has called for members to resign where they have accepted specific Council of Europe posts (for example, where they have been elected members of the European Committee for the Prevention of Torture (CPT).

vii. Scope of the provisions of Article 11 of the General Agreement on Privileges and Immunities of the Council of Europe and Article 5 of the Protocol to the Agreement

59. In connection with the request for the waiver of immunity referred to the Committee on Rules of Procedure and Immunities on 23 April 2001, a number of questions were raised concerning the scope of Article 11 of the General Agreement on Privileges and Immunities and Article 5 of the Protocol to the Agreement, which state in virtually the same terms, *"Consequently, a Member has not only the right but the duty to waive the immunity of its Representative in any case where, in the opinion of the Member, the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."*

60. I have already indicated my opinion that the immunity of members of the Assembly and the procedure for waiving it are independent of and should not be affected by national procedures. Parliamentary immunity is granted not for the personal benefit of the individual members themselves but in order to safeguard the independence of the Assembly and its members vis-à-vis other authorities. With an eye to consistency, it must be noted that Article 11 of the General Agreement, quoted above, comes under the section concerning Representatives to the Committee of Ministers and is not replicated in the section concerning the Assembly. There is all the more justification for this in that, contrary to the situation in respect of the Assembly, no Council of Europe legal text referring to the members of the Committee of Ministers contains any provision concerning a procedure for waiving immunity. . It will be observed that the definition in paragraph 12 (b) of the term "representative" within the meaning of Article 11 does not include the members of the Assembly. This all goes to show that Article 11 of the General Agreement does not directly concern members of the Assembly. Like considerations apply to Article 5 of the Protocol. Plainly, the term "member" in the second sentence does not apply to the Assembly.

61. Of course, although not bound by the provisions of Articles 11 of the Agreement and 5 of the Protocol, the Assembly adheres to the principles underlying these texts.

C. PROCEDURE TO BE FOLLOWED REGARDING REQUESTS FOR THE WAIVER OF IMMUNITY

62. In Article 15, the General Agreement on the privileges and immunities of the Council of Europe (1949) expressly recognises the right of the Assembly to waive the immunity of a member or Substitute. However, the Agreement and the protocol thereto (1952) are silent with respect to the procedure for waiving the immunity of Assembly members. Still, some details are specified in Rule 64 of the Parliamentary Assembly's Rules of Procedure:

- such requests must be made by the competent authority of a member state;

- they are referred by the Assembly to the Committee on Rules of Procedure and Immunities;

- the member of the Assembly concerned may be heard by the Committee on Rules of Procedure and Immunities;

- the Committee's report shall conclude with a draft resolution for the retention or the waiver of the immunity.

- the Committee shall consider the request but shall not examine the merits of the case in question; in particular, it shall not take a decision on the guilt or otherwise of the member nor on whether or not the opinions or acts attributed to him/her justify prosecution, even if, when considering the request, it acquires detailed knowledge of the facts. The Assembly's debate on the report shall be confined to arguments for or against the waiver of the immunity.

i. The competent authority for requesting waiver of the immunity

63. Recently the Assembly and its competent bodies agreed (see doc. AS/Bur (2001) 28 and Minutes of Proceedings of the Assembly's sitting on 23 April 2001) that a request for the waiver of immunity coming from a competent national judge and forwarded via the President of the Supreme Court and the Permanent Representative of the corresponding member state to the Council of Europe had been made by a competent authority within the meaning of Rule 64 of the Assembly's Rules of Procedure. At the same time it was indirectly acknowledged that a request for the waiver of immunity could be made by the authority of a member state other than that of which the person concerned was a national. The recent report by the European Parliament on reform of the procedure for waiving parliamentary immunity (A5-195/2002) contains a number of very relevant and qualified observations on the concept of competent authority which the Parliamentary Assembly might wish to take into account in the event of problems of interpretation.

64. European Parliament practice further demonstrates that in certain member states various authorities can be competent in the matter. I therefore propose that Article 64 of the Rules of Procedure of the Parliamentary Assembly henceforth refer to "a competent authority".

ii. Hearing by the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly member concerned

65. As stated above, on 23 April 2001, for the first time in its history, the Assembly referred to the Committee on Rules of Procedure and Immunities a request for the waiver of the immunity of an Assembly member. The member concerned was invited to attend the meeting of the committee (on 25 April 2001) of which, moreover, he was a member. The committee held an exchange of views on the request and the person concerned was represented by another member of his national delegation. That member took part in the

preliminary discussion. The Assembly's Rules of Procedure should stipulate that a member affected by a request for removal of immunity may be represented by another Representative or Substitute belonging to the Assembly and may submit to the committee any document that he/she considers relevant. At the meeting of the Committee on Rules of Procedure and Immunities held on 29 January 2003, certain members stressed the need for the member concerned by a request to waive immunity, or the member's representative, to receive the earliest possible hearing.

iii. Requests at both national and European level to waive the immunity of a member of the Parliamentary Assembly

66. Where a request for the waiver of immunity is submitted not only to the Parliamentary Assembly but also to the national parliament of the member concerned, should the Assembly await the outcome of the national procedure before commencing its own examination of the matter? It is my opinion that the Parliamentary Assembly's approach must depend on all of the factors relevant to each individual case, taking care of course not to go into the merits. One of these factors is the authority submitting the request, i.e. whether it has been submitted by an authority from the person's own country or by an authority from another Council of Europe member state. It may be preferable for practical reasons and for reasons of political expediency to await the decision of the national parliament; similarly there may be cases where the opposite approach would be more appropriate. When the European Parliament is presented with a request to waive the immunity of a member who is at the same time a member of a national parliament, it awaits the position of the national parliament on the immunities of the member concerned before taking its own stand. This can lead to delay.

67. The Parliamentary Assembly must be able to ask the competent national authority which submitted the request for the necessary additional information and clarifications. If that authority fails to co-operate, the Assembly may defer consideration of the request. It should be noted, however, that at the meeting of the Committee on Rules of Procedure and Immunities held on 29 January 2003, some members expressed anxiety about possible delays that could arise from such requests for information.

68. A further question is whether a national authority which has already submitted a request to waive the immunity of a member of the Assembly to the national parliament must also submit the request to the Assembly. It should be remembered that the "European" immunity of an Assembly member is independent of the immunity he or she enjoys at national level and, as stated above, this serves to ensure that the work of the Assembly is not hampered. During the discussions in the Committee on Rules of Procedure and Immunities some members stressed that the mandate of members of national delegations to the Parliamentary Assembly derived from national parliaments. Handling the same immunity case twice, that is by the national parliament and the Assembly, could raise complications.

While admitting the necessary and close links between the Assembly and the national parliaments of member States, it has to be borne in mind that Article 15 of the General Agreement explicitly stipulates that the immunities are granted to members of the Assembly, whether they be members of parliament *or not*. This is a most important argument in favour of the independence of the European parliamentary immunity in comparison to the national one.

It is the opinion of the Committee on Rules of Procedure and Immunities that national authorities are obliged to co-operate with the Council of Europe and its Assembly where questions are raised concerning the immunity of Assembly members. That would presuppose an obligation to submit a request for the waiver of immunity to the Assembly, if the person concerned was a member, in parallel to the request submitted to the national parliament. However, it must be conceded that no Council of Europe or Assembly text spells

out the arrangements for such co-operation between national authorities and the Parliamentary Assembly in the field of immunities. These aspects were raised in the questionnaire sent to national delegations to the Parliamentary Assembly in May 2002.

69. The overall trend to be seen in the replies is that the obligations deriving from ratification of the General Agreement on the Privileges and Immunities of the Council of Europe and its additional Protocol are being honoured. Several replies pointed out that as there had been no requests to waive the immunity of members of the Parliamentary Assembly, their national parliaments had no precedents to follow. Four national delegations made explicit reference to the parallel waiving of national and European immunity, but said that no specific order had been agreed upon for submitting requests to waive national and European immunities.

70. The Belgian reply made reference to two concrete cases concerning Belgian members of the Parliamentary Assembly. In the first case, the Belgian Senate in 1988 refused to waive the immunity of a member. In the second case (1990), the immunity was waived but on account of the relatively trivial nature of the charge (a traffic offence), no request was made for waiving European immunity. Moreover, at the time the Belgian Senate was taking its decision on parliamentary immunity, the Parliamentary Assembly was not in session.

71. Therefore the Committee on Rules of Procedure and Immunities considers it necessary to specify, or to recall, in a recommendation of the Committee of Ministers to member states or in the Assembly's Rules of Procedure that the words "*during the sessions of the Assembly*" cover the whole year. It is also appropriate to remind national parliaments of the need to request the waiving of the "*European*" immunity of a Representative who is both a member of the national parliament and the Parliamentary Assembly. As some member States do not have a system of parliamentary inviolability, they should be exempted from the above-mentioned obligation insofar as their national parliamentarians are concerned.

iv. Compliance with Article 6 of the European Convention on Human Rights and the presumption of innocence

72. At a meeting of the Committee on Rules of Procedure and Immunities on 25 April 2001 it was underlined that even if the Assembly agreed to waive the immunity of one of its Representatives or Substitutes, his/her rights under Article 6 of the European Convention on Human Rights (the right to a fair hearing) as interpreted by the European Court of Human Rights would be fully applicable in the ensuing procedures by the national authorities having requested the waiver. Moreover, it is generally acknowledged that at the stage when parliamentary immunity is waived, the presumption of innocence must be consistently respected, both by criminal courts and by the state authorities (see the report by the European Commission for Democracy through Law of the Council of Europe (Venice Commission) on the regime of parliamentary immunity, document CDL-INF (96) 7, p.15).

v. Confirmation of parliamentary immunity

73. The report written by Mr Duff of the European Parliament (Doc. A5-195/2002) quite rightly draws attention to this aspect, which also has a certain role to play in the activities of the Parliamentary Assembly. Quite regularly, members of the Assembly who are involved in judicial or other proceedings in their own member state refer to the Assembly bodies for clarification of their position as regards immunities in a particular case. Such a possibility has not been catered for in the Assembly's Rules of Procedure. Nor is there any mention of what action the President of the Assembly could take when he is informed of a member's arrest or restriction on his/her freedom of movement or that national authorities have omitted to request the waiving of immunity of a member of the Assembly. The Committee on Rules

of Procedure and Immunities proposes that Rule 64 of the Rules of Procedure should make explicit reference to this question.

74. Not long ago Mr Ilascu, a member of the Romanian parliamentary delegation, was detained at Tiraspol/Transnistria (cf. Doc. 9083) and Mr Cubreacov, a member of the Moldovan parliamentary delegation to the Assembly, was also detained (cf. AS (2002) CR 17).[7]

By a letter of 25 November 2002, the President of the Italian Senate, Mr Pera, informed the President of the Assembly of the situation of Mr Jannuzzi, Italian member of the Assembly with respect to the Italian justice. Furthermore, Mr Pera pointed to the fact that Mr Jannuzzi was subject of an arrest warrant from the *Tribunale di Sorveglianza* of Naples. In his reply of 2 December 2002 to the President of the Italian Senate, the Secretary General of the Assembly recalled the immunities which Mr Jannuzzi enjoyed in his quality as member of the Assembly.

vi. Other procedural issues

75. A further question is whether the Assembly has the authority to waive the immunity of a member with respect to the criminal charges he or she is facing but to retain it insofar as the arrest or detention on remand of this member is concerned. The Assembly could follow the practice adopted by the European Parliament and several national parliaments(e.g. the French parliament) which have maintained this option.

76. The procedure for the Assembly's consideration in plenary sitting of the report by the Committee on Rules of Procedure and Immunities must be able to satisfy the urgency of the matter but must also be reasonable. At the Committee's meeting of 27 September 2001, the following points were made:

- the Committee needed to be able to carry out its work with the required diligence to avoid, as far as possible, a situation where the member resigned before the Committee had approved the report on the request to waive immunity;

- the Committee should organise its work in such a way as to be able to present the report at an Assembly plenary sitting and not at a meeting of the Standing Committee.

77. Given that the draft resolution forming part of the committee's report will conclude with retaining or waiving the immunity, no amendment should be permitted to that conclusion. Accordingly, where the Assembly rejects the Committee's proposal, the contrary decision should be deemed to have been adopted. Any amendments to the other paragraphs of the draft resolution should, of course, be admissible. Should a request to waive immunity involve several charges, each charge may be the subject of a separate decision.

78. It is especially important that the competent national authorities inform the President of the Parliamentary Assembly when one of its members is subject to custodial measures and judicial procedure. The Committee of Ministers could be invited to remind the national authorities of this obligation.

79. According to its current version, Rule 64 of the Assembly Rules of Procedure contains information on the purpose of the inquiry by the Committee on Rules of Procedure and Immunities regarding requests to waive immunity. It would be advisable that the rule specify in addition that the committee may deliver an opinion on the formal admissibility of such a request.

D. BRIEF SUMMARY OF THE SITUATION CONCERNING PARLIAMENTARY IMMUNITY AT NATIONAL LEVEL

i. General remarks

80. As the Council of Europe's Parliamentary Assembly is a body formed from members of national parliaments, I feel it would be useful to provide a very brief summary of the characteristics of national parliamentary immunities. Of course, given the major differences between European and national parliamentary immunities, the features of the latter are only of relative usefulness in drawing up a regime of immunities for the Parliamentary Assembly. With one exception (United Kingdom)[8], national parliamentary immunities are guaranteed by the constitutions of all the European Union member states. The situation is comparable for the countries in the Council of Europe[9].

ii. Current trends regarding parliamentary immunities in the Council of Europe member states

81. The situation as regards immunities in European states has been dealt with in two comparative studies, as mentioned above: the 2001 study published by the European Centre for Parliamentary Research and Documentation (ECPRD) covering the member states of the European Union and the European Parliament, and the 1996 study by the Venice Commission which looked at the situation not only in the EU countries but also a further twenty countries which were members only of the Council of Europe. The two studies by and large – although not invariably – arrive at the same conclusions for those countries which feature in both analyses. The replies received from the questionnaire sent by the Committee on Rules of Procedure and Immunities to national delegations have made it possible to supplement the information provided by these studies.

(a) Statistics on requests to waive immunity in national parliaments

82. According to the information gleaned from the national parliaments which replied to the questionnaire, the situation in Autumn 2002 was as follows:

- no request in the last five years: Luxembourg[10], Azerbaijan, the Belgian Senate, Finland, Andorra, Norway, United Kingdom, Cyprus;

- one request: Estonia (waiver of immunity), Latvia (waiver of immunity), Poland (waiver of immunity), Sweden (no waiver as parliament did not consider it to be a problem of immunity), "the former Yugoslav Republic of Macedonia" (rejected), Bosnia and Herzegovina (no waiver as the parliamentarian has forgone immunity);

- two requests: Denmark and Ukraine (both accepted);

- three requests: Belgian Chamber of Representatives (one accepted, one withdrawn and one still pending);

- four requests: Switzerland (none accepted[11]);

- five requests: Romania (three accepted, two still pending);

- six requests: Bulgaria (four accepted);

- seven requests: Albania (four accepted);

- seventeen requests: Germany (all accepted); Spain (thirteen accepted); Czech Republic (last six years: ten accepted);

- eighteen requests since October 2000: Serbia and Montenegro (six accepted, in two cases immunity was maintained and proceedings are still under way in the other ten);

- nineteen requests between 1996 and 2000: Slovenia (three accepted);

- thirty-seven requests: Austria (twenty-nine accepted);

- sixty requests between September 1999 and January 2003: Portugal (thirty-eight accepted)

- eighty-three requests: Hungary (accepted for criminal proceedings by the prosecution and rejected for proceedings brought by private individuals and cases involving defamation and slander);

- one hundred and twenty-four requests: Greece (two accepted, twenty-five still under investigation);

- two hundred and thirty-five requests (since April 1999): Turkey (two accepted);

- three hundred and seventy-six cases involving non-liability/non-accountability between 1996 and 2002: Italy (two hundred and eighty cases decided by the houses of parliament, non-liability being confirmed in two hundred and sixty two cases and withheld in twenty four; six requests to allow the arrest of a parliamentarian were refused).

In the vast majority of the parliaments in the countries in question, the number of requests to waive immunity has remained stable; only in two parliaments has there been an upward trend.

(b) Parliamentary non-accountability/non-liability

83. The authors of both studies mentioned above (paragraph 81) take the view that the question of "non-liability/non-accountability" (Article 14 of the General Agreement on the Privileges and Immunities of the Council of Europe) is dealt with in a relatively uniform and stable way in Europe and indeed in the world, and that this form of immunity goes generally unchallenged. The differences between the regime in force in the Parliamentary Assembly of the Council of Europe and those of national parliaments with the most recent rules in this field relate primarily to:

- non-accountability/non-liability for opinions expressed and votes cast by members of parliament cannot be invoked in cases of abuse, involving defamation, personal insults and slander (for example in Lithuania for personal insult and slander; Latvia for defamation, Hungary for cases of defamation and slander, or again in Hungary and Belarus for betrayal of State secrets). The reason for this is that the freedom of expression of parliamentarians cannot take precedence over human dignity and the overriding interests of the State; of course in this latter case, proceedings are possible only after the prior consent of parliament[12];

- while criminal liability for the opinions expressed and votes cast by members cannot be incurred, civil liability is often explicitly maintained.

84. Other differences relate to the interpretation of the terms *"in the exercise of their [parliamentary] functions".* A number of national texts stipulate that non-liability applies only within proceedings in parliament (e.g. the United Kingdom, Russia, Slovakia, Denmark).

Other national texts are similarly worded as Rule 14 of the General Agreement and refer to *"in the exercise of their functions, …"* (Czech Republic). There is a third group of texts which specify the cases in which non-liability applies outside parliament (e.g. Moldova, Georgia and Bulgaria). There is also an observed tendency to place a broader construction on the concept of opinions expressed in the discharge of their office. This reflects the fact that more parliamentary delegations perform characteristically parliamentary tasks away from the headquarters of the parliament.

85. In Italy, Article 68 paragraph 1 of the Constitution provides that *"Members of Parliament shall not be called to account for opinions expressed or votes cast in the exercise of their functions"*. The Italian Constitutional Court has specified that where a deliberation by the Senate or the Chamber of Deputies states that the conduct of one of their members comes within the ambit of the aforementioned provision, this precludes the introduction or continuation of all criminal or civil proceedings for the purpose of establishing the parliamentarian's liability and obtaining redress of the damage incurred. Such a deliberation is not open to censure by the courts. However, where a judge considers that a deliberation by parliament concerning immunities amounts to unlawful exercise of the discretion conferred on the houses of parliament, he may invoke a conflict of State powers before the Constitutional Court.

(c) Parliamentary inviolability

86. The information in both studies shows that the question of inviolability (cf. Article 15 of the General Agreement) is much more complex and subtle since it concerns the acts of parliamentarians as "simple citizens". The studies also show a great diversity among the various European legal systems. Furthermore, it is parliamentary inviolability which is increasingly being challenged in certain European states. Therefore, is why it is sometimes underlined that it is a procedural guarantee, limited in time and only applicable to criminal proceedings. As a result of pressure from, amongst others, public opinion and the media, and in the light of a number of notorious cases involving parliamentary immunity, certain countries (such as France, Belgium and Portugal) have since 1995 reformed their regime governing inviolability. In other countries, the public debate on immunities continues. Immunities are often attacked for being anachronistic and contrary to the fundamental principles of modern democracies. It is also held that inviolability protects parliamentarians against the legal effects of arbitrary charges and indictments or misconceived complaints aimed at discrediting a political figure.

87. Such criticism, raised in Ukraine and Moldova for instance, has been countered by those who argue that despite the problems which are well known, the reasons which originally lay behind the introduction of parliamentary immunity are still valid. In an opinion of July 2002 (CDL-AD (2002) 14) on the amendment of the Constitution of the Republic of Moldova, the European Commission for Democracy through Law of the Council of Europe pointed out:

- in new democracies, in the initial stages of constitutional development, the presence of such immunities vis-à-vis the judiciary must be considered very advisable, in order to avoid undue interference by the judicial organs in parliamentary affairs, particularly when the independence of the judiciary is still being consolidated;

- parliamentary immunities vis-à-vis the executive power, referring to detention, arrest, questioning, seizures, or any other interference of the police or security forces in the personal freedom of members of parliament (apart from cases of flagrancy) are a sine qua non requisite to guarantee the independence of the Representatives of the people in the performance of their functions.

88. In over half of the 35 national European parliaments looked at in the above-mentioned studies, the situation as regards inviolability is comparable to that in the Assembly. In other words, members are exempt from detention and prosecution for offences as long as their immunity has not been waived by their own national parliament. The situation is very different in some 15 European parliaments. There is no inviolability in the Netherlands, and in Ireland and the United Kingdom it is very limited. Members of the Irish parliament are granted immunity only when travelling to and from parliament. In the United Kingdom, immunity from arrest and detention is restricted to civil actions, which are very rare, and does not apply to any criminal activities carried out by members of parliament.

The rules governing inviolability have been amended in various national parliaments, including France, Portugal and Belgium, to allow the preliminary stages of criminal proceedings (enquiries, questioning, etc) to begin without the prior authorisation of national parliaments (i.e. without immunity first having been waived). Moreover, in certain countries parliament's consent is no longer required for the execution of sentences passed on a parliamentarian. In Andorra and Cyprus, waiver of parliamentary immunity has been entrusted to the courts.

89. Some member states follow another approach in order to make the immunity regime less cumbersome. They lay down that beyond a certain duration of imprisonment for offences committed by a parliamentarian, he may be arrested without prior authorisation (waiver of immunity) by the competent parliament. The length of minimum sentences ranges from six months (Finland) to 5 years (Croatia). In Sweden it is 2 years and in Portugal, 3 years. It may be noted in passing that candidates registered for some countries' election campaigns cannot be arrested or prosecuted except in the event of flagrancy.

90. There are also further approaches adopted to differentiate between cases where immunity may be waived or not. One is to specify certain offences for which immunity is not granted. Examples are minor offences (Luxembourg) and non-criminal matters such as tax or civil offences (France).

91. The study (p. 8) of the European Centre for Parliamentary Research and Documentation (ECPRD) also stressed that in those national parliaments where immunity was not waived in numerous cases, there was a tendency to interpret these immunities very widely.

iii. Plans to reform parliamentary immunity regimes (in 2002)

92. In several parliaments that replied to the Committee's questionnaire, the regime of immunities is due to be either modernised or made more strict. The system in Romania will be reformed at the same time as the revision of the Constitution in accordance with proposals made by the political parties and civil society.

93. Luxembourg is planning to restrict parliamentary immunity, and the procedure for amending the constitution has already begun. The reform will make it possible:

- for the public prosecutor to initiate criminal proceedings against members of parliament, even during sessions, except for votes cast and opinions expressed in the exercise of their functions;

- for sentences, including custodial sentences, handed down to members of parliament, to be enforced without the prior authorisation of the Chamber.

Of course, except in the case of *"flagrante delicto"*, a member of parliament could not be arrested or subject to any other custodial measure without the prior authorisation of the Chamber.

94. The reply from the parliament of Serbia and Montenegro, which has special guest status with the Parliamentary Assembly (as at February 2003), says that following the redefinition of relations between Serbia and Montenegro, parliamentary immunity will be regulated in accordance with contemporary trends in this field.

95. The Ukrainian reply states that reforms to the system of parliamentary immunity are contemplated in order to carry into effect the results of the consultative referendum of 2000 in which one question concerned abolition of parliamentary inviolability.

96. A number of proposals to alter the Italian parliamentary immunity arrangements have been tabled in the Italian parliament and may be considered in the near future.

97. In the Austrian parliament, reforms to immunities are under discussion but no move has been made as yet to amend the relevant provisions. Apart from that, a tendency to stop waiving immunity for certain types of alleged offences by parliamentarians is observed.

98. Two reforms are planned in the field of parliamentary immunities in the Swiss parliament, although it is far from certain that they will come to practical results. First, it is hoped to make a stronger link between the offence a member of the Federal Assembly is alleged to have committed and his or her parliamentary activity. Following a parliamentary initiative, the Swiss National Council is set to decide on a proposal that the protection afforded by parliamentary immunity be removed for offences relating to racial discrimination.

99. In Bulgaria, reforms to the regime of parliamentary immunities are under discussion. In 2002 the Turkish parliament rejected proposals for limitation of the scope of parliamentary privilege.

100. In Spain and Germany, reforms are afoot as regards the procedural aspects (information to the Speaker of Parliament, time limits to be complied with) for waiver of immunity.

101. The Slovenian delegation's reply indicates that proposals have been put forward to amend the Constitution so as to extend parliamentary immunity to liability in tort.

102. In the Parliament of the Czech Republic there have been eight bills since 1998 proposing a reform (limitation of parliamentary immunities). The Czech Government submitted one proposal, the Senate two and the Chamber of Deputies five. None of these proposals was adopted. Furthermore, the limitation of parliamentary immunity is a part of the political programmes of most of the Czech political parties.

iv. The attitude of the media and the public towards parliamentary immunity

103. The media and particularly the press have always seized upon cases concerning the waiving of parliamentary immunity. Media interest depends to a large extent on the number of requests made, the people involved, the questions at issue and the need for reform. Very many media reports, press articles and opinion polls in Russia and Ukraine have clearly shown that the purpose and scope of parliamentary immunities are not totally understood and that they are often viewed as a privilege. Several of the replies to the questionnaire of the Committee on Rules of Procedure and Immunities give some idea of the attitude of the media. Luxembourg's reply states that the press is relatively neutral about immunity issues. In Albania the press is interested in sensitive cases involving parliamentarians' immunity. According to the Czech reply, the general opinion of the media in that country is that the range of activities covered by parliamentary immunities is too broad, should be limited only to the activities performed in the exercise of the function of a member of the parliament and should not include common offences. In Portugal one notes a growing incomprehension by the media with respect to parliamentary inviolability.

104. In Romania, public opinion as reflected in the media seems to view parliamentary immunity and its objective as a means of circumventing the application of justice. This explains why Romanian political parties in their proposals for revising the constitution tend to reject the rules governing parliamentary immunity, or restrict them to non-liability/non-accountability in respect of votes cast or opinions expressed by members of parliament in the exercise of their functions.

105. According to the Estonian reply, the media in this country only take an interest in the issues relating to parliamentary immunities when a member of parliament is likely to be deprived of immunity.

106. In Poland, the media present commentaries on every procedure for waiving parliamentary immunity. While the articles are objective, journalists' knowledge of the grounds and the procedure with regard to the request for waiver of immunity does not always enable them to give a thorough analysis of the aspects. The Greek delegation's reply also stresses that the press seldom gets to the bottom of parliamentary immunity cases.

107. In Slovakia, there was considerable discussion in the media when an amendment to the constitutional provisions concerning immunities came before parliament in 2001. The media wanted immunities to be restricted still further than provided for in the texts finally adopted.

108. Before the revision of the system of parliamentary privilege in Belgium in 1997, the press and the public in general were to a certain extent hostile to parliamentary immunity, viewed as a privilege granted to members of parliament. On the other hand, the fact that before the 1997 reform the initiation of proceedings had required the waiving of parliamentary immunity meant that such proceedings were made public prematurely and as a result the parliamentarians in question often had to endure a veritable trial by the media. The 1997 reform may have put an end to these two tendencies

109. The Italian reply indicates that Italian media interest in immunity issues is usually not great. The situation changes when important national political figures are involved or when it is a matter of waiving a parliamentarian's exemption from custodial measures.[13].

110. The Turkish media sometimes criticise the extensiveness of parliamentary immunities.

111. In Hungary, the media devote a lot of coverage to all proceedings relating to presumed instances of corruption on the part of parliamentarians. The media tended to publish at the end of the year figures on requests for waiving parliamentary immunity and details of the action taken.

112. Lastly, in Ukraine, the media support various points of view. Some call for the abolition of parliamentary privileges whereas others demand that they be maintained, while at the same time putting forward proposals to make the constitutional provisions relating to immunities more flexible.

v. Opinion polls on parliamentary immunities

113. Opinion polls on parliamentary immunities have been held in Russia and Ukraine. An opinion poll was conducted in Russia in August 2000 on the meaning of the expression "parliamentary immunity" (cf. press statement of the Russian Duma of 2 August 2000). Almost 43% of the people surveyed were able to give an acceptable definition, even though it often had an "emotional" connotation because the Russian public often believe that members of parliament are entirely exempt from punishment and even that they are allowed

to break the law. Only 2% of those surveyed knew the real aim of immunity, namely to enable parliamentarians to perform their role with total independence.

114. In April 2000, a consultative referendum was held in Ukraine. One of the questions asked concerned the limitation of parliamentary immunity (abolishing parliamentary inviolability). The majority of those who voted were in favour of abolition. The Venice Commission raised objections at the time for the same reasons as those cited in paragraph 83 above (see document CDL-Inf (2000) 14, par. 14 et seq.).

E. PRECEDENTS AND FACTS TO BE TAKEN INTO ACCOUNT BY THE PARLIAMENTARY ASSEMBLY FOR DEVELOPING A DOCTRINE CONCERNING REQUESTS FOR THE WAIVER OF MEMBERS' IMMUNITY

115. It must first of all be reiterated that no procedure for waiving immunity is provided for or admissible with regard to the non-liability/non-accountability of Assembly members established under Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe.

116. The Committee on Rules of Procedure and Immunities has so far not had to pursue to its conclusion the consideration of a request for the waiver of a member's immunity guaranteed by Article 15 of the General Agreement. The referral to the Committee on Rules of Procedure for the waiver of a representative's immunity in April 2001 did not result in a report presented to the Assembly as the member concerned resigned beforehand. Two cases regarding the waiver of representatives' or Substitutes' immunity were submitted to the Bureau of the Assembly (AS/Bur (10) PV 4 of 1958 and AS/Bur (31) PV 11 of 1980) but did not give rise to any substantive examination. In other instances, the President or Secretary General of the Assembly has written, at the request of Assembly Representatives or Substitutes, to the national authorities concerned, when questions regarding their immunity were at stake (see par. 74 above)[14].

117. In contrast, there are many precedents concerning the waiver of the immunity of members of the European Parliament (EP) and members of national parliaments. Insofar as is justified and compatible with the principles and practice of the Parliamentary Assembly and the particular institutional features of the Council of Europe, the Assembly could base its approach on these precedents. It should also be pointed out that the abovementioned studies on immunities carried out

by the Venice Commission and the European Centre for Parliamentary Research and Documentation provided an analysis of the common trends in dealing with requests to waive immunity and the criteria applied to justify a waiver or not. In addition, the replies to the committee's questionnaire contain numerous useful particulars.

118. It has already been shown that the immunities provided for under Article 15 of the General Agreement are granted only if there is a link between the acts which the member of the Assembly is alleged to have committed and his or her political activities. Moreover, the Committee on Rules of Procedure and Immunities is required to take a stance on the competence of the national authority having submitted the request for waiver of parliamentary immunity, and on the technical admissibility of the request (in particular the seriousness and non-arbitrariness of the request).

119. The general criteria to be applied in accepting or rejecting a request for the waiving of immunity were set out in the study produced by the Venice Commission (pages 15 and 17) and the study by the European Centre for parliamentary research and documentation (page 7). National delegations to the Assembly were consulted on these criteria by means of the questionnaire sent to them by the Committee on Rules of Procedure and Immunities. Several of them approved these criteria. Some delegations have put forward supplementary

suggestions which have been widely taken into account in this draft report. The general criteria, thus supplemented, are as follows:

For maintaining immunity:

- failure to comply with the procedures concerning immunities (inadmissibility of the request);

- obvious lack of grounds for the accusations against the member; imprecise and unacceptable nature of the request for waiving immunity; establishment of the mere existence of presumption;

- the political nature of the acts considered criminal in the request for the waiver of the immunity (the acts referred to being the unforeseen consequence of a political act or an offence for which the political motives are obvious);

- the purpose of the criminal proceedings is to unfairly persecute the member of Parliament and to jeopardize his freedom and independence in carrying out his mandate.

For waiving immunity:

- the seriousness, sincerity and fairness of the request; in other words the request is admissible and the facts reported do not on the face of it lead to the conclusion that the request is based on fanciful, anomalous, proscribed or arbitrary considerations;

- the particularly serious nature of the allegations[15];

- the necessity not to establish members' immunity from punishment for offences committed;

- the safeguarding of parliament's reputation in this respect; public opinion has to be consulted in order to uphold public order;

- the necessity of not intentionally obstructing the course of justice and the proper functioning of democracy.

Of course, there must ultimately be a weighting of the criteria in support of waiving or maintaining immunity in order to preserve the independence of parliament while at the same time endeavouring to stamp out misuses of immunity.

120. The above-mentioned study of the Venice Commission also underlines :

- the fact that the parliament to which a request for the waiver of the immunity is referred plays a fundamental role in carrying out stringent scrutiny of the request as to its seriousness, sincerity and fairness, as well as timeliness (particularly when the parliament's term of office is drawing to a close) and procedural correctness;

- the influence of public opinion, changing attitudes and the media on the application of the parliamentary immunity system.

Moreover, the study shows that there is an effort to define fixed, objective criteria.

121. Finally, it is to be recalled that at all stages when parliamentary immunity is waived, the presumption of innocence must be respected, in order to avoid that the public believes the parliamentarian guilty.

122. The Committee on Rules of Procedure and Immunities has given a favourable opinion in response to the suggestion that the aforementioned guidelines be taken into account as regards the scope of Article 15 of the General Agreement, insofar as they are compatible with the principles and practice of the Assembly (see paragraphs 39 and 40 above).

The Committee further points out that

- the immunity according to Article 15 (b) of the General Agreement (enjoyment by members on the territory of all other member States than their national territory, of exemption from arrest and prosecution) may only be lifted by the Parliamentary Assembly following a request submitted to it by a competent national authority;

- the competent authorities of member States having a system of parliamentary inviolability and which wish to waive the immunity of a national parliamentarian who is also a member of the Parliamentary Assembly, should also request the Assembly to waive the European immunity of that member which is granted to him/her under Article 15 (a) of the General Agreement).

The Committee is aware that the latter proposal raises problems with a view to a coherent system of European parliamentary immunity, besides which this compromise proposal could facilitate the adoption of the draft texts contained in this report by members of national parliaments having no system of parliamentary inviolability.

F. CONCLUSIONS

123. The system of parliamentary immunities has undergone development at both the national and the European levels. In many parliaments, inviolability and non-liability/non-accountability have been overhauled and more stable, objective criteria have been laid down for the procedure to waive immunity. Moreover, both in 2001 and in 2002 important issues regarding the immunities of its members were raised at the level of the Parliamentary Assembly (see paragraphs 74 and 114 above).

124. In the light of these developments and the European Parliament's standard practice regarding European parliamentary immunity, it is important to determine the extent to which the provisions of the General Agreement on the Privileges and Immunities of the Council of Europe and its Protocol dating from 1949/1952, and the Parliamentary Assembly's approach to parliamentary privilege, should be adjusted or reinterpreted.

125. With regard to the parliamentary non-liability secured by Article 14 of the General Agreement, it is proposed to broaden the concept "in the exercise of their functions" to include the typically parliamentary duties which members of the Assembly discharge in the field in accordance with its bodies' decisions. The Committee on Rules of Procedure and Immunities further considers that the Assembly's arrangements for maintaining order (Rule 20 of the Rules of Procedure) should be revised and reinforced in order to allow suitable action should a member's expressed opinions seriously infringe the rights of a third person.

126. As to the inviolability provided for in Article 15 (a) of the General Agreement, the Committee on Rules of Procedure and Immunities thinks that to interpret this guarantee regard should be had to the general principles evolved by the European parliamentary institutions and particularly the European Parliament, insofar as they are compatible with the nature of the Parliamentary Assembly and its practice.

127. With respect to member States which have a system of parliamentary inviolability (Article 15 of the General Agreement) there is a need to remind the national authorities that in the case of a parliamentarian belonging to the Assembly who is accused of a wrongful act,

both national and European immunity should be waived. Furthermore, member states should accept that, owing to a considerable increase in the Parliamentary Assembly's activities, the concept "during the sessions of the Assembly" covers the entire parliamentary year.

It is also important to remind member States that according to Article 15 of the General Agreement, Representatives to the Assembly and their Substitutes continue to enjoy the parliamentary immunities secured by this provision when they are no longer members of their national parliament, and do so until their replacement as Assembly members.

128. Another implication of this report is that Rule 64 of the Assembly's Rules of Procedure, governing waiver of immunity, should be adapted to practical needs. This provision should also explicitly mention the possibility for members to have their privileges and immunities confirmed by the bodies of the Assembly.

129. The draft resolution and recommendation accompanying this report reflect these aspects and contain specific points directed at the competent national authorities. It is especially important that upon adoption the texts are brought to the attention of the appropriate national judicial authorities.

130. For the purposes of this report, the Committee on Rules of Procedure and Immunities has taken account of developments in the European Parliament. The European Parliament adopted on 11 June 2002 a resolution on reform of the procedure for waiving parliamentary immunity (Rule 6 of the European Parliament's Rules of Procedure). On the same day, the Parliament adopted a resolution on the immunity of members elected in Italy and the practice of the Italian authorities in this connection, which contains a number of interesting passages on non-liability/non-accountability. It is anticipated that the European Parliament delegation to the Convention on the future of Europe will put forward proposals to revise the 1965 Protocol on the Privileges and Immunities of the European Communities. This initiative could be reflected in the work on a revised statute of members of the European Parliament.

131. In the light of the results of the foregoing, the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly of the Council of Europe could also discuss in due course whether the provisions of the General Agreement on Privileges and Immunities of the Council of Europe (of 1949) and its Protocol (of 1952) continue to be appropriate or should be updated.

APPENDIX I

Criteria for interpreting the concept of non-accountability/non-liability (parliamentary privilege) and inviolability (general principles of European parliamentary immunity).

It is recalled that the purpose of parliamentary immunity is to preserve the integrity of parliaments and to safeguard the independence and not the impunity of their members in exercising their office.

A. Parliamentary non-accountability/non-liability (parliamentary privilege)[16]

1. One trend in member states is to grant non-accountability/non-liability on condition that the opinions expressed by parliamentarians do not infringe the rights of third parties (through defamation for example). In the event of defamation, a parliamentarian may be prosecuted following authorisation by his parliament.

2. The constitutions of other member states not containing such an exempting clause where parliamentary privilege is concerned do in some cases state that parliamentarians are subject to the disciplinary powers of their parliament in respect of opinions expressed.

3. Furthermore, the notion of opinions expressed by members *"in the exercise of their functions"* is now more broadly interpreted by certain parliaments, given that there are more parliamentary delegations performing tasks outside the seat of parliament. In that case the term *"in the exercise of their functions"* is defined in relation to typical parliamentary activities and not in relation to a notion of geographical location.

B. Parliamentary Inviolability[17]

1. A number of European states which joined the Council of Europe after 1990 do not use the terms *"immunities"* and *"waiving the immunity"* in their constitutions, which instead state that members may not be prosecuted or detained without prior authorisation from parliament.

2. Several member states have reformed the constitutional provisions relating to inviolability with a view to giving judicial bodies more opportunity to gather evidence before asking parliament to waive the immunity of one of its members. To that end, while the necessary guarantees are provided for, provisions have been amended so that most of the steps in criminal proceedings prior to the referral of the case to the judge for examination on the merits may be carried out without prior authorisation from parliament.

3. Criteria for maintaining immunity (inviolability):

- failure to comply with the procedures concerning immunities (inadmissibility of the request);
- obvious lack of grounds for the accusation against the member; imprecise and unacceptable nature of the request for waiving immunity; establishment of the mere existence of presumption;
- the political nature of the acts considered criminal in the request to waive immunity (the acts referred to being the unforeseen consequence of a political act or an offence for which the political motives are obvious);
- the purpose of the criminal proceedings is to unfairly persecute the member of parliament and to jeopardise his freedom and independence in carrying out his mandate.

4. Criteria for waiving immunity (inviolability):

- the seriousness, sincerity and fairness of the request, in other words the request is admissible and the facts reported do not on the face of it lead to the conclusion that the request is based on fanciful, anomalous, proscribed or arbitrary considerations;

- the particularly serious nature of the allegations,

- the necessity to not establish members' immunity from punishment for offences committed,

- the safeguarding of parliament's reputation in this respect; public opinion has to be consulted in order to uphold public order,

- the necessity of not intentionally obstructing the course of justice and the proper functioning of democracy.

It should be remembered that at all stages when parliamentary immunity is waived the presumption of innocence must be maintained, to avoid encouraging public belief that the parliamentarian is guilty.

Of course, there must ultimately be a weighting of the criteria in support of waiving or maintaining immunity in order to preserve the independence of parliament while at the same time endeavouring to stamp out misuses of immunity.

APPENDIX II

PROVISIONS CONCERNING IMMUNITIES CONTAINED IN THE STATUTE OF THE COUNCIL OF EUROPE, THE SUPPLEMENTARY TEXTS TO THE STATUTE AND THE ASSEMBLY'S RULES OF PROCEDURE

A. Article 40 of the Statute (5 May 1949)

"a. The Council of Europe, Representatives of Members and the Secretariat shall enjoy in the territories of its Members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all Representatives to the Consultative (Parliamentary) Assembly from arrest and all legal proceedings in the territories of all Members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions;

b. The Members undertake…".

B. General Agreement on Privileges and Immunities of the Council of Europe

(2 September 1949)

Article 13: "No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative (Parliamentary) Assembly and their Substitutes.

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."

Article 14: "Representatives to the Consultative(Parliamentary) Assembly and their Substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions".

Article 15: "During the Sessions of the Consultative (Parliamentary) Assembly, the Representatives to the Assembly and their Substitutes, whether they be members of Parliament or not, shall enjoy:

a. on their national territory, the immunities accorded in those countries to members of Parliament;

b. on the territory of all other Member States, exemption from arrest and prosecution.

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

C. Protocol to the General Agreement (6 November 1952)

Article 3: *"The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of Committees and Sub-Committees of the Consultative (Parliamentary) Assembly, whether or not the Assembly is itself in Session at such time."*

Article 5: *"Privileges, immunities and facilities are accorded to the Representatives of Members not for the personal benefit of the individuals concerned, but in order to safeguard the independent exercise of their functions in connection with the Council of Europe. Consequently, a Member has not only the right but the duty to waive the immunity of its Representative in any case where, in the opinion of the Member, the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which the immunity is accorded".*

D. Rule 64 of the Parliamentary Assembly's Rules - waiver of the immunity of Representatives and Substitutes [18]

64.1. Any request addressed to the President by the competent authority of a member State for the waiver of immunity of a Representative or Substitute shall be transmitted to the Assembly and then referred without prior discussion to the Committee on Rules of Procedure and Immunities.

64.2. The Committee shall immediately consider the request but shall not make any examination of the merits of the case in question.[19] The Representative or Substitute concerned may, if he wishes, be heard by the Committee. The report of the Committee shall conclude with a draft Resolution for the retention or the waiver of the immunity. No amendment to this conclusion shall be admitted.

64.3. The report of the Committee shall be the first item of business of the Assembly on the first sitting day after the report has been tabled.

64.4. The debate on the report shall be confined to arguments for or against the waiver of the immunity.

64.5. The President shall immediately communicate the decision of the Assembly to the authority which submitted the request.

Committee responsible for the report : Committee on Rules of Procedure and Immunities

Reference to committee: Assembly's decision of 23.04.2001 and Reference 2727 of 29.05.2002 (Doc. 9439)

Draft resolution and draft recommendation adopted by the committee on 29 January 2003

Members of the committee: *Mr Holovaty, (Chairperson), MM. Vis, Olteanu, Mrs Posada (Vice-Chairpersons)*, MM. *Akçam*, Aliyev, Mrs Auken, MM. Bernik, Calmes, Ceder (Alternate: *Mr Timmermans* [Rule 46.7. of the Rules of Procedure]), Collavini, Debono-Grech, *Mrs Doktorowicz*, MM. Dule, Flajolet, Frankenhauser, *Mrs Herczog*, MM. Himmer, Höfer, *Janssen van Raaij*, Jung Armand, *Kroupa*, Laakso, *Lydeka*, *Magnusson*, Maissen, Malins, Mme Mintas-Hodak, MM. Mišší k, *Monsen*, Occhetto, *Pentchev*, Pereira Coelho, Mrs Pericleous-Papadopoulos, Mrs Ragnarsdottir, MM. Riccardi, Salaridze, Sharandin, Stepaniuc, Taliadouros, Wright, Zernovski

N.B. The names of members who took part in the vote are printed in italics.
Secretary of the committee: Mr Heinrich.

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[1] It should be recalled, that parliamentary immunity matters are also dealt with in application No.25646/94 (Young v. Ireland), decision of the European Commission of Human Rights of 17 January 1996, DR 84-A p. 126.

[2] These general considerations are well set out in the reply by the Andorran Parliament to the questionnaire on parliamentary immunity.

[3] Agreement on the status of the Western European Union, international Representatives and staff of 11 May 1955).

[4] Cf. Doc W8 rev, op. cit, pp. 187-190 and the study by the European Centre for Parliamentary Research and Documentation: *"Rules on parliamentary immunity in the European Parliament and the member states of the European Union"*, 2001, p. 54.

[5] "Rules on parliamentary immunity in the European Parliament and the member states of the European Union", 2001, p. 50.

[6] At the meeting of the Committee on Rules of Procedure and Immunities held on 29 January 2003, a member rightly pointed out the superfluity of this clarification, considering that the concept *"during the sessions of the Assembly"* covers the entire year (see paragraphs 46-48 of this report). Allowance should nevertheless be made for the origin of this provision, which dates from the period when the Assembly and its bodies had no activities which were spread continuously over the whole of the year (for details, see paragraphs 40 and 46 of this report).

[7] Other cases where members of the Parliamentary Assembly have experienced problems over their privileges and immunities are recorded in a contribution on the waiving of immunity before the Council of Europe Parliamentary Assembly for a symposium in Brussels on 15 October 1997 by Mr G. P. Castenetto, former Assembly Secretariat officer: *"La levée de l'immunité devant l'Assemblée parlementaire du Conseil de l'Europe" in "les droits de la défense devant les parlements exerçant des prérogatives juridictionnelles".* Actes du séminaire du 15 octobre 1997, organisé à Bruxelles par les Instituts des droits de l'homme des barreaux de Paris et de Bruxelles , éditions Bruylant, Bruxelles, 1998, pp. 51-56. It is to be recalled that Assembly Resolution 1030 (1994) dealt, inter alia, with immunities of Turkish parliamentarians. Assembly Recommendation 482 (1967) concerns the immunities of international organisations and their staff.

[8] In the United Kingdom, immunities of Members of Parliament are regulated by the Bill of Rights.

[9] Parliamentary immunity is regulated by provisions in texts other than the constitution in Russia (the Law on the status of members of parliament) and Switzerland (federal law).

[10] Between 1969 and 1994 there were 13 requests, 5 of which were accepted.

[11] One request was accepted by only one of the two chambers in the Swiss parliament.

[12] In an opinion delivered in July 2002 (CDL-AD (2002) 14), the European Commission for Democracy through Law had reservations about the proposal in a parliament to confine non-accountability to political "views" expressed.

[13] The above-mentioned case of Mr Jannuzzi (see par. 74) aroused considerable interest in the Italian press. *"La Stampa"* (of 27.11.2002) referred to *a "conflict between the judicial authorities and the national parliament".*

See also the press coverage of a case of search of the parliamentary office of an assistant of a German member of Parliament *(Frankfurter Allgemeine Zeitung* of 15 January 2003).

[14] It is to be noted that par. 36 of the report (Doc. 9571) on which is based Resolution 1303 (2002) on the functioning of democratic institutions in Moldova, mentions parliamentary immunities in that country; this is also the case in the expert study on the law on the status of members of the Moldovan Parliament (see Doc. SG/Inf (2002) 41 of the Secretary General of the Council of Europe.)

[15] Certain national delegations stressed that the seriousness or otherwise of an act held against a member has no effect.

[16] It should be noted that two judgments delivered by the European Court of Human Rights on 17 December 2002 (case of A. v. United Kingdom, Application No. 35373/97) and 30 January 2003 (case of Cordova v. Italy, Application No. 45649/99) give clarifications on the rules governing parliamentary privilege.

[17] Some member states do not recognise this form of immunity. In other states parliamentary inviolability may also cover civil proceedings.

[18] See Statute of the Council of Europe, Article 40, and General Agreement on Privileges and Immunities, Articles 13 to 15, and Protocol thereto, Articles 3 and 5.

[18] Guidance on the meaning of this phrase can be found in Rule 6 (a) paragraph 7. of the Rules of Procedure of the European Parliament which provides: "The Committee(…) shall not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution even if, in considering the request, it acquires detailed knowledge of the facts of the case."

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

THIRTY-THIRD ORDINARY SESSION

ORDER No. 398 (1981) [1]

on the term of office of the Turkish parliamentary delegation

The Assembly,

Regretfully concludes, bearing in mind the outstanding contribution of Turkish parliamentarians to its work, that, in the light of Article 25, paragraph 1, of the Statute, and Rule 7, paragraphs 1 and 2, of the Assembly's Rules of Procedure, it would be out of order to envisage the prolongation of the term of office of the Turkish parliamentary delegation to the Council of Europe, and looks forward to the time when developments in Turkey will enable it to welcome back in its midst an elected and properly constituted Turkish delegation.

1. *Assembly debate* on 13 and 14 May 1981 (4th, 5th and 6th Sittings) (see Doc. 4727, Motion for an Order).
Text adopted by the Assembly on 14 May 1981 (6th Sitting).

ASSEMBLÉE PARLEMENTAIRE DU CONSEIL DE L'EUROPE

TRENTE-TROISIÈME SESSION ORDINAIRE

DIRECTIVE N° 398 (1981) [1]

sur le mandat de la délégation parlementaire turque

L'Assemblée,

Consciente de la contribution remarquable des parlementaires turcs à ses travaux, conclut à regret que, compte tenu des dispositions de l'article 25 (paragraphe 1) du Statut et de l'article 7 (paragraphes 1 et 2) du Règlement de l'Assemblée, il ne serait pas conforme à ces textes d'envisager la prolongation du mandat de la délégation parlementaire turque auprès du Conseil de l'Europe, et attend avec espoir le moment où la situation en Turquie lui permettra d'accueillir de nouveau en son sein une délégation turque, élue et normalement constituée.

1. *Discussion par l'Assemblée* les 13 et 14 mai 1981 (4e, 5e et 6e séances) (voir Doc. 4727, proposition de directive).
Texte adopté par l'Assemblée le 14 mai 1981 (6e séance).

Order No. 395 (1981)

PARLIAMENTARY ASSEMBLY
OF THE
COUNCIL OF EUROPE

THIRTY-SECOND ORDINARY SESSION

ORDER No. 395 (1981)[1]

on the situation in Turkey

The Assembly,

1. Having considered the report of its Political Affairs Committee (Doc. 4657), drawn up following a fact-finding visit to Turkey carried out from 5 to 8 January 1981 by two of its members ;

2. Reaffirming its position, based on the Statute of the Council of Europe, that only states respecting democratic principles can maintain their membership of the Council of Europe, and recalling, in this connection, its Recommendation 904, of 1 October 1980, stressing the necessity of a rapid return to normal democratic life in Turkey ;

3. Taking note of the reply of the Committee of Ministers to Recommendation 904, in which it declared that it will continue to follow developments in Turkey attentively, in close liaison with the Assembly ;

4. Reaffirming as was stipulated in paragraph 10 of Recommendation 904, the requirement that the Turkish Government give precise indications on the conditions and timetable for the restoration of democratic institutions fully respecting the freely expressed will of the people, and implying complete political, trade union and press freedom ;

5. Taking note of the intention expressed by the Turkish Government to satisfy its obligations under the European Convention on Human Rights, and in particular to respect fully the rights from which Article 15 of the Convention allows no derogation ;

6. Considering that democratic principles are not at present applied, and that human rights are not respected in Turkey as appears from information concerning :

i. arrests and imprisonment, so far without trial, of thousands of persons ;

1. *Assembly debate* on 28 and 29 January 1981 (24th and 26th Sittings) (see Doc. 4657, report of the Political Affairs Committee).

Text adopted by the Assembly on 29 January 1981 (26th Sitting).

ASSEMBLÉE PARLEMENTAIRE
DU
CONSEIL DE L'EUROPE

TRENTE-DEUXIÈME SESSION ORDINAIRE

DIRECTIVE N° 395 (1981)[1]

sur la situation en Turquie

L'Assemblée,

1. Ayant examiné le rapport de sa commission des questions politiques (Doc. 4657), établi à la suite de la visite d'information en Turquie effectuée du 5 au 8 janvier 1981 par deux de ses membres ;

2. Réaffirmant sa position, fondée sur le Statut du Conseil de l'Europe, que seuls des Etats respectant les principes démocratiques peuvent maintenir leur appartenance au Conseil de l'Europe, et rappelant à cet égard sa Recommandation 904, du 1er octobre 1980, soulignant la nécessité d'un retour rapide à une vie démocratique normale en Turquie ;

3. Prenant acte de la réponse du Comité des Ministres à la Recommandation 904, dans laquelle celui-ci a déclaré qu'il continuera à suivre de près les développements en Turquie, en liaison étroite avec l'Assemblée ;

4. Réaffirmant, telle que stipulée dans le paragraphe 10 de la Recommandation 904 (1980), l'exigence d'indications précises du Gouvernement turc quant aux conditions ou aux délais de rétablissement des institutions démocratiques dans le plein respect d'une volonté populaire librement exprimée, ce qui implique une complète liberté d'activité politique, syndicale et de la presse ;

5. Prenant acte de la volonté exprimée par le Gouvernement turc de satisfaire à ses obligations découlant de la Convention européenne des Droits de l'Homme, et en particulier de respecter pleinement les droits auxquels l'article 15 de la convention ne permet aucune dérogation ;

6. Constatant que les principes démocratiques ne sont pas actuellement appliqués en Turquie et que les droits de l'homme ne sont pas respectés, tel qu'il ressort d'informations concernant :

i. les arrestations et les emprisonnements, sans jugement jusqu'à ce jour, de milliers de personnes ;

1. *Discussion par l'Assemblée* les 28 et 29 janvier 1981 (24e et 26e séances) (voir Doc. 4657, rapport de la commission des questions politiques).

Texte adopté par l'Assemblée le 29 janvier 1981 (26e séance).

ii. several cases of torture although the Prime Minister declared on 6 December 1980 his firm intention to enquire into allegations of torture and, if need be, to prosecute the guilty officials ;

iii. *de facto* censorship of press and literary activities ;

iv. other violations of the Human Rights Convention, including alleged ill-treatment ;

7. Concerned by the recourse to the execution of death sentences, contrary to previous practice, even though in conformity with the law ;

8. Considering that the absence of concrete progress towards the restoration of democracy would be incompatible with Turkey's continued membership of the Council of Europe ;

9. Expressing the wish that the investigations being carried out into the cases of the two members of the Assembly at present in detention be completed rapidly in order to make personal contacts possible,

10. Instructs its Political Affairs Committee to follow internal developments in Turkey closely ;

11. Instructs its Standing Committee to review the situation at its meeting in The Hague on 26 March 1981 ;

12. Instructs the Secretary General to seek with the Turkish authorities information in every case of alleged torture or ill-treatment of prisoners brought to his attention by members of the Parliamentary Assembly ;

13. Decides to examine the situation in the light of paragraphs 1 to 12 above, at the first part of its 33rd Ordinary Session in May 1981.

ii. plusieurs cas de torture, bien que le Premier ministre ait déclaré le 6 décembre 1980 sa ferme volonté d'enquêter sur les allégations de torture et de poursuivre le cas échéant les fonctionnaires qui s'en seraient rendus coupables ;

iii. une censure de fait des activités de presse et de littérature ;

iv. d'autres violations à la Convention des Droits de l'Homme, y compris des allégations de mauvais traitements ;

7. Préoccupée par le recours à l'exécution de condamnations à mort, contraires à la pratique antérieure, même si elles sont conformes à la loi ;

8. Considérant que l'absence de signes concrets d'un rétablissement progressif de la démocratie rendrait la situation de la Turquie incompatible avec son maintien au Conseil de l'Europe ;

9. Exprimant le vœu que l'instruction menée contre les deux membres de l'Assemblée actuellement en état de détention s'achève dans un bref délai, de façon à rendre possibles les contacts personnels,

10. Charge sa commission des questions politiques de continuer à suivre de près l'évolution de la situation intérieure en Turquie ;

11. Charge sa Commission Permanente de faire le point de la situation au cours de sa réunion du 26 mars 1981 à La Haye ;

12. Charge le Secrétaire Général de rechercher auprès des autorités turques les informations nécessaires dans chaque cas où des membres de l'Assemblée parlementaire font état d'allégations de torture ou de mauvais traitements des prisonniers ;

13. Décide d'examiner la situation, à la lumière des paragraphes 1 à 12 ci-dessus, au cours de la première partie de sa 33e Session ordinaire en mai 1981.

Order No. 392 (1980)

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

THIRTY-SECOND ORDINARY SESSION

ORDER No. 392 (1980)[1]

on the members of the Turkish delegation to the Parliamentary Assembly

The Assembly,

1. Noting that, in accordance with Article 25.*b* of the Statute of the Council of Europe, and subject to the provisions of paragraph *a* of that article, the term of office of the members of the Turkish delegation to the Parliamentary Assembly, whose composition was notified by the Turkish Government on 21 April 1980 and whose credentials were approved by the Assembly at the opening of its 32nd Ordinary Session, cannot expire before 11 May 1981 ;

2. Noting also that Turkish participation in the Parliamentary Assembly will end on that date unless new elections are held in the meantime ;

3. Considering that the continuation of Turkish participation in the Parliamentary Assembly, as indicated above, will be an important means of aiding the rapid return of Turkey to normal democratic life ;

4. Concerned at the absence at the second part of its 32nd Session of the majority of the members of the Turkish delegation,

5. Instructs the President of the Assembly to seek information on their fate and to report to the Assembly ;

6. Instructs its Political Affairs Committee to follow developments in Turkey closely, in such a way as to ensure that no member of the Turkish delegation is prevented from participating in the Assembly's work ;

7. Decides to include this question on the agenda of the third part of its 32nd Session in January 1981.

1. *Assembly debate* on 30 September and 1 October 1980 (16th, 17th and 18th Sittings) (see Doc. 4621, report of the Political Affairs Committee).

Text adopted by the Assembly on 1 October 1980 (18th Sitting).

ASSEMBLÉE PARLEMENTAIRE DU CONSEIL DE L'EUROPE

TRENTE-DEUXIÈME SESSION ORDINAIRE

DIRECTIVE N° 392 (1980)[1]

relative aux membres de la délégation turque à l'Assemblée parlementaire

L'Assemblée,

1. Prenant acte du fait que, conformément à l'article 25.*b* du Statut du Conseil de l'Europe et sous réserve des dispositions du paragraphe *a* de cet article, le mandat des membres de la délégation turque à l'Assemblée parlementaire du Conseil de l'Europe, dont la composition a été notifiée par le Gouvernement turc le 21 avril 1980 et dont les pouvoirs ont été validés par l'Assemblée à l'ouverture de sa 32e Session ordinaire, ne pourra prendre fin avant le 11 mai 1981 ;

2. Constatant que la participation turque à l'Assemblée parlementaire se terminera à cette date à moins que de nouvelles élections n'interviennent entre-temps ;

3. Considérant que la continuation de la participation turque à l'Assemblée parlementaire, comme indiqué ci-dessus, sera un moyen important d'aider au retour rapide de la Turquie à une vie démocratique normale ;

4. Préoccupée par l'absence de la majorité des membres de la délégation turque à la deuxième partie de sa 32e Session,

5. Charge le Président de l'Assemblée de se renseigner sur leur sort et de faire rapport à l'Assemblée ;

6. Charge sa commission des questions politiques de suivre de près l'évolution de la situation en Turquie, de manière à veiller à ce qu'aucun des membres de la délégation turque ne soit empêché de participer aux travaux de l'Assemblée ;

7. Décide d'inscrire cette question à l'ordre du jour de la troisième partie de sa 32e Session en janvier 1981.

1. *Discussion par l'Assemblée* les 30 septembre et 1er octobre 1980 (16e, 17e et 18e séances) (voir Doc. 4621, rapport de la commission des questions politiques).

Texte adopté par l'Assemblée le 1er octobre 1980 (18e séance).

A. 1555 Strasbourg, 20th March 1967

Your Excellency,

Paragraph 1 of Rule 6 of the Assembly's Rules of Procedure requires that credentials of Representatives and their Substitutes to the Consultative Assembly of the Council of Europe shall be sent by Members on a form which shall be forwarded to them by the Secretary General and which should be returned to him not less than a week before the opening of the Session.

I should be grateful to Your Excellency if, as soon as possible, you would kindly let me have a copy of the form attached hereto, duly completed and signed. The opening date of the Nineteenth Ordinary Session of the Assembly has been fixed on 24th April 1967.

I remain
Your Excellency's obedient Servant,

for the Secretary General

G. SCHLOESSER
Clerk of the Assembly

Encls.

To all Foreign Ministers
of member countries of
the Council of Europe

ROYAL MINISTRY
OF FOREIGN AFFAIRS

Athens, 4th April 1967

In reply to your letter No. A/1555 of 20th March 1967 concerning the Greek Representatives and their Substitutes to the 19th Ordinary Session of the Consultative Assembly of the Council of Europe, I have the honour to inform you that the Greek Parliament will be represented at that Session by the Parliamentarians who took part in the 18th Session of that Assembly. We are obliged to extend the term of office of the present Greek Representatives, since our country is on the eve of elections and, most probably, the Greek Parliament will be dissolved at the time when the 19th Session of the Consultative Assembly of the Council of Europe opens.

We shall send you a copy of the form provided for under Rule 6 (1) of the Assembly's Rules of Procedure as soon as the new Greek Parliament has been elected and its Representatives to the Consultative Assembly of the Council of Europe have been duly appointed.

I remain Sir,
Your obedient Servant,

Under-Secretary of State for
Foreign Affairs

Ach. Yerocostopoulos

Mr. Peter Smithers,
Secretary General of
the Council of Europe,
STRASBOURG

Permanent Representative
of Greece to the
Council of Europe

Strasbourg, 17th April 1967

VERY URGENT

Sir,

With reference to your letter No. 1555 of 20/3/67 to the Greek Ministry of Foreign Affairs, I have the honour to enclose, duly completed, a form certifying the appointment of the members of the Greek Parliamentary Delegation to the First Part of the 19th Ordinary Session of the Consultative Assembly.

I remain, Sir,
Your obedient Servant,

(Signed) B. VITSAXIS
Ambassador

Mr. G. Schlösser,
Clerk of the Consultative Assembly
of the Council of Europe
STRASBOURG

Strasbourg, 23rd April

To His Excellency
The Minister of Foreign Affairs,
Athens.

Extremely concerned about recent events. I have the honour to request you to inform me whether the Greek Representatives to the Consultative Assembly of the Council of Europe as duly appointed for the 18th Session enjoy the privileges laid down under Article fifteen of the General Agreement on Privileges and Immunities (Council of Europe) ratified by Greece on 17th November 1953 and are in a position to carry out their terms of reference.

DE FREITAS
President of the Assembly

CONSULTATIVE ASSEMBLY

ORDER No. 256 (1967)[1]

on the general policy of the Council of Europe

The Assembly,

1. Deplores the suspension of constitutional law in Greece. As a member of the Council of Europe, Greece must remain loyal to the Statute of the Council of Europe, and especially its preamble;

2. Calls upon the Greek authorities to restore the constitutional regime and system of parliamentary democracy, and protests against all measures contrary to the European Convention on Human Rights;

3. Instructs the Bureau to enquire into the fate of the Greek Deputies who had been appointed members of the Assembly by the Greek Parliament.

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(1) Assembly Debates on 24th, 25th and 26th April 1967 (1st, 2nd and 3rd Sittings). See Doc. 2202 and Addendum, Report of the Political Committee. Text adopted by the Assembly on 26th April 1967 (4th Sitting).

Permanent Delegation of Greece
to the Council of Europe

No. 840 E/3 Strasbourg, 8th May 1967

Sir,

I am instructed by my Government to inform you as follows:

Greece is under no obligation to supply the information sought by the President of the Consultative Assembly since, there having been no Greek Representatives at the First Part of the 19th Session, there is no cause to apply Article 15 of the General Agreement on the Privileges and Immunities of the Council of Europe to the case in point.

Nevertheless, as a gesture of courtesy and for your unofficial information, the Greek Government requests you to note:

(1) that the former Members of Parliament, Mr. Constantin CALLIAS, Mr. Leon BOURNIAS, Mr. Jean ZIGHDIS, Mr. Apostole ANTONIOU and Mr. Constantin TRIKOUPIS are at liberty, having at no time been subject to any restriction whatsoever;

(2) that the former Member of Parliament, Mr. Anastase DROULIA is also at liberty, having never been subjected to any restriction. He was in Strasbourg in a private capacity during the last Session of the Consultative Assembly;

(3) that the former Member of Parliament Mr. Michel PAPACONSTANTINOU is provisionally under surveillance at his residence.

I remain, Sir,
Your obedient Servant,

(Signed) B. Vitsaxis
Ambassador

Mr. Peter Smithers,
Secretary General
of the Council of Europe,
STRASBOURG

"The term of office of Representatives thus appointed will date from the opening of the Ordinary Session following their appointment; it will expire at the opening of the next Ordinary Session or of a later Ordinary Session, except that, in the event of elections to their Parliaments having taken place, Members shall be entitled to make new appointments."

The members of the Greek Parliamentary Delegation to the 18th Session were entitled, in this capacity, to the advantages accorded under the provisions of Articles 13. 14 and 15 of the General Agreement on Privileges and Immunities of the Council of Europe, ratified by Greece on 17th November 1953. These Articles define the privileges and immunities conferred on Representatives to the Consultative Assembly.

Since the said privileges and immunities exist by virtue of an International Agreement from which no Contracting Party may derogate on its own authority, you will easily understand my concern and the desire of the Members of the Assembly to know what has become of their colleagues in the Greek Parliamentary Delegation to the 18th Session. which ended at 3 p.m. on 24th April.

I should consequently be grateful for any information you can give me concerning the following Representatives and Substitutes to the 18th Session, who are not mentioned in your letter of 8th May relating to the Representatives to the 19th Session:

MM. PAPASPYROU Demètre
RODOPOULOS Constantin
CALANTZACOS Aristide
CANELLOPOULOS Athanase
PAPALAZAROU Zissis
YEROCOSTOPOULOS Achille

I remain,
Your Excellency's obedient Servant,

GEOFFREY de FREITAS

Reports

Committee on Rules of Procedure and Immunities (2003)

Draft minutes on the status of parliamentarians; immunities and incompatibilities: towards a harmonisation of existing standards (2003)

Bucharest (Romania), 27 October 2003
Palace of Parliament

Opening Session

The session **opened** at 10.15.

Mr Holovaty, Chairman of the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly of the Council of Europe, welcomed all participants and gave the floor to Mr Valer Dorneanu, Speaker of the Chamber of Deputies of the Romanian Parliament.

Mr Dorneanu made a statement which is appended to this document.

Mr Holovaty expressed his thanks to Mr Valer Dorneanu, Speaker of the Chamber of Deputies of the Romanian Parliament, Mr Ion Neagu, Chairman of the Committee for Legal Affairs, Discipline and Immunities of the Chamber of Deputies, Mr Ionel Olteanu, Deputy in the Romanian Parliament, rapporteur on immunities of the Committee on Rules of Procedure and Immunities of the PACE, Mr Ghiorghi Prisacaru, Chairman of the Romanian Delegation to the PACE, for their valuable support in organising this Hearing.

He then presented the contribution of the Council of Europe to the democratisation process in Europe since its creation, an organisation based on the principles of pluralistic democracy, human rights and the rule of law.

In this context, he underlined that parliamentary immunity was not a theoretical approach, but a practically important one in order to assure an effective parliamentary democracy in Europe. He mentioned the case of ex-communist countries, with reference to the excessive control over the Parliaments. He referred in particular to the latest events in Azerbaijan, where a member of Parliament had been arrested immediately after the elections.

The two working themes of the Hearing approached the problem of the status of parliamentarians as well as the one of immunities and incompatibilities.
Mentioning the European regulations in this matter, he challenged the participants to focus on how the hearing could contribute to the harmonisation of the existing standards in all member States of the Council of Europe.

He invited the Romanian participants to share their experience regarding the newly revised Romanian Constitution which had updated the provisions regarding parliamentary immunities.

Mr Prisacaru welcomed the initiative of the Romanian delegation at the PACE and initiated by underlining that the hearing in Bucharest was meant as a confirmation to the constant efforts of Romania to adapt to the democratic standards, as well as its participation to the debates concerning the improvement of parliamentary activities at European and national level.

He informed participants of two recent major events in Romania: the anniversary of 10 years' membership of Romania in the Council of Europe and the democratic exercise represented by the adoption of the newly revised Constitution of Romania. This constitution contained the principles that made it compatible with the standards defended by the Council of Europe. Underlining that the process of adoption and promotion of democratic norms was a continuous one, he added that Romania too, had still to work in this field, within the legal frame, the implementation of legislation and the need for a change of mentalities.
He had noted, after exchanges of views with other colleagues, a constant concern for the image of the parliamentary institutions existed towards the public and the need for an improvement of the image of all democratic institutions was necessary.

Mr Prisacaru disagreed with the point of view of Emmanuel Todd presented in *"Après l'Empire"*[1], in which the author said that elites would rather hold the control over the evolution of the society, than leave it to those elected through legislative votes. He argued that there was rather a strong will from the voters in seeing that parliamentarians used their status in the public interest, and that they did not seek personal gains. In exercising their rights of freedom of speech, the immunities should protect parliamentarians from unjust judicial measures but not allow them to avoid the act of justice.

He also pointed out that the new Constitution of Romania established limits to the parliamentary immunity and that through a law adopted this year the incompatibilities with the status of parliamentarians had been specified, measures which he considered would have a positive impact on the image of the Parliament in the Romanian society.

Mr Prisacaru expressed his confidence in the success of the hearing that was meant to promote new and modern ideas regarding the status of the parliamentarians.

Theme 1: The status of parliamentarians

The Chairman, Mr Holovaty introduced the item.

The keynote Speaker, Mr Clerfayt, former Vice-President of the Parliamentary Assembly of the Council of Europe, underlined the need for a status or parliamentarians. It should allow them to carry out their electoral mandate which mainly consisted in making laws in the common interest and to control the other powers, mainly the executive. Therefore parliamentarians should be able to act – mainly speaking and voting - independently and without unjustified restrictions to their freedom of expression. They needed various protections against arrest and prosecution, against tentatives to influence and manipulate them. Basically, the status of the parliamentarians was aimed at setting guarantees for their mandate.

There were national differences in the status of parliamentarians. This was not astonishing, as in the course of the years these statuses were developed and improved. To the rights and protections of members were added obligations and codes of conduct were introduced. It would be useful to sort out these differences and establish a model on the basis of good practice.

The first issue to consider in this connection was the remuneration of parliamentarians to allow them to dedicate themselves entirely and independently to the fulfilment of their mandate. It varied at national level. In Belgium it was aligned with the remuneration of a magistrate in the State Council (i.e. the Administrative Court). This remuneration should be taxable. Moreover, parliamentarians were given the possibility to employ their own staff paid from the budget of the Parliament and they enjoyed various other advantages. In order to assure their financial independence, parliamentarians also needed to be granted a pension.

[1] Edited in 2002 by *Gallimard* Publishing House.

Mr Clerfayt then referred to the issue of the incompatibilities classified in two categories: those justified by the principle of separation of powers and the incompatibilities with certain private functions. The first category included the incompatibilities with the functions of members of the executive, the judicial functions and non-elective public functions. There were exceptions, for example, regarding the professors paid from the budget of State. The second category did not exclude the possibility in some cases for parliamentarians to keep their private professions. This made their professional reintegration and their contacts with social and economic problems easier. However, there were incompatibilities between the parliamentary mandate and activities in high finance and with activities as lawyers defending the State and public services, etc.

A further issue, he pointed out, relied on the transparency of the material situation of the parliamentarians and the obligation for parliamentarians to make public their assets or present interest declarations. In this connection, he mentioned that some recent legislation took into consideration limitations to electoral expenditure and the transparency of the funds of the political parties. He recalled that about three years ago Mrs Stepova had presented to the Parliamentary Assembly a comprehensive report on these issues.

The discussions of the second part of the present hearing would focus on the immunities of parliamentarians which were a main element of the status of parliamentarians. They comprised the problems of non-liability or freedom of expression and the inviolability or the freedom of movement, except for the cases when the Parliament decided on lifting the immunity. This was important since it protected the independence of parliamentarians. Therefore, the harmonisation of standards was highly needed. Still, one had to take into consideration limitations to the freedom of expression in the case of racism and xenophobia as stipulated in the reports of Mr Mc Namara and Ms Feric-Vac adopted by Parliamentary Assembly of the Council of Europe in September 2003 as well as in the case of defamation or abusive use of parliamentary functions.

A further item to be raised was the protection of parliamentarians against manipulations by means of provisions regarding "parliamentary lobbying". Finally, provisions should be foreseen in the status of parliamentarians concerning the end of the parliamentary mandate. This was normally the consequence of the dissolution of parliament and the holding of new elections. Furthermore, the dismissal and exclusion of a member could put an end to the parliamentary mandate. However, these should be exceptional measures and be subject to precise conditions.

In the absence of Mr Rothley, member of the European Parliament and rapporteur for the status of its members, Mr Clerfayt gave general information on this issue. He said that the EU-Council of Ministers had not yet approved the European Parliament's proposals of June 2003.

Mr Holovaty thanked Mr Clerfayt for his statement and gave the floor to the next speaker Mr Dimitri Constas, Professor, Member of the Venice Commission (European Commission for Democracy through Law).

Mr Constas, in his quality of member of the Venice Commission, said that the Commission had worked on the issue of parliamentary immunity twice: in a report of 1996 on the regime of parliamentary immunity and in a report of 2002 on the law on parliamentary immunity in Moldova. The report of 1996 underlined that the freedom of expression of parliamentarians (non-liability) was fairly uniformly understood and was applied in member States of the Council of Europe. Except in cases of racist utterances by members, non-liability was not substantially debated or challenged.

The report of 1996 showed the tendency in certain Council of Europe member countries to settle objective criteria for lifting parliamentary immunity. This trend was prompted by the

concern for stricter application of the principles of the rule of law and by demands for safeguarding fundamental freedoms.

The Venice Commission's report on the law on parliamentary immunity in Moldova pointed, inter alia, to:

- the very strong position of the individual member of parliament;
- the large number of legal notions and concepts which were neither defined nor determined in the law;
- the lacking distinction between immunity in criminal and civil matters;
- the possibility for a single member of parliament to initiate legislation without the need for support by other members;
- the lack of precise criteria for determining which types of conviction and of deliberate offence could justify the withdrawal of the parliamentary mandate.

Mr Constas considered that both reports of the Venice Commission could offer some guidelines for making parliamentary immunity more effective and more balanced.
(N.B. the full statement by Mr Constas is reproduced in Appendix III)

Mr Holovaty thanked Mr Constas and gave the floor to Mr Mihai Constantinescu, Professor, Counsellor to the Presidency of Romania.

Mr Constantinescu said that the status of parliamentarians was rather uniformly approached because of the representative character of the mandate. This gave the parliamentary status the characteristics of a public function. According to his opinion, there were more resemblances than differences in the status of parliamentarians.

The status was generally defined as comprising the rights, freedoms and duties involved by the exercise of the mandate. These rights and freedoms of parliamentarians had both political and patrimonial bases. Political rights and freedoms were fundamental in terms of parliamentary initiative, freedom of expression, the right of control of the executive, the rights of voting and being elected. Patrimonial rights were important in order to assure the independence of the parliamentarians.

He also referred to some of the obligations parliamentarians had: being member of standing committee(s), attending the activities of the Parliament, respecting the rules and procedures of the status of members, making public their assets declaration and keeping in touch with the voters in order to assume an assistance role in society.

Mr Holovaty pointed to the national differences in the views expressed before and opened the discussion.

Mr Manzella remarked that the problems regarding the status of the parliamentarians were interlinked. He agreed with Professor Constantinescu' s thesis on the representative mandate as defining the relation between parliamentarians and constituents. He also agreed with Mr Clerfayt's point of view regarding the public anti-parliamentarian feelings in all States. He considered that this was due to the fact that the Parliament's activity was not well known because of lack of objective criteria of evaluation. Therefore, it was necessary to set some objective parameters of evaluation and shift the focus from the rights of the parliamentarian to the rights of the Parliament.

Further, he stressed the necessity of taking into consideration the principle of subsidiarity in the case of standard harmonisation between the different national Parliaments in Europe.
In his opinion, the Italian legislation could give some useful solutions to the problem of incompatibilities. He mentioned the cases of incompatibility of parliamentarians with the activity of lawyers and professors. The latter were not allowed to each at university as long as they were parliamentarians.

Mr Höfer pointed to the problem of standard harmonisation and asked participants to give it special attention.

Mr Vis asked Professor Constantinescu's opinion on any limitations to members' rights of information.

Mr Cekoulis said that the right of information represented one of the most important possibilities of control for parliamentarians. He asked the Romanian participants to speak about the experience of Romania regarding parliamentary control over the intelligence services and the military.

Mr Constantinescu remarked that his approach to the problem was a general and not a detailed one. He made clear that he spoke about the status of parliamentarians and not the statute of the Parliament. Referring to the right of information of parliamentarians, he mentioned that this was a compulsory constitutional right on which the entire legislative activity depended on, but difficulties arose when put into practice.

Individual parliamentarians in Romania did not have the right of information regarding intelligence services and the military for security reasons, but there was a special parliamentary committee whose members had the right to obtain such information which, however, had to remain secret. Moreover, the right of criticizing completed the right of information in the context of parliamentary control. In conclusion, secrets could not be kept away from Parliament.

Mr Holovaty said that concerning the right of control and the freedom of expression there was no uniform approach in Council of Europe member States. He remarked that in Eastern Europe there were some new democracies where the Parliaments were largely prevented from controlling the Executive. The highest executive tried to influence parliamentary elections and to control the candidates elected. In certain post-communist countries neither the opposition nor the majority, influenced by the executive, were ready to control the latter.

Mr Holovaty distinguished between the provisions of legislation and the de facto situation and insisted on a continuous evaluation of parliamentary democracy in these countries on the basis of the key principles of the Council of Europe.

Mr Iorgovan said that after 1989 the constitutional pattern in Europe had inspired the first constitutional project in Romania (1991/92). It applied to the activity of the Parliament, the parliamentary committees as well as to parliamentarians in committees. He underlined the independence of the Romanian Parliament and the effectiveness of control over the government. However, under the 1991 Constitution the Government was only politically responsible before the Parliament. The revised Constitution of 2003 enhanced the parliamentary control.

The Parliament also had the right of control of the intelligence services through a special joint committee composed of representatives of all parliamentary political parties in the Chamber of Deputies and the Senate. These representatives were under oath to keep the confidentiality of the information received.

He referred to the proposals under discussion in connection with the revision of the constitution that parliamentarians who had changed electoral parties should loose their mandate.

Further, he said that the revised Constitution included the obligation of parliamentarians to take oath at the beginning of their mandates.

Mr Constantinescu pointed out that most of the legislation in Romania had been initiated by parliamentarians and not by the government. The political opposition had been highly involved in the activity of the Parliament.

Mr Magnusson referred to the relation between parliamentarians and the constituents. He thought that this should be an equal and confidence-based one. The voters should defend the work of their parliamentarians. It was necessary to have limitations to parliamentary immunities and caution was necessary regarding the sources of financing of political parties. This would exclude subsequent pressures on parliamentarians. He also mentioned that the control of the Parliament over the Government was consecrated in the Swedish Constitution. The Riksdagen's Constitutional Committee had to control if acts of the Prime Minister and the Ministers respected the constitution.

Concerning incompatibilities, **Mr Magnusson** said that in Sweden the public defender was a member of parliament.

Mr Manzella considered it necessary to focus on the rights of parliamentarians according to the position of the Parliament in the constitutional system. The status of members derived from the constitutional articles relating to the parliament.

In Italy, parliamentarians did not have a general right of information concerning activities of the secret services. The control of the work of security and secret services was the responsibility of a joint parliamentary committee of both chambers of parliament.

He recommended that the Council of Europe should improve the status of parliaments within the constitutional system.

Mr Holovaty agreed that the Parliamentary Assembly of the Council of Europe should find a way to improve the status of parliamentarians legitimately elected, particularly in the new democracies.

The sitting **adjourned** at 12.45.
The hearing **resumed** at 2.30.

Theme 2: Immunities and Incompatibilities

Mr Iorgovan, Professor, member of the Romanian Senate, chaired the session, and initiated the theme by giving the floor to Mr Nicolae Popa, President of the Romanian Constitutional Court.

Mr Popa presented the recent revision of the Romanian Constitution, with a special focus on the provisions regarding the freedom of expression of parliamentarians. According to the revised Constitution, parliamentarians could not be prosecuted for their political opinions expressed during their mandate.

The Constitutional Court of Romania needed to define the political acts that were subject to immunity. It could simply be limited to the exercise of the mandate or in a broader assertion to include the declarations directly linked to the exercise of the mandate, irrespective of the place where they were expressed.

The Constitutional Court of Romania had pronounced itself on several cases related to issues on immunity and lifting of immunity. In February 2003, in a decision of the Court it was stated that the acts committed by a parliamentarian being tried at the moment of beginning of his mandate automatically fell under the jurisdiction of the Supreme Court of Justice (named the High Court of Cassation and Justice, after the revision of the Constitution). He said that in earlier decisions pronounced by the Constitutional Court only the facts committed during the parliamentary mandate, were under the jurisdiction of the

Supreme Court of Justice. The Constitution did not distinguish between facts committed before and during the exercise of mandate. These solutions had been subject to discussions inside the Constitutional Court.

Mr Popa presented other cases solved by the Constitutional Court and related to the constitutional character of several provisions in the law on ministerial responsibility, mainly on the possibility of comparing the ministerial mandate with the parliamentary one. He stressed that the mandate of parliamentarians was simply different by its purpose, while the criteria of protection for members of the executive was distinct, even if they also were individually responsible. Moreover, the Government was politically responsible before the Parliament. He stated that the ministers were responsible for their acts, and that they could be tried, with the approval of the President of Romania.

The Constitutional Court had also debated on the necessity of taking into account the lifting of the immunity in the case when a parliamentarian was assigned to a successive new mandate. It was considered as necessary to have a new waiver procedure of the immunity.

Mr Popa concluded that there should be a balanced relation between the extension and the restrictions of immunity.

Mr Iorgovan referred to the problem Mr Popa had mentioned to and which had not been dealt with by the revised Romanian Constitution – the case of parliamentarians, who could also be members of Government. He asked whether the protection of parliamentarians could be fully assured in such a matter. This should be an important theme of reflection he said.

Mr Manzella questioned the signification of a “parliamentary act”. It could not be limited to the activity inside the Parliament. It had to be extended to the activity outside the Parliament, too. He presented some cases solved by the Italian Constitutional Court.
Since the consent for lifting the immunity of a parliamentarian was given by the parliamentary majority, he wondered if such a resolution could be judged by the Constitutional Court.

Mr Iorgovan mentioned the extremely valuable discussions that the Romanian officials had recently had with members of the Italian Constitutional Court. He underlined that the constitutional democracy could not be effective without a constitutional justice.

Mr Iorgovan said that both for the Constitution of 1991/92 and its reform, the advice of the Venice Commission of the Council of Europe had been sought.

Mr Popa said that Romania shared the views of the Italian Constitutional Court. Parliamentarians, as any other citizens, had the right to protection of their dignity. Still, the fact was that parliamentarians were in the public eye. Referring to freedom of expression, he agreed with Professor Manzella's point of view.

Mr Maissen added that parliamentarians should have the possibility to express their opinion during free debates in parliament with the exception of certain national security issues. The freedom of expression of parliamentarians was in the interest of the citizens and did not represent an extra right in relation to the rights of any other citizen. Members should avoid libels and insults of third persons when speaking in the exercise of their functions. Parliamentary immunity should be lifted by the parliament and not by the courts.

It was necessary, he said, to define more clearly the signification of defamation and the body authorized to lift parliamentary immunity. According to the principle of the separation of powers, it should fall under the responsibility of the Parliament only.

Mr Höfer agreed with Mr Maissen. He also referred to the experience of the Constitutional Court in Germany concerning the extension of the immunity to the parliamentary employees as well as to the documents and materials being part of a parliamentarians' work.

Mr Iorgovan mentioned the case of Romania, where the public opinion was rather favourable to limitations of the immunity.

The keynote Speaker, **Mr Martynenko**, Professor of Comparative Law, former judge of the Constitutional Court of Ukraine, presented three issues related to the status of parliamentarians: the independence of the parliamentary mandate, the incompatibilities with the function of deputy and the parliamentary immunities of mandate from the point of view of the Constitution of Ukraine and the case-law of the Constitutional Court of Ukraine. He referred to the Soviet heritage of imperative mandate and quasi-absolute immunities of the parliamentarians. This heritage was most important in the first stage of the independence of post Soviet States. When adapting the status of parliamentarians to European standards, these States overcame the Soviet inheritance with differing success.

He said that regarding the status of parliamentarians, the Ukrainian Constitution had only worked a compromise with respect to the situation under Soviet legislation. As it had not emancipated it from the Soviet heritage, there was a strong wish to modify it.
As the text of the constitution regarding the status of parliamentarians differed from that of the existing legislation on this matter, the Constitutional Court had frequently been appealed to. Half of the 25 cases it had to deal with were on parliamentary immunity and incompatibilities. However, the Court could not find a solution to all the problems raised as in some instance either constitutional or legislative changes would be necessary.

But neither the Constitution nor the legislation and the Rules of Procedure of the Ukrainian Parliament explicitly prohibited the imperative mandate and pressures on parliamentarians both from political party leaders or other interest groups.

Moreover, the Constitution laid down in Article 84, the rule of individual voting. In July 1998, the Constitutional Court by means of an official interpretation of this article stated that a deputy could not vote for another.

Mr Martynenko considered that the legislation should provide for proxy votes if a member was unable to be present in a sitting of parliament for objective reasons (sickness, accident, military service, participation in the work of international parliamentary assemblies).

The second issue he approached regarded the incompatibilities with the parliamentary mandate. Contrary to the texts of the Soviet era, the Ukrainian Constitution fixed in Article 78 the professional and constant nature of the parliamentary mandate. However, its exact meaning was not clearly defined neither in the Ukrainian Constitution nor in the legislation or the Rules of Procedure, and this had led to several suits. In a decision of 13 May 1997 the Constitutional Court stated that the incompatibility of a function with a parliamentary mandate had no retroactive effect. The problem arising from such incompatibility had to be solved by means of an anticipated ending of the parliamentary mandate. Furthermore, the Court considered that the legislator should define the contents of the following words of Article 78 "the incompatibility of other aspects of the parliamentarian's activities with his mandate".

In a further judgement of 4 July 2002 the Constitutional Court stated that a parliamentarian had no right to be a member of the Government nor Head of a central body of the executive. In case of violation of these incompatibilities, the mandate of the parliamentarian ceased before its normal end. The Constitutional Court decided on 6 July 1999 that there was an incompatibility between a parliamentary mandate and the office of mayor of a local authority.

Finally, he referred to parliamentary immunities as laid down in the Constitution of 1996 and which had provoked a sharp discussion in the Ukrainian society. However, the principle of parliamentary non-liability contained in article 80 of the Constitution was uncontested. According to this principle parliamentarians were 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. The Ukrainian Constitution allowed only two exceptions from this principle: offence and libel. The principle of parliamentary inviolability had given rise to many problems. The Constitution of 1996 protected members of parliament from detention, arrest and from measures in criminal proceedings prior to the referral of the case to the judge for examination of the merits.

Before October 1999, the law enforcement bodies of the Ukrainian State frequently interpreted the provisions regarding parliamentary inviolability as prohibiting any kind of prosecution of a deputy. In a judgement of 27 October 1999, the Constitutional Court made a distinction between penal responsibility and prosecution once penal responsibility had been established by a final judgement.

The consent of the Ukrainian Parliament for the prosecution of a parliamentarian may be given by it even before the presentation to the deputy of the indictment. In a judgement of 26 June 2003 the Constitutional Court gave interpretations of all main concepts linked with the inviolability of members. In particular the Court defined the concept of inviolability itself and of detention and arrest. The consent of parliament to the detention or arrest of a member had to be given by the absolute majority of parliament in its composition according to the Ukrainian Constitution. According to Article 82 of the Constitution, the details of the consent procedure should have been laid down in a "law on the Procedure of Parliament". However, such a law had not yet been adopted.
The absence of a strict legal definition of the limits of the inviolability of a member had become the subject of political discussions in Ukraine. The Ukrainian people, in a referendum held in 2000, supported by an absolute majority of the votes cast the suppression in the Constitution of the provision on parliamentary inviolability. Since then a series of bills to abolish that article were tabled. When the Constitutional Court examined their conformity with articles 157 and 158 of the Constitution, it expressed itself against the elimination of inviolability. The Court supported the bill presented by the parliament (Rada), which proposed to word henceforth Article 82 of the Constitution as follows: "The deputy of the people may not without the consent of the Verkhovna Rada, be detained or arrested until the date where the judgement concerning his accusation has become final". If this bill was adopted by the Parliament, the parliamentary inviolability would be at the same level as that of judges which never gave rise to controversies in the country.

In conclusion, the Ukrainian experience regarding parliamentary immunity was instructive. After having resolved the question of common standards for parliamentary immunity, the member States of the Council of Europe should give priority to their applications.

Mr Iorgovan thanked Mr Martynenko and gave the floor to the next speaker.

Mr Olteanu, rapporteur on immunities of the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly, said that there was a misperception of the activity of parliamentarians by the public. This was true in particular with respect to the rights and duties of parliamentarians. Only few citizens knew that the purpose of parliamentary immunity was to preserve the integrity of parliaments and to safeguard the independence and not the impunity of their members in exercising their office. In his opinion this was due to the lack of information. Moreover, because of different constitutional traditions, experiences and political cultures, the parliamentary immunity systems in European countries provided for different degrees of protection. The parliamentary privilege (non-liability) for words spoken or votes cast by a parliamentarian in the exercise of his functions offered an absolute protection to members in the United Kingdom, the European Parliament and the Parliamentary Assembly.

Referring to the parliamentary privileges, he considered that there should be a wider definition of the notion *"during the exercise of parliamentary mandate"* in terms of specific activities of parliamentarians and not only in terms of *"area".*

Mr Olteanu referred to the "Draft statute for members of the European Parliament" adopted in June 2003, where the parliamentary non-liability included initiatives taken by a member in the exercise of the mandate. It was up to the European Parliament to decide whether or not an initiative or words spoken complied with this principle.

Finally, Mr Olteanu referred to the inviolability of parliamentarians as a means to protect them against prosecutions that hided political motivation. This principle was important in new democracies where the independence of justice was still to be consolidated. Several new constitutions in European countries no longer explicitly guaranteed parliamentary inviolability but stipulated instead that members may not be prosecuted or detained without prior authorisation from the parliament. Furthermore, any criminal inquiries and proceedings against a member had to be suspended if parliament so requested.

In conclusion, Mr Olteanu affirmed that the harmonisation of standards represented a necessity. He considered that the draft statute for members of the European Parliament (of June 2003) was an appropriate basis for a "European concept" of parliamentary immunity.

With respect to incompatibilities, Mr Olteanu said that they aimed at ensuring the separation of powers and at guaranteeing members' independence with respect to the executive but also to the interests of the private sector. Most functions in the civil service and functions in the judiciary were incompatible with a parliamentary mandate. Activities in the private sector were often compatible with the parliamentary mandate. In some countries there were exceptions for lawyers', university professors and functions in "high finance"

Mr Iorgovan expressed his appreciation for Mr Olteanu's opinions and opened the discussions.

Mr Vis referred to the problem of freedom of expression and party discipline. He gave the example of a member of the Labour Party in the United Kingdom, who was excluded from the party for publicly having expressed his opinions on the war in Iraq.

Mr Magnusson considered that this issue should be approached on a case by case basis. He mentioned the experience of Sweden where it was up to the executive committee of a party to decide on the criteria of membership. It was necessary to make a distinction between the problem of parliamentary immunities and privileges and the problem of party membership. The immunity related to the capacity of the parliamentarians to carry out their duties and should not go beyond it. He also said that one should not mix the parliamentary immunity inside the Parliamentary Assembly of the Council of Europe with the parliamentary immunity inside national parliaments.

Mr Maissen distinguished between full-time and part-time parliamentarians. A characteristic of the latter was that they allowed their members to continue their profession. He considered that in this way they did not need to become parliamentarians for a lifetime and it was easier for them to be professionally reintegrated.
Still it was necessary to avoid conflicts of interest. He referred to the experience of Switzerland and the obligation of transparency of members' assets and declarations of financial interests. Parliamentarians had to make a public declaration on their situation which was accessible via Internet. Often journalists checked if the parliamentarians' declarations were correct.

Mr Clerfayt considered that one should not use the word "privileges" when referring to the mechanisms of parliamentary mandate protection. The harmonisation of immunities and the

incompatibilities of the parliamentarians was necessary, though difficult. The solution could be found after a detailed analysis.
He was in favour of the extension of the immunity for typical parliamentary activities accomplished outside the Parliament.
Referring to the problem of the functions of the parliament, he considered it useful to prepare a report on the rights of parliamentarians to control the executive.
In conclusion, he referred to the problem put forward by Mr Vis and said that the decision of a political group with regard to its members represented a private issue that had nothing to do with the issue of parliamentary immunities.

Mr Höfer questioned the access to information, and referred to the problem of the independence of parliamentarians in relation with the independence of the Parliament.

He said that the rights of a parliamentarian were more important than those of a political group he belonged to. He defined the immunity as a working tool.

It was necessary to identify the problems that could be solved inside the Parliament, without recourse to judicial proceedings and to enhance this possibility in the relations with the executive.

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* *

Mr Olteanu summing up, said that in order to assure the members of the parliaments the independence to exercise their mandate, certain national and international parliaments in Europe had issued general conditions on the *"Status of parliamentarians".*
This status had been improved throughout time and duties of parliamentarians were added to it as well as codes of parliamentary conduct. The main principles of the status were: the freedom and independence of the parliamentarians, the definition of immunity and their rights in case of criminal investigations or restrictions of their liberties, freedom of movement, incompatibilities, the right of parliamentarians to table motions or take other initiatives, freedom of vote and expression, the access to information held by Parliaments (with certain exceptions), the right to be remunerated, the obligation to declare any financial interests and many other issues that had been discussed throughout the present Hearing.

Referring to the immunities of the members of parliaments or their rights in case of criminal prosecution or restrictions of freedom, Mr Olteanu affirmed that this was a consecrated guarantee of democracies and did not represent impunity. Moreover, it had different ways of regulation that varied from one country to another. He then presented the main solutions found with respect to parliamentary non-liability and parliamentary inviolability.
The parliamentary incompatibilities were designed to assure the respect of the principle of separation of powers, to guarantee the parliamentary independence in relation with public powers and interests of the private sector. He also mentioned some cases of compatibility and incompatibility of the parliamentary mandate with public functions or functions within the private sector.

Mr Olteanu presented some guidelines to be taken into consideration in the case of lifting of immunity (inviolability), consisting of factors in favour or against the lifting of immunity (See Appendix IV). They could also be useful criteria for decisions by parliaments to authorise the detention of parliamentarians.

In his concluding words **Mr Holovaty** said that the hearing had shown how difficult it was to achieve a harmonisation concerning the status of parliamentarians in the Council of Europe member States, which was most desirable.
The Organisation was based on three principles: human rights, the rule of law and pluralistic democracy. The human rights were well defined legally and a European Court had been set

up to ensure their protection. A long list of legal instruments relating to the rule of law had been elaborated. However, no binding legal texts existed in the Council of Europe which defined the principles of pluralistic democracy, which included also the status of parliamentarians. The rule of law could not exist without immunity of judges, and likewise pluralistic democracy needed parliamentary immunity. The Council of Europe, and in particular its Assembly, would try to promote the elaboration of common standards in this respect.
Concerning the rights and duties of parliamentarians and their legal protection, immunities, the heritage of member States was different. This stemmed from different political culture, development of democratic institutions and legal provisions. Those differences existed also regarding incompatibilities.
It was to be noted that some elements of the status of parliamentarians were subject to rapid change. Efforts undertaken to modernise this status, and especially parliamentary immunities, were therefore to be welcomed.

Furthermore, the hearing also had showed the importance of improving mutual understanding between parliamentarians, their electorate and the media. The findings of the hearing would be discussed by the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly. The Committee would try to identify common approaches to reduce the existing differences in the Council of Europe' member States concerning the rights and duties of parliamentarians.

M. Holovaty suggested that the Committee should continue its work to define the minimum criteria for the protection of parliamentarians. Furthermore, the Committee could elaborate a report on the status of parliamentarians. Here he counted on the cooperation with the European Parliament and on the assistance of the experts at the present hearing, whom he thanked for their excellent contribution.

Finally, he warmly thanked the Romanian authorities and Mr Olteanu for having made the hearing a success.

The hearing **rose** at 17.35
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APPENDIX III

Statement by Professor CONSTAS,
Member of the Venice Commission

The Venice Commission has worked on the subject of parliamentary immunity and incompatibilities on different occasions. A report on the regime of the parliamentary immunity was adopted at its 27th meeting on 17-18 May 1996 (CDL-INF (1996) 7).

An opinion was also given on this topic in the case of such countries as Moldova (CDL-AD (2002) 15), adopted at its 52nd plenary session (Venice 18-19 October 2002). The same subject was treated in the framework of other opinions related to constitutional reforms in different countries, as, for example, in the case of Ukraine (CDL-Inf (2000) 11, 14 and CDL (2001) 51).

In the conclusions of its 1996 report on the regime of parliamentary immunity, the Venice Commission stressed, among other things, that:

1. On balance, the system established to protect parliamentarians' freedom of expression is fairly uniform in the various countries considered. Except in cases of racist utterances by members, this particular aspect of immunity is not substantially debated or challenged.

2. Parliamentary immunity continues to be an institution which assures members of their independence from other powers and their freedom of action and expression, although the relationship between the characteristics of the various powers has evolved considerably in the parliamentary democracies. It also protects parliamentarians from possible abuses by the majority.

3. The immunity must, and this is most important, not be such as to obstruct the course of justice.

4. The extent of the protection provided, largely depends on parliamentary practice but also on the role of public opinion and the development of attitudes. The role of the press, together with a certain ethical sense accordingly have a decisive effect on the application of the parliamentary immunity system.

5. Finally, in certain countries one can observe a tendency to regulate by law the conditions for lifting parliamentary immunity, or else an effort to define fixed, objective criteria as far as possible. This trend is prompted by concern for stricter application of the principles of rule of law and by the demands of safeguarding fundamental freedoms.

Some of these principles have been repeated in the opinion by Mr Grabenwarter on the law on parliamentary immunity in Moldova in 2002. This opinion was adopted by the Venice Commission at its 52nd session (18-19 October 2002).

As to the particular case of Moldova, the Rapporteur pointed out the following:
1. The unusually strong position of the individual Member of Parliament.

2. The rights of Members of Parliament to supervise the organs of the public administration of the State and the local communities, and also those of the private enterprises established in Article 21 of the Law, these rightly seemed to be too wide and problematic as regards the protection of official and professional secrets.

3. The Moldovan Law contained a large number of legal notions and concepts which were neither defined nor determined by the legislature.

4. The law did not expressly state what type of conviction and what type of deliberate offence would justify withdrawing the mandate.

5. The Law did not prescribe a period within which the Constitutional Court was to take a decision concerning the lifting of immunity of a Member of Parliament.

6. Furthermore, the law did not make any distinction between immunity in criminal matters and immunity in civil matters, which was a traditional feature in numerous member States of the Council of Europe.

7. A single Member of the Moldovan Parliament œuld exercise the right to initiate legislation without the support of other Members of Parliament.

8. The individual right of a Member of Parliament to participate in the work of committees could again prevent, and even paralyse the normal work of parliamentary committees.

9. Finally the right of individual supervision enjoyed by Members of Parliament extended not only to public bodies but also to enterprises governed by private law. This power could lead to the infringement of the provisions of Article 8 of the European Convention on Human Rights.

The conclusions of that report recommended that the following amendments to the Law under examination could be envisaged:

- a reform of the individual rights of Members of Parliament to facilitate the normal functioning of Parliament;
- an amendment of the provisions governing the withdrawal of the parliamentary mandate and parliamentary immunity;
- an amendment of the rights of supervision, especially as regards the right to supervise private enterprises, in order to ensure that business secrets, operating secrets and manufacturing secrets are protected; and
- finally, the use of more precise and defined legal notions and concepts, in order to ensure the certainty and stability of the law and also effective supervision by the competent judicial authorities.

I believe that these conclusions, although referring to the case of Moldova, have a general value and offer some useful guidelines for making parliamentary immunities and incompatibilities more effective and more balanced.

APPENDIX IV

Conclusions of the general rapporteur
M. Ionel OLTEANU (Romania, SOC)

A. Status of parliamentarians

1. Parliamentarians have received from their constituents a mandate to enact laws in the public interest and to supervise the other State powers, particularly the executive. So that they may discharge this mandate independently and without impediment, parliamentarians need certain guarantees.

2. Most national parliaments in Europe and the European Parliament[1] have therefore gathered together the general conditions governing the discharge of MPs' duties in a "statute for parliamentarians".

3. The statute has been perfected over the years, with obligations and ethical rules being added to the safeguards for parliamentarians.

4. The basic principles of this statute for parliamentarians are :

- the conditions of entry to parliamentary office, including its commencement and termination,
- parliamentarians are free and independent; they cannot be bound by instructions, nor may they receive an imperative mandate,
- definition of their immunities or rights in the event of prosecution or restrictions on their personal freedom; right to withhold their testimony,
- freedom of movement in their own country and, in the ambit of a European parliamentary mandate, in the European Union and/or Council of Europe member states,
- determination of incompatibilities with parliamentary office,
- members' right to take the classic initiatives such tabling bills for legislation, motions, and amendments, right to speak and vote, and to ask parliamentary questions,
- right to consult the files held by their parliament, excepting personal documents and voting counts,
- entitlement to a taxable monthly allowance (remuneration) often aligned to judges' salary,
- entitlement to material aids (office, telephone, etc.) and allocation of staff (assistant),
- right to reimbursement of expenses incurred in the performance of their mandate,
- obligation for members to declare their property and their financial interests ("elected representative's financial transparency"),
- arrangements to be made at the expiry of the parliamentary mandate (pension/retirement scheme/severance allowance),
- safeguards against covert manipulations by parliamentarians (regulation of lobbying).

B. Parliamentarians' immunities or protection in the event of prosecution or restrictions on their personal freedom

5. Parliamentary immunity is one of democratic government's age-old guarantees, but has evolved considerably through time.

[1] The European Parliament's proposals on conditions of office for members are still being examined by the Council of the European Union (for details, see European Parliament Resolution of 17 December 2003, Communiqué N° 40/2003 by the European Parliament's Information Directorate dated 18.12.2003, and the "Europe Daily Bulletin" of 18.12.2003, p. 11).

6. Immunity does not signify impunity; rather, it serves to safeguard the integrity of parliaments and to preserve the independence of their members in the performance of their mandate.

7. Given their traditions, political culture and political life, as well as the state of independence of the courts, the systems of parliamentary immunity are extremely varied and of differing importance in the European countries. In some new European democracies, a special situation regarding protection of parliamentarians has arisen as a consequence of the transitional period in their constitutional development.

8. Virtually all European countries grant parliamentary non-accountability or non-liability whereby a member cannot normally be sought out, detained or prosecuted for opinions expressed and votes cast in the discharge of their office; the degree of protection accorded them nevertheless varies greatly:

- some modern constitutions or statutory provisions no longer provide a shield for opinions expressed by parliamentarian that infringe the rights of third parties; however, the parliamentarian cannot be prosecuted except upon the authorisation of his parliament;

- in other countries it is possible to subject a parliamentarian who offends against the rights of third parties to disciplinary measures.[2]

9. In this context, the participants noted the Parliamentary Assembly's efforts to outlaw racist and xenophobic utterances in politicians' speeches.

10. A broader construction is henceforth placed by some parliaments on the concept "in the performance of their mandate" to allow for the increased discharge of functions by parliamentary delegations away from the seat of the parliament.

11. Concerning parliamentary inviolability (protection of parliamentarians in respect of acts extraneous to typical parliamentary business but linked with their political functions), and the possibility of waiving this immunity, there are more and more countries where inviolability is no longer expressly conferred. On the other hand, the relevant legal texts nearly always prescribe:

- that any limitation to a parliamentarian's personal freedom requires the prior consent of the parliament concerned, unless the member is caught red-handed;
- that an investigative or criminal procedure instituted against a representative shall be suspended at the request of the parliament concerned.

12. It has been observed that in the new democracies in the initial phase of constitutional development, provision for immunities is very substantial, particularly when the independence of the justice apparatus is still being consolidated.

13. Several parliaments have made efforts to settle by means of legal provisions the requirements for waiving parliamentary inviolability, with the aim of laying down the most objective criteria possible. Certain European parliamentary institutions have done likewise. Guidelines to be applied in deciding for or against the lifting of inviolability are appended. These could also be helpful in cases where parliaments are called upon to authorise restriction of a member's personal freedom.

14. The participants in the hearing drew attention to the importance of maintaining the presumption of the parliamentarian's innocence at every stage of waiving immunity.

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[2] Note that two judgments delivered by the European Court of Human Rights on 17 December 2002 (case of A. v. United Kingdom, Application N35373/97) and 30 January 2003 (case of Cordova v. Italy, Application N° 45649/99) make clarifications on the rules of parliamentary privilege. The Section 4 of the Court decided on 27 November 2003 that Application N° 62902/00 in the case of M. and S. Zollmann v. United Kingdom, also concerning parliamentary non-liability, was inadmissible.

15. Lastly, the participants stressed the need to guard against any over-protectiveness towards parliamentarians detracting from other rights or values to be upheld in a democracy.

C. Parliamentary incompatibilities

16. These are intended to compel respect for the principle of separation of powers and to guarantee parliamentarians' independence vis-à-vis the public authorities and private-sector interests.

17. Certain public offices and justice department positions are incompatible with the parliamentary mandate (Head of State, non-elected public appointments, ombudsmanship, judicial office, state audit functions, and duties with the National Bank, in an international organisation or in a state-run enterprise).

18. Private-sector positions are often compatible with a parliamentary mandate. Owing to instances of clashes between high finance and politicians, some such positions have been declared incompatible; parliamentarians may come under a restriction on engaging in the lawyer's profession.
In one European country, parliamentarians who are university lecturers cannot deliver lectures while in office.

Appendix

Pointers for interpreting the concept of parliamentary inviolability[3]

1. Factors that militate in favour of maintaining immunity (inviolability):

- non-compliance with the procedures governing immunities (inadmissibility of the request);

- manifest lack of foundation of the charges laid against the member; inaccuracies and unacceptable forms in the request to waive immunity; ascertainment of the mere existence of presumptions;

- political nature of the acts designated as criminal in the request to waive immunity (the facts reported are the unforeseen outcome of a political action or of an offence whose political motives are plain);

- intent to wrongfully prosecute the parliamentarian and to endanger his/her freedom and independence in the execution of the mandate.

2. Factors that militate in favour of waiving immunity (inviolability)

- the seriousness, sincerity and fairness of the request for waiver, ie the request is admissible and the facts reported do not *prima facie* prompt a conclusion that the action is founded on evidence of a fanciful, improper, prohibited and arbitrary nature;

- the gravity of the acts with which the member is charged;

- the need to avoid sanctifying parliamentarians' immunity for offences committed by them;

- safeguarding the good repute of parliament in this matter; public feeling should be consulted so that parliamentary order may be preserved,

- the need to avoid intentionally raising impediments to the action of justice and the proper functioning of democracy.

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Of course, as the final consideration, the elements in favour of waiving or maintaining immunity must be weighed in order to preserve the independence of parliament while at the same time endeavouring to end abuses of immunity.

[3] Some Member States do not recognise this type of immunity. In others, parliamentary inviolability can also cover civil proceedings.

AS/Pro (2002) 11
English only
24 July 2002
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COMMITTEE ON RULES OF PROCEDURE AND IMMUNITIES

Information document on Parliamentary Immunities and Privileges (2002)

Speech by Sir Alan Haselhurst, Deputy Speaker,
House of Commons, United Kingdom, at the Conference
of Speakers and Presidents of European Parliamentary Assemblies (Zagreb, 9-11 May 2002)

and

Decision of the European Court of Human Rights
on the admissibility of Application N° 35373/97
by A. against United Kingdom

PARLIAMENTARY IMMUNITIES AND PRIVILEGES: Case A. v. UNITED KINGDOM, pending before the European Court of Human Rights

I am grateful to you, Mr President, for allowing me to raise an issue which is not on the formal agenda. I will do so as briefly as I can.

When speaking in parliamentary debates, members of both Houses of the United Kingdom Parliament enjoy the privilege of freedom of speech. That means that they cannot be prosecuted or be sued for libel for any remarks made in the course of parliamentary proceedings. I am sure that most, if not all, of you enjoy comparable immunity. For those of you who have written constitutions, the immunity is no doubt laid down in the Constitution. The United Kingdom, as is well known, does not have a written constitution. But we do have the Bill of Rights of 1689 – a law passed at the time when Parliament finally established its constitutional independence from the Monarch. This states clearly that "the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

We were therefore very concerned by a preliminary judgement delivered last week by the European Court of Human Rights. As the case may also have implications for your parliamentary freedoms, my Speaker asked me to draw it to your attention and seek your support when the case comes up for its main hearing. The Clerk of the House of Commons is also writing to his fellow Secretaries-General about the matter.

The case is now called A v. the UK and the basic facts are these. In 1996 a Member of Parliament initiated a short debate about municipal housing policy, and in particular the problem of disruptive and unruly tenants who make life a misery for other tenants – a phenomenon he called the "neighbours from hell" problem. To illustrate the problem, he referred several times to a particular tenant in a housing scheme in his constituency, identifying her by name and address and describing her alleged anti-social behaviour. He

also issued a press release to several newspapers to coincide with the debate, which contained much the same information.

As a result, the lady in question was the subject of a great deal of unfavourable publicity, both nationally and locally. She claimed to have received hate mail and to have been threatened and abused; and she eventually had to be re-housed in another locality. She did not attempt to take action against the Member of Parliament in our national courts, even though he might have been vulnerable to an action on account of his press release, which does not enjoy the same absolute privilege as his speech in the House. Instead, with the support of a human rights pressure group, she took her case straight to the European Court of Human Rights in Strasbourg.

You may well consider that the actions of the Member of Parliament in this case were inconsiderate and perhaps unfair. But our main concern has been to protect the principle that freedom of speech in Parliament is absolute. As our procedural text book, Erskine May, says "a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character of individuals". The House itself may, and occasionally does, discipline Members for flagrant misuse of the privilege. But it is not for "any court or place out of Parliament" to question how the privilege is used.

So the core of the Government's submission to the Court of Human Rights was that the lady's complaint was inadmissible because a person whose reputation was damaged by a parliamentary speech had no actionable case in law which could form the basis of a complaint under Article 6 of the Human Rights Convention, relating to the right to a fair trial. We were pleased to have the valuable support of the Dutch, Irish and Italian Parliaments in making this submission to the Court.

I will not go into the full details of the Court's judgement. We have a few copies of the English version here for those of you who are interested. It is enough to say that the Court found against the UK on this central issue of admissibility. It decided unanimously that at the next stage of the hearing, the UK Government's objection concerning the applicability of Article 6 of the Convention should be linked to the hearing on the merits of the case. The consequences of this decision are difficult to assess precisely. But if the exercise of freedom of speech can be subjected to judicial scrutiny by reference to the facts of a particular case, whatever our respective constitutions may say, parliamentary immunity is no longer absolute. Indeed the Court may have opened up the possibility of applying the European law concept of "proportionality" to parliamentary immunity: in other words, asking whether the general benefits of freedom of speech are proportionate to the harm alleged to have been suffered by an individual as a result of a Member of Parliament speaking freely in a particular debate.

If the Court maintains this line at the second stage of the hearing, it could have serious consequences for the parliaments of all states who are signatories to the Convention. And these consequences may not be limited to the Court of Human Rights in Strasbourg. National courts now frequently take their lead from Strasbourg case law; and so they might take this case as a precedent and start applying similar principles when judging domestic cases affecting parliamentary immunities.

At the earlier stage, there were written third-party interventions from the Governments of Ireland, Italy and the Netherlands. We understand it is open to other countries to intervene at the next stage. The deadline for submissions is 24th June 2002. I hope that colleagues will take notice of this case. If you conclude that the possible long-term consequences of an adverse ruling are as serious as I have suggested, I hope that you will take appropriate steps to make your views known to the Court of Human Rights before the next stage of the hearing.

Thank you Mr President.

Report on the Challenge of credentials of national delegations in the course of an ordinary session (1996)

Doc. 7481

9 February 1996

REPORT

Rapporteurs: Mr CUMMINGS, United Kingdom, Socialist Group and Sir Anthony DURANT, United Kingdom, European Democratic Group

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Summary

At present the Assembly's Rules of Procedure do not provide explicitly for the case when credentials of a national delegation are challenged in the course of an ordinary session (parliamentary year). To remedy this, the report proposes to add to Rule 6 of the Assembly's Rules of Procedure by allowing, under certain conditions, the annulment of the Assembly's ratification. The new provisions also deal with the consequences of such annulment.

I. Draft resolution

The Assembly notes that its Rules of Procedure do not provide explicitly for the re-examination of ratified credentials of a national delegation in the course of an ordinary session (parliamentary year).

It considers that it should be able to challenge ratified credentials when urgent action is deemed necessary.

The Assembly therefore decides to insert in Rule 6, after paragraph 6, the following new paragraphs:

"7. Ratified credentials may be reconsidered in the course of the same ordinary session if a motion for a resolution has been tabled with a view to annulling the ratification. Such a motion must state the reasons and shall be based:

_ on a serious violation of the basic principles of the Council of Europe mentioned in Article 3 and the Preamble of the Statute;

_ or on paragraph 9 of Order No. 508 (1995).See footnote 2

The motion must be tabled by at least two political groups and two national delegations and be distributed at least two weeks before the opening of a part-session.

8. The motion shall be referred to the Political Affairs Committee for report and to the Committee on Legal Affairs and Human Rights and the Committee on Rules of Procedure for opinion. The report including a draft text shall be submitted to the Assembly or the Standing Committee, if necessary under urgent procedure.

9. The draft text shall, if appropriate, justify annulling the ratification of credentials of a delegation and submit proposals with respect to the consequences such as:

_ depriving the members of the delegation concerned of tabling official documents in the sense of Rule 23 of the Rules of Procedure, taking on duties and voting in the Assembly and its bodies, while maintaining those members' rights to attend and to speak at Assembly part-sessions and meetings of its bodies;

_ or depriving these members of the exercise of the full rights of participation in the activities of the Assembly and its bodies.

10. Members of the delegation concerned shall not vote on any request to annul the Assembly's ratification of their credentials."

II. Explanatory memorandum by Mr CUMMINGS and Sir Anthony DURANT

A. Introduction

On 27 April 1995 Mr Hardy and other members tabled a motion for an order (Doc. 7298) worded as follows:

"The Assembly, considers that it should have the capacity to withdraw the credentials of a delegation when urgent action is deemed necessary".

This motion was referred to the Committee on Rules of Procedure for report (Reference No. 2008).

This report will summarise the current situation with respect to the possibilities of challenging credentials in the course of a session and submit proposals for a rule change and the modalities of its implementation.

B. Current situation regarding the challenge of credentials

i. Statutory provisions and Assembly Rules of Procedure

Under Article 25 of the Statute "the Consultative [Parliamentary] Assembly shall consist of representatives of each member ...". Article 26 specifies the number of representatives to which a member shall be entitled. This right of representation is reinforced by Articles 1.*b* and 3 according to which each member "must ... collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I [of the Statute]", *inter alia* "through the organs of the Council", that is the Committee of Ministers and the Parliamentary Assembly.

From the side of the Committee of Ministers the right of representation may under the Statute be restricted (suspended or withdrawn) if the conditions and modalities of Articles 8 or 9 are fulfilled. According to Articles 23.*a* and 15.*a* of the Statute, the Assembly may propose to the Committee of Ministers to take action under Articles 8 or 9 of the Statute. Under Statutory Resolution (51) 30A the Committee of Ministers committed itself to consult the Assembly before taking a decision under Article 8 of the Statute.See footnote 3

Article 28 (paragraphs *a* and *c*.iv) of the Statute also empowers the Assembly to adopt its Rules of Procedure which shall determine *inter alia* "the time and manner in which the names of Representatives and their Substitutes shall be notified". It is on this

basis that the Assembly introduced since its beginning a comprehensive procedure for examining credentials of members, the details of which are to be found in Rule 6 of the Rules of Procedure.

ii. Timing for the challenge of credentials

Rule 6, paragraph 5.*a* of the Rules specifies that the credentials which give rise to an objection or are contested shall be referred without debate to the Committee on Rules of Procedure. But the Rules do not say when the credentials may be contested.

It is the Assembly's practice that this is done at the moment of the presentation of credentials. Rule 6.3 requires that "at the beginning of each ordinary session these credentials shall be submitted to the Assembly by the provisional President for ratification".

Under the Statute (Article 25 paragraphs *a* and *b*) and the Rules of Procedure (Rule 6.4) there are a limited number of cases where credentials may be presented and ratified/contested in the course of a session:

_ when a new delegation is appointed as a result of national parliamentary elections;

_ when new members are appointed after seats have become vacant through death or resignation; when, under Article 25.*b* of the Statute,See footnote 4 the Assembly has agreed that a national delegation deprives a member (members) of his/her (their) position(s) during a session and this vacancy has been filled accordingly;

_ when following accession to the Council of Europe a new member state has appointed its delegation to the Assembly.

In addition, the Assembly developed for major political crises (like those in Greece _ period of 1967-69 _ and Turkey 1980-83) a special formula of anticipated contestation of credentials in the course of a session.

In paragraph 8 of Recommendation 547 (1969) the formula is as follows:

"[The Assembly] decides not to recognise the credentials of any Greek delegate purporting to represent the Greek Parliament until such time as the Assembly is satisfied that freedom of expression is restored and a free and representative parliament is elected in Greece".

Paragraph 12 of Resolution 803 (1983) reads as follows:See footnote 5

"[The Assembly] declares that, under present conditions and on the basis of information now available, the parliament which will be elected in Turkey on 6 November will not be able to be considered as representing the Turkish people in a democratic manner, and could not therefore validly constitute a delegation to participate in the work of the Parliamentary Assembly of the Council of Europe."

However, such a contestation would not have immediate effects but would apply only after the presentation of (new) credentials for ratification.

In conclusion there is nothing in the Rules which provides for a re-examination of ratified credentials in the course of a session. Moreover, this has never happened. But the Rules also do not explicitly prevent the Assembly from doing so. In practice the ratification remains therefore valid until the end of the parliamentary year.

iii. Annulment of the Assembly's ratification of credentials

Any parliamentary assembly should be able to regulate its own membership and to take appropriate action in case of urgency. Such urgent action may particularly be deemed necessary if the situation in the country of a parliamentary delegation whose credentials have

been ratified, has fundamentally changed since the opening of the ordinary session and constitutes a serious violation of the basic principles of the Council of Europe's Statute which are also safeguarded through Rule 6, paragraph 5, of the Rules.See footnote 6

Because of its far-reaching consequences such a measure by the Assembly should have a proper legal basis and be compatible with the Statute and the Rules of Procedure.

As already indicated, participation in the Parliamentary Assembly is governed by Articles 25 and 26 of the Statute. Except the three cases mentioned under indents 1 to 3 of paragraph 8 above, Article 25.*a* of the Statute provides that the term of office of a

member "will expire at the opening of the next ordinary session or of a later ordinary session". In the Assembly's practice See footnote 7 "ordinary session" is equivalent to "parliamentary year". In the last years this practice has also constantly been confirmed, when national delegations envisaged to replace members in the course of the parliamentary year.

This could raise a problem if credentials which were ratified for the whole parliamentary year were suspended/"withdrawn" before the end of the latter. An additional problem stems from the fact that the Assembly is not the competent authority (see Rule 6.1 of the Rules) having issued the credentials and cannot, therefore, withdraw or suspend them. This right is reserved to the competent national authority until the credentials have been ratified by the Assembly. Instead of speaking of a withdrawal/suspension of the credentials it should therefore be considered if the Assembly may annul its ratification of the credentials.

In this connection Article 25.*b* of the Statute is relevant, according to which "no representative shall be deprived of his position as such during a session of the Assembly without the agreement of the Assembly". If the Assembly has the right to block any tentative from national authorities to deprive members of their mandate during a session of the Assembly, it could be deduced thereof that it should also be empowered to annul the ratification of that delegation's credentials or to suspend itself a delegation from its activities in case of a serious violation of the fundamental principles for which the Council of Europe and its Parliamentary Assembly stand for.

Under Article 23, paragraph 2, of the Vienna Convention on Consular Relations of 24 April 1963, the receiving state of a consular officer may, under certain conditions, annul the *exequatur* (authorisation from the receiving state to be admitted to the exercise of consular functions) from the person concerned. Likewise the *agrément* of diplomats may be "withdrawn" (see Articles 9 and 43 of the Vienna Convention on Diplomatic Relations of 18 April 1961).

Independently from these considerations it is worth mentioning that the "human rights and democracy clauses" in agreements concluded between the European Union (Community) and third countries, authorising the Union to suspend the operation of the agreement are based on Article 60 of the Vienna Convention of 1969See footnote 8 on the Law of Treaties. According to Article 60, paragraph 1, "a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. Under Article 60, paragraph 3.*b* a

material breach is "the violation of a provision essential to the accomplishment of the object or purpose of the Treaty".

Another case where the Assembly should be in a position to annul its ratification of credentials is when a member state persistently fails to honour commitments made by its authorities *vis-à-vis* the Assembly and to co-operate in the Assembly's monitoring process (see paragraph 9 of Order No. 508 (1995).See footnote 9

The rapporteurs are convinced that the Assembly will exercise any new prerogatives responsibly, bearing in mind the spirit of Article 25.*b* of the Statute. In particular, the Assembly should take into account the position of the parliamentary delegation concerned *vis-à-vis* its government.

C. Implementation of these proposals

For reasons of fairness and good order and following the general parliamentary practice that rescission of a decision requires notice,See footnote 10 any consideration of annulling a ratification should be based on a motion for a resolution.See footnote 11

The conditions for tabling and processing such a motion should be as follows:

a. circulation of the motion at least two weeks before the opening of a part-session (reflecting the provision in Rule 28.2 of the Rules of Procedure);

b. the motion must state the reasons of the request for annulling the ratification, which would have to be based on a serious violation by the member state concerned of Article 3 of the Statute and/or its Preamble, or on paragraph 9 of Order No. 508 (1995);See footnote 12

c. the motion would also ask for examination of the report at the opening of the following part-session or at the next meeting of the Standing Committee, if necessary in application of urgent procedure (Rule 48); it should be tabled by at least two political groups and two national delegations, to take account of the importance of the matter;

d. any such motion procedurally in order would be referred by the Bureau to the Political Affairs Committee for report and the Committee on Legal Affairs and Human Rights and the Committee on Rules of Procedure for opinion; if necessary the Bureau could issue instructions concerning the timetable for preparing the report etc;

e. the reference to committee would be ratified by the Assembly (or the Standing Committee).

A delegation concerned by a request for annulling the ratification of their credentials should not be entitled to vote on the draft text included in the report of the Political Affairs Committee. It is recalled that under Rule 6, paragraph 6, of the Rules of Procedure "any Representative or Substitute or any national delegation whose credentials are contested ... shall not vote on the examination of his or its own credentials".

The outlined procedure should, in so far as necessary, be incorporated in the Assembly's Rules (see the draft resolution on page 2 above).

D. Consequences of the annulment by the Assembly of its ratification of credentials

Any annulment of the ratification of credentials affects the position of the members concerned within the Assembly and its bodies.

In addition to taking position on the requested annulment of the Assembly's ratification, the report and the draft text to be submitted by the Political Affairs Committee shall also, if appropriate, submit proposals with respect to the consequences of the decision.

Such consequences could be:

_ depriving members concerned of tabling official documents in the sense of Rule 23 of the Rules of Procedure (notably motions and amendments) taking on duties (such as rapporteur, observer of elections, ...) and voting in the Assembly and its bodies, while preserving the right to attend and to speak at Assembly part-sessions and meetings of its bodies;

_ depriving these members from the exercise of the full rights of participation in the Assembly and its bodies.

At the meeting of the Committee on Rules of Procedure on 9 November 1995 one member raised the possibility of formally expelling a delegation from the Assembly. However, in this respect a distinction has to be made between the consequences of the annulment by the Assembly of its ratification of credentials, which comes under the sole province of the Assembly and the sanctions based on Article 8 of the Statute (see paragraph 4 above). According to this provision it is up to the Committee of Ministers to

suspend a state from the Council of Europe as a whole and to decide that it will cease to be a member of the Organisation as from a date the committee will determine.

If the conditions having led to the rescission of the Assembly's ratification of credentials no longer exist, the delegation concerned may request that the credentials of its members be submitted for a new ratification to the Assembly or the Standing Committee according to paragraphs 4 to 6 of Rule 6.

In so far as these proposals imply Rule changes, they have been included in the draft resolution above.

E. Final remark

The new provisions should enter into force immediately after their adoption.

APPENDIX

Order No. 508 (1995)

See footnote 13 on the honouring of obligations and commitments by member states of the Council of Europe

1. The Assembly, in Order No. 488 (1993), instructed its Political Affairs Committee and Committee on Legal Affairs and Human Rights "to monitor closely the honouring of commitments entered into by the authorities of new member states and to report to the Bureau at regular six-monthly intervals until all undertakings have been honoured".

2. In Order No. 485 (1993) the Assembly instructed its Committee on Legal Affairs and Human Rights "to report to it when problems arise on the situation of human rights in member states, including their compliance with judgments by the European Court of Human Rights".

3. In Resolution 1031 (1994) the Assembly observed "that all member states of the Council of Europe are required to respect their obligations under the Statute, the European Convention on Human Rights and all other conventions to which they are parties. In addition to these obligations, the authorities of certain states which have become members since the adoption in May 1989 of Resolution 917 (1989) on a special guest status with the Parliamentary Assembly freely entered into specific commitments on issues related to the basic principles of the Council of Europe during the examination of their request for membership by the Assembly. The main commitments concerned are explicitly referred to in the relevant opinions adopted by the Assembly."

4. The Assembly considered in the same resolution that "persistent failure to honour commitments freely entered into will have consequences (...). For this purpose, the Assembly could use the relevant provisions of the Council of Europe's Statute and of its own Rules of Procedure ...".

5. Taking also into account the declaration on compliance with commitments accepted by member states of the Council of Europe, adopted by the Committee of Ministers on 10 November 1994, the Assembly seeks to strengthen its own monitoring procedure, established in 1993.

6. The Assembly therefore instructs its Committee on Legal Affairs and Human Rights (for report) and its Political Affairs Committee (for opinion) to continue monitoring closely the honouring of obligations and commitments in all member states concerned. The Committee on Relations with European Non-Member Countries will also be asked for an

opinion with regard to the member states which previously enjoyed special guest status. To start the procedure, the Committee on Legal Affairs and Human Rights must take such a decision, in accordance with normal committee procedure.

7. Countries which are members or candidates for full membership at their accession should honour Recommendation 1201 (1993). This should also be a part of the monitoring process.

8. The committees should work in close co-operation. They may report direct to the Assembly. Their reports should concern one single country and include a draft resolution in which clear proposals are made for the improvement of the situation in the country under consideration.

9. The Assembly may sanction persistent failure to honour commitments, and lack of co-operation in its monitoring process, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session, in accordance with Rule 6 of the Rules of Procedure.

10. Should the country continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action provided for in Article 8 of the Statute of the Council of Europe.

11. This order supersedes Order No. 488 (1993) and Resolution 1031 (1994).

Reporting committee: Committee on Rules of Procedure.

Budgetary implications for the Assembly: none.

Reference to committee: Doc. 7298 and Reference No. 2008 of 28 April 1995.

Draft resolution unanimously adopted, with one abstention, by the committee on 24 January 1996.

Members of the committee: (*Chairperson*), Mrs *Lentz-Cornette*, MM. *Rewaj*, Verbeek (*Vice-Chairmen*), MM. Alloncle (*Alternate*: *Vinçon*), Cummings, Djerov, Sir Anthony Durant (*Alternate*: Sir Russell Johnston), Mr Fenech, Mrs *Fernández Ramiro*, Lord *Finsberg*, MM. Gabrielescu, Galanos, *Gjellerod*, *Goovaerts*, Mrs *Holand*, MM. Laakso, *Lorenzi*, Loukota, *Magnusson*, *Marten*, Masson, Molnár, Proriol, Pukl, Mrs Ragnarsdóttir, MM. Rokofyllos, Schieder, *Schloten*, von Schmude, Seiler, Selva (*Alternate*: *Speroni*), *Slobodnik*, *Sinka*, Soldani (*Alternate*: *La Russa*), Spahia, *Stretovych*, *Tahiri*, Wallace.

N.B. The names of those members who took part in the vote are printed in italics.

Secretary to the committee: Mr Heinrich.

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1 By the Committee on the Rules of Procedure.

2 Paragraph 9 of Order No. 508 (1995) reads: "The Assembly may sanction persistent failure to honour commitments, and lack of co-operation in its monitoring process, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session, in accordance with Rule 6 of the Rules of Procedure."

3 Article 8 reads: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the committee may decide that it has ceased to be a member of the Council as from such date as the committee may determine."

4 Article 25.b reads as follows "No Representative shall be deprived of his position as such during a session of the Assembly without the agreement of the Assembly".

5 See in this context also Order No. 398 (1981): "The Assembly, regretfully concludes, bearing in mind the outstanding contribution of Turkish parliamentarians to its work, that, in the light of Article 25, paragraph 1, of the Statute, and Rule 7, paragraphs 1 and 2, of the

Assembly's Rules of Procedure, it would be out of order to envisage the prolongation of the term of office of the Turkish parliamentary delegation to the Council of Europe ...".

6 These are the principles referred to in Article 3 and the Preamble of the Statute, Article 25 and 26 of the Statute and the principle that national parliamentary delegations should reflect the various currents of opinion within their parliaments.

7 As the Assembly held in 1949 a single session of thirty-one days which was not interrupted, the view has also been expressed that "ordinary session" in Articles 25.a and *b* of the Statute meant in fact "part-session"; the term of "ordinary session" also appears in Articles 28.*a*, 32, 33, 41.*d* of the Statute and at many places in the Assembly's Rules of Procedure (for example, Rules 9.9 and 45.8) where it cannot be doubtful that it covers the whole parliamentary year; it would be difficult to conceive that in one case "ordinary session" means "part-session" and in others the "parliamentary year".

8 See p. 3 of COM (95) 216 final (23 May 1995) from the Commission of the European Communities and the European Parliament's hearing of 20 to 21 November 1995 on the Human Rights Clause in External Agreements.

9 It is recalled that already in its Order No. 488 (1993) the Assembly considered that the honouring of specific commitments entered into by the authorities of the candidate states on issues relating to the basic principles of the Organisation were a condition for full membership of parliamentary delegations of new member states in its work.

10 Another principle to be taken into account under international law is that rescission of a decision has to follow the same (or stronger) rules as those which have to be fulfilled for obtaining the relevant decision.

11 Motions for orders should be excluded, since, according to Rule 31.3 they may be put to the vote without first being referred to committee; however, given the importance of the matter it is essential that a committee report is always prepared.

12 Paragraph 9 of Order No. 508 (1995) reads as follows: "The Assembly may sanction persistent failure to honour commitments, and lack of co-operation in its monitoring process, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session, in accordance with Rule 6 of the Rules of Procedure."

13 Assembly debate on 26 April 1995 (12th Sitting). See Doc. 7277, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Columberg), Doc. 7292, opinion of the Committee for Relations with European Non-Member Countries (rapporteur: Mr Seitlinger) and Doc. 7294, opinion of the Committee on Rules of Procedure (rapporteur: Lord Finsberg). Text adopted by the Assembly on 26 April 1995 (12th Sitting).

RESOLUTION 1081 (1996)[1] on the challenge of credentials of national delegations in the course of an ordinary session

1.The Assembly notes that its Rules of Procedure do not provide explicitly for the re-examination of ratified credentials of a national delegation in the course of the ordinary session (parliamentary year).

2.It considers that it should be able to challenge ratified credentials when urgent action is deemed necessary.

3.The Assembly therefore decides to insert in Rule 6, after paragraph 6, the following new paragraphs:

"7.Ratified credentials may be reconsidered in the course of the same ordinary session if a motion for a resolution has been tabled with a view to annulling the ratification. Such a motion must state the reasons and shall be based:
- on a serious violation of the basic principles of the Council of Europe mentioned in Article 3 and the preamble of the Statute; or
- on paragraph 9 of Order No. 508 (1995).2
The motion must be tabled by at least two political groups and two national delegations and be distributed at least two weeks before the opening of a part-session.
8.The motion shall be referred to the Political Affairs Committee for report and to the Committee on Legal Affairs and Human Rights and the Committee on Rules of Procedure for opinion. The report including a draft text shall be submitted to the Assembly or the Standing Committee, if necessary under urgent procedure.
9.The draft text shall, if appropriate, justify annulling the ratification of credentials of a delegation and submit proposals with respect to the consequences such as:
- depriving the members of the delegation concerned of tabling official documents in the sense of Rule 23 of the Rules of Procedure, taking on duties and voting in the Assembly and its bodies, while maintaining those members' rights to attend and to speak at Assembly part-sessions and meetings of its bodies; or
- depriving the members of the delegation concerned of the exercise of the full rights of participation in the activities of the Assembly and its bodies.
10. Members of the delegation concerned shall not vote on any request to annul the Assembly's ratification of their credentials."

_____

1. Assembly debate on 22 April 1996 (9th Sitting) (see Doc. 7481, report of the Committee on Rules of Procedure, rapporteurs: Mr Cummings and Sir Anthony Durant).
Text adopted by the Assembly on 22 April 1996 (9th Sitting).

2. Paragraph 9 of Order No. 508 (1995) reads: "The Assembly may sanction persistent failure to honour commitments, and lack of co-operation in its monitoring process, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session, in accordance with Rule 6 of the Rules of Procedure."

CONSULTATIVE ASSEMBLY
OF THE
COUNCIL OF EUROPE

24th April 1967 **Doc. 2221**

DRAFT REPORT

presented on behalf of the Credentials Committee [1]

by Mr. KIRK

1. Meeting in accordance with the provisions of Rule 6 of the Rules of Procedure, the Committee appointed for the checking of credentials examined those of the Representatives and Substitutes to the 19th Ordinary Session of the Consultative Assembly.

2. The credentials certified by the Ministers of Foreign Affairs and received by the Secretariat General of the Council of Europe called for no comment.

3. The credentials of the *Maltese delegation* have not yet been received at Strasbourg. By letter of 24th April 1967 the Maltese Permanent Representative has informed the Secretary General that the credentials have been signed by the Minister of Commonwealth and Foreign Affairs, but owing to a postal strike, have not yet reached Strasbourg. The Committee recommend that the Maltese delegation be seated provisionally in accordance with paragraph 4 of Rule 6 of the Rules of Procedure, and that the President of the Assembly shall be requested to inform the Assembly when the credentials are received.

1. (*a*) Unanimously adopted by the Committee on 24th April 1967.

MEMBERS OF THE COMMITTEE : Mr. Finn Moe *(Chairman)*; MM. Akça, Bauer, Mrs. Firnberg, MM. Furler, Kirk, Meyers, Menderes, Peel, Eugène Schaus.

(*b*) See 1st Sitting, 24th April 1967 (adoption of the report).

ASSEMBLÉE CONSULTATIVE
DU
CONSEIL DE L'EUROPE

24 avril 1967 **Doc. 2221**

RAPPORT

présenté au nom de la commission de Vérification des Pouvoirs [1]

par M. KIRK

1. La commission chargée de la vérification des pouvoirs, réunie conformément aux dispositions de l'article 6 du Règlement, a examiné les dossiers de désignation des Représentants et Suppléants à la 19e Session ordinaire de l'Assemblée Consultative.

2. Les pouvoirs certifiés par les ministres des Affaires Étrangères et transmis au Secrétariat Général du Conseil de l'Europe n'appellent pas d'observations.

3. Les pouvoirs de la *délégation maltaise* n'ont pas encore été transmis au Secrétariat. Par lettre du 24 avril 1967, le Représentant permanent de Malte a informé le Secrétaire Général qu'ils avaient été signés par le ministre des Affaires Étrangères et du Commonwealth, mais que les documents n'étaient pas encore parvenus à Strasbourg en raison d'une grève des postiers. La commission recommande que la délégation maltaise siège provisoirement, conformément à l'article 6 (4) du Règlement, et que le Président de l'Assemblée soit invité à informer l'Assemblée dès que les pouvoirs auront été transmis.

1. (*a*) Adopté à l'unanimité le 24 avril 1967.

MEMBRES DE LA COMMISSION : MM. Finn Moe *(Président)*; Akça, Bauer, Mmes Firnberg, MM. Furler, Kirk, Meyers, Menderès, Peel, Eugène Schaus.

(*b*) Voir 1re séance, 24 avril 1967 (adoption du rapport).

Letters

Représentation de la Turquie (1981) (french only)

La Haye, le 24 mars 1981

Monsieur le Président,

Le Président en exercice de la Commission du Règlement, M. Frangos, ayant dû partir d'urgence, m'a chargé de vous écrire comme suit, de sa part :

Par lettre du 2 mars dernier, vous m'avez demandé de soumettre à la Commission du Règlement deux questions concernant la représentation de la Turquie à l'Assemblée.

Au cours de sa réunion de ce jour, la Commission a examiné ce problème, sur la base de la note que j'avais fait établir par le secrétariat (document AS/Pro (32) 7 ci-joint).

A l'issue de la discussion, la Commission du Règlement m'a chargé de vous faire savoir ce qui suit :

./.

Monsieur H.J. de KOSTER
Président de l'Assemblée
parlementaire du
Conseil de l'Europe

Par 9 voix contre 7 elle a estimé qu'en l'absence momentanée d'un Parlement en Turquie, le Gouvernement de ce pays ne transgresserait ni la lettre ni l'esprit du Statut du Conseil de l'Europe en prolongeant pour la 33e Session le mandat des membres de la délégation turque à l'Assemblée telle qu'elle a été nommée par le Parlement turc en avril 1980 pour notre 32e Session.

La minorité de la Commission, par contre, est d'avis qu'une prorogation des pouvoirs de l'actuelle délégation turque n'était pas concevable, puisqu'elle n'a été nommée par le Parlement que pour la seule 32e Session qui prendra fin le 11 mai prochain, ce Parlement agissant en l'occurence conformément à une tradition remontant à 1949 et partagée par d'autres Etats membres du Conseil de l'Europe.

D'autre part, à la quasi-unanimité, les membres de la Commission du Règlement ont exprimé le souhait que, même si, pour une raison ou une autre, la représentation turque pleine et entière à l'Assemblée ne pouvait être maintenue, une formule de "liaison" soit trouvée.

Veuillez agréer, Monsieur le Président, l'expression de mes sentiments très dévoués.

Signé : Georges CHARITONS
Secrétaire de la
Commission du Règlement

Représentation de la Turquie (1981) (french only)

Strasbourg, le 10 mars 1981

Restricted
AS/Pro (32) 7

ASSEMBLÉE PARLEMENTAIRE

COMMISSION DU REGLEMENT

Représentation de la Turquie à l'Assemblée parlementaire du Conseil de l'Europe

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Note du Secrétariat Général,
préparée par le Greffe de l'Assemblée
à la demande du Président en exercice
de la Commission du Règlement

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1. Le 2 mars 1981, le Président de l'Assemblée a adressé la lettre suivante au Président de la Commission du Règlement :

"La représentation de la Turquie à l'Assemblée parlementaire du Conseil de l'Europe soulève une série de problèmes dont vous êtes certainement conscient. Des difficultés particulières pourraient surgir à l'ouverture de la 33e Session ordinaire, le 11 mai prochain. En vue de clarifier nos idées sur le plan de la procédure, et notamment celles du Bureau de l'Assemblée et de la Commission des questions politiques, j'aimerais connaître l'avis de la Commission du Règlement sur les deux points suivants :

1. Est-il concevable que des pouvoirs valables puissent être transmis par le Ministre des affaires étrangères de Turquie à l'ouverture de la 33e Session de l'Assemblée, par exemple pour l'ensemble des membres de la Délégation turque actuelle ? Je rappelle à ce propos que la transmission des pouvoirs, en ce qui concerne la Turquie, a toujours été faite par le Ministre des affaires étrangères et non par le Président du Parlement comme c'est le cas de certains autres pays membres.

2. Si la réponse à cette première question est négative, existe-t-il une formule qui permettrait une participation des membres de l'actuelle délégation turque aux travaux de l'Assemblée et/ou de ses commissions, évidemment sans droit de vote ?

Je vous serais très reconnaissant de soumettre ces questions à la Commission du Règlement lors de sa prochaine réunion, le 23 mars, et de me faire tenir aussitôt que possible votre réponse, afin qu'elle puisse être communiquée à la Commission des questions politiques et au Bureau de l'Assemblée qui se réuniront trois jours plus tard."

2. Jusqu'à la fin de la 32e Session ordinaire de l'Assemblée le 11 mai 1981, les membres de la Délégation turque dont les pouvoirs avaient été validés à l'ouverture de cette Session, le 21 avril 1980, peuvent siéger de plein droit à l'Assemblée et dans les commissions en application de l'article 25 du Statut ; mais en vertu de ce même article, leur situation sera radicalement modifiée à l'ouverture de la 33e Session.

3. Les dispositions du Statut applicables en la matière sont les suivantes :

"ARTICLE 25

(a) L'Assemblée ... est composée de Représentants de chaque Membre, élus par son Parlement en son sein ou désignés parmi les membres du Parlement selon une procédure fixée par celui-ci, sous réserve toutefois que le Gouvernement de tout Membre puisse procéder à des nominations complémentaires quand le Parlement n'est pas en session et n'a pas établi de procédure à suivre dans ce cas ...

Le mandat des Représentants ainsi désignés prend effet à l'ouverture de la session ordinaire suivant leur désignation ; il n'expire qu'à l'ouverture de la session ordinaire suivante ou d'une session ordinaire ultérieure, sauf le droit des Membres de procéder à de nouvelles désignations à la suite d'élections parlementaires.

...

(b) Aucun Représentant ne peut être relevé de son mandat au cours d'une session de l'Assemblée sans l'assentiment de celle-ci.

(c) Chaque Représentant peut avoir un Suppléant qui, en son absence, aura qualité pour siéger, prendre la parole et voter à sa place. Les dispositions du paragraphe (a) ci-dessus s'appliquent également à la désignation des Suppléants."

4. Une première remarque s'impose à propos d'une possible interprétation du membre de phrase "sous réserve ... que le Gouvernement de tout Membre puisse procéder à des nominations complémentaires quand le Parlement n'est pas en session et n'a pas établi de procédure à suivre dans ce cas".

5. Ici les mots déterminants sont "nominations complémentaires" - en anglais : "any additional appointments necessary". Cette formulation signifie clairement qu'un gouvernement peut, dans le cours d'une Session de l'Assemblée et lorsque son Parlement national n'est pas lui-même en session, pourvoir aux sièges devenus vacants par suite de décès ou de démission, mais non désigner la Délégation tout entière à l'ouverture de la Session annuelle de l'Assemblée.

6. La deuxième question qu'il convient de poser est celle de la durée du mandat des membres de l'actuelle Délégation turque. En effet, le Statut dispose que le mandat des membres de l'Assemblée "n'expire qu'à l'ouverture de la session ordinaire suivante ou d'une session ordinaire ultérieure". Comme indiqué dans le projet de rapport, présenté par M. Heger, sur la vérification des pouvoirs et le mandat des membres de l'Assemblée, une fraction des Etats membres ont coutume de désigner leurs Délégations pour une durée plus longue qu'une session ordinaire de l'Assemblée, le plus souvent pour toute la durée de la législature nationale (AS/Pro (32) 5, paragraphe 12, de l'exposé des motifs).

7. Tel n'est, cependant, pas le cas de la Turquie où, depuis son adhésion au Conseil de l'Europe en 1949, la Délégation est désignée par les Chambres chaque année pour la session ordinaire à venir de l'Assemblée. Cette pratique ressort clairement des indications figurant sur les formulaires de transmission des pouvoirs signés chaque année par le Ministre turc des affaires étrangères et, pour la 32e Session de l'Assemblée, des comptes rendus officiels du Sénat turc du 8 avril 1980, et de l'Assemblée nationale du 17 juin 1980, reproduisant une décision du 8 avril précédent :

(a) Extrait du Compte rendu des débats du Sénat du 8 avril 1980 (traduction officieuse)

" ...

5. Propositions de la Présidence concernant les candidats présentés par les groupes politiques pour l'Assemblée parlementaire du Conseil de l'Europe, l'Assemblée de l'Atlantique Nord, et l'Union Interparlementaire.

M. LE PRESIDENT. - Je vous présente la proposition de la Présidence contenue dans la lettre suivante signée par le Vice-Président du Sénat :

"A l'attention du Sénat
Les noms des sénateurs ci-après ont été présentés pour les trois Assemblées (internationales) :

(Suit la liste des noms)"

Je porte cette liste à votre connaissance".

(b) Extrait du Compte rendu des débats de l'Assemblée nationale du 17 juin 1980 (traduction officieuse) :

"1. Liste des candidats désignés par les groupes politiques pour l'Assemblée parlementaire du Conseil de l'Europe

M. LE PRESIDENT. - Je porte à votre connaissance la proposition suivante de la Présidence en date du 8 avril 1980 :

"Conformément aux articles 25 et 26 du Statut du Conseil de l'Europe, et en application de la Loi N° 378, modifiée par la Loi N° 1599, sur les relations extérieures des Chambres, je vous soumets la liste de la délégation qui va représenter l'Assemblée Nationale :

(Suit la liste des noms)"

Je vous soumets cette communication pour information

8. Cette désignation de la Délégation est intervenue avant l'ouverture de la 32e Session de l'Assemblée, dans les mêmes conditions et formes que chaque année précédemment.

9. En outre, la lettre de transmission des pouvoirs, signée par le Représentant Permanent de Turquie auprès du Conseil de l'Europe, adressée au Greffier de l'Assemblée le 21 avril 1980 précise : "... je m'empresse de vous présenter ci-joint les pouvoirs des membres titulaires et suppléants de la Délégation Parlementaire turque à la 32e Session ordinaire de l'Assemblée Parlementaire du Conseil de l'Europe."

10. Ainsi donc, le mandat des membres de l'actuelle délégation turque à l'Assemblée viendra effectivement à expiration à l'ouverture de la 32e Session, le 11 mai 1981.

11. Or, depuis le 12 septembre 1980, il n'y a plus de Parlement en Turquie qui aurait pu désigner une nouvelle Délégation ou renouveler le mandat des membres de la Délégation sortante, de sorte que des Représentants et Suppléants ne peuvent pas être nommés conformément aux dispositions du Statut du Conseil de l'Europe.

12. Tels sont les éléments que la Commission du Règlement doit prendre en considération pour répondre à la première question du Président de l'Assemblée, à savoir s'il est concevable que des pouvoirs valables puissent être transmis par le Ministre des affaires étrangères de Turquie à l'ouverture de la 33e Session de l'Assemblée, par exemple pour l'ensemble des membres de la Délégation turque actuelle.

13. En cas de réponse négative, il convient alors de se demander s'il existe une procédure qui permettrait aux membres de cette Délégation d'apporter leur concours aux travaux l'Assemblée, continuant ainsi l'active participation des parlementaires de ce pays qui remonte à 1949 et dont l'utilité dans bien des domaines est évidente.

14. Il n'apparaît pas possible d'appliquer en l'occurrence l'article 54 du Règlement, relatif aux observateurs, car il s'agit (paragraphe 1) de "représentants officiels d'Etats non membres du Conseil de l'Europe désignés avec l'agrément de leur Parlement". Or, (a) la Turquie n'est pas un Etat non membre, et (b) il n'y a pas de parlement susceptible de donner son agrément.

15. On pourrait, par contre, imaginer que le Gouvernement turc constitue une "délégation de liaison avec l'Assemblée parlementaire du Conseil de l'Europe", composée de tous les Représentants et Suppléants désignés par le Parlement en avril 1980, et dont les membres auraient accès à l'hémicycle et le droit de parole, de même que dans les commissions.

16. Il s'agirait d'une formule "ad hoc", destinée à faire face à une situation particulière, qui n'est pas prévue par le Règlement, mais qui n'est pas non plus spécifiquement interdite. De toute évidence, l'Assemblée devra donner son accord, mais il s'agirait alors d'une décision de caractère politique et non plus règlementaire.

Appendix III: Relevant Case Law

COUR EUROPEENNE DES DROITS DE L'HOMME

Affaire Cordova c. Italie (no 2) (2003) (french only)

PREMIÈRE SECTION, Requête n° 45649/99, ARRÊT, 30 janvier 2003

En l'affaire Cordova c. Italie (n° 2),

La Cour européenne des Droits de l'Homme (première section), siégeant en une chambre composée de :

M. C.L. Rozakis, *président*,

Mme F. Tulkens,

M. G. Bonello,

Mmes N. Vajic,

S. Botoucharova,

MM. A. Kovler,

V. Zagrebelsky, *juges*,

et de M. S. Nielsen, *greffier adjoint de section*,

Après en avoir délibéré en chambre du conseil les 17 octobre 2002 et 9 janvier 2003, Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 45649/99) dirigée contre la République italienne et dont un ressortissant de cet Etat, M. Agostino Cordova (« le requérant »), avait saisi la Commission européenne des Droits de l'Homme (« la Commission ») le 31 octobre 1998 en vertu de l'ancien article 25 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le requérant alléguait, d'une part, que la décision d'annuler la condamnation d'un parlementaire jugé l'avoir diffamé s'analysait en une violation de ses droits d'accès à un tribunal et à l'octroi d'un recours effectif devant une instance nationale (articles 6 § 1 et 13 de la Convention), et, d'autre part, que l'étendue de la liberté d'expression reconnue au parlementaire en question était contraire à l'article 14 de la Convention.

3. La requête a été transmise à la Cour le 1er novembre 1998, date d'entrée en vigueur du Protocole n° 11 à la Convention (article 5 § 2 du Protocole n° 11).

4. Elle a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement). Au sein de celle-ci a été constituée, conformément à l'article 26 § 1 du règlement, la chambre chargée d'en connaître (article 27 § 1 de la Convention).

5. Le 1er novembre 2001, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). La requête a alors été transférée à la première section telle que remaniée (article 52 § 1).

6. Par une décision du 13 juin 2002, la Cour a déclaré la requête recevable.

7. Tant le requérant que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire (article 59 § 1 du règlement).

8. Une audience s'est déroulée en public au Palais des Droits de l'Homme, à Strasbourg, le 17 octobre 2002 (article 59 § 3 du règlement).

Ont comparu :

– *pour le Gouvernement*

M. F. Crisafulli, *coagent*,

– *pour le requérant*

M. G. Minieri, *conseil*.

La Cour les a entendus en leurs déclarations.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

9. Le requérant est né en 1936 et réside à Naples.

10. En 1993, il était procureur de la République au parquet de Palmi.

11. Lors d'une réunion électorale tenue à Palmi le 13 mars 1994, M. Vittorio Sgarbi, député au Parlement italien, prononça le discours suivant:

« Je connaissais Palmi à cause de l'action scélérate d'un magistrat nommé Cordova, qui a conféré à ce lieu la seule célébrité de l'inquisition qu'il y a représentée et qu'il continue d'y représenter en diffamant le Sud. Je poursuivrai mon combat contre les magistrats inféodés (*collusi*) aux partis [politiques], qui veulent seulement mener une lutte politique et non défendre la justice. (...) Je me souviens d'une chose inacceptable (...) : par délire de toute-puissance, par volonté de dominer, ce magistrat a envoyé deux carabiniers (...) saisir les listes des personnes inscrites au Rotary. Va te faire foutre, Cordova, va te faire foutre (*vaffanculo Cordova, vaffanculo*) ! Vous ne devez pas accepter qu'un magistrat dépense votre argent pour sa propre gloire, juste pour s'affirmer ».

12. Lors d'une deuxième réunion, qui eut lieu à Palmi le 6 juin 1994, M. Sgarbi prononça un autre discours, dont voici les passages pertinents pour la présente espèce :

« Première ville d'Italie, Palmi a désigné une candidate au concours de *Miss Italia*, créant ainsi une opposition avec cette vilaine tête de Cordova, qui a porté plainte contre moi (...) Vous savez, il y a des plaintes dont je suis fier, alors que ce M. Cordova, à propos duquel j'ai tout simplement dit ce que lui même accepte, on le surnomme « bulldog » (*Mastino*) ; et moi j'ai dit qu'il a tellement une tête d'acteur qu'il pourrait jouer le rôle aussi bien du policier

que du chien du policier, et il a porté plainte contre moi ; moi, j'ai trouvé qu'il n'avait pas beaucoup d'humour, mais cette plainte ne m'inquiète pas, car si quelqu'un accepte de se faire appeler « bulldog », et il en a vraiment un peu l'allure, on comprend mal pourquoi il se fâche pour une de mes plaisanteries ; or, pour montrer comment la magistrature profite de son pouvoir, il a porté plainte contre moi, et on m'a même renvoyé en jugement ».

13. Estimant que les affirmations de M. Sgarbi avaient porté atteinte à son honneur et à sa réputation, le requérant déposa plainte pour diffamation aggravée.

14. Par une ordonnance du 15 décembre 1994, le parquet de Palmi renvoya M. Sgarbi en jugement devant le juge d'instance de cette même ville et fixa la date de l'audience au 6 mars 1995. Le jour venu, le requérant se constitua partie civile.

15. Par un jugement du 6 mars 1995, dont le texte fut déposé au greffe le 6 juin 1995, le juge d'instance condamna M. Sgarbi à une peine de deux mois d'emprisonnement avec sursis, ainsi qu'à la réparations des dommages subis par le requérant, dont le montant devait être fixé dans un procès civil. Il octroya également au requérant une créance exécutoire par provision de 20 000 000 lires (environ 10 329 euros) sur le montant global de ces dommages.

16. Le juge d'instance précisa tout d'abord qu'il n'avait pas estimé nécessaire de suspendre la procédure afin de demander l'avis de la Chambre des députés. En effet, il ressortait d'une simple lecture du chef d'accusation que les affirmations litigieuses n'avaient pas été prononcées dans l'exercice de fonctions parlementaires ; elles n'étaient donc pas couvertes par la garantie constitutionnelle de l'immunité parlementaire (article 68 § 1 de la Constitution). Quant au fond de l'affaire, le juge d'instance observa qu'au delà des expressions clairement vulgaires et outrageantes (en particulier le mot « *vaffanculo* »), les affirmations de M. Sgarbi tendaient à présenter le requérant comme un magistrat narcissique qui faisait usage de ses fonctions et de l'argent public uniquement pour rechercher sa propre gloire et qui ne poursuivait pas les intérêts de la justice, mais ceux de certains partis politiques. Dans ces circonstances, il ne pouvait y avoir aucun doute sur le caractère diffamatoire des affirmations de M. Sgarbi. Certes, ce dernier avait, comme tout autre citoyen, le droit de critiquer un magistrat, mais une telle critique devait revêtir une forme civile et se référer à des faits objectifs et précis, ce qui n'avait pas été le cas en l'espèce. Bien au contraire, M. Sgarbi avait, de façon tout à fait générale et injustifiée, attribué au requérant des comportements contraires à l'éthique professionnelle, se lançant ainsi dans une querelle de personnes.

17. M. Sgarbi interjeta appel de ce jugement. Il demanda notamment la suspension de la procédure et la transmission du dossier à la Chambre des députés. Cette demande était fondée sur l'article 2 § 4 du décret-loi n° 116 de 1996 (tel qu'en vigueur à l'époque), aux termes duquel si le juge n'accueille pas l'exception concernant l'applicabilité de l'article 68 § 1 de la Constitution soulevée par l'une des parties, il transmet dans les meilleurs délais une copie du dossier à la chambre législative à laquelle le membre du Parlement appartient. La transmission du dossier entraîne la suspension de la procédure jusqu'à la délibération de la chambre législative concernée. Cette suspension ne peut en aucun cas excéder une durée globale de cent vingt jours.

18. Par un arrêt du 28 mars 1996, la cour d'appel de Reggio de Calabre confirma la décision de première instance. Quant à la demande de suspension, elle observa que le juge d'instance avait déjà transmis le dossier à la Chambre des députés, qui avait donc eu la possibilité de délibérer sur la question de l'applicabilité de l'article 68 § 1 de la Constitution. Par ailleurs, le délai légal de cent vingt jours était depuis longtemps expiré.

19. M. Sgarbi se pourvut en cassation.

20. Par une ordonnance du 23 octobre 1996, la Cour de cassation prononça la suspension de la procédure et ordonna la transmission du dossier à la Chambre des députés. La question fut d'abord examinée par la commission des immunités (*Giunta per le autorizzazioni a procedere*), qui proposa de dire que les faits pour lesquels M. Sgarbi avait été jugé ne concernaient pas des opinions exprimées dans l'exercice de ses fonctions, et que donc l'article 68 de la Constitution ne trouvait pas à s'appliquer en l'espèce.

21. Le 22 octobre 1997, après en avoir délibéré, l'Assemblée plénière de la Chambre des députés rejeta, par 197 voix contre 154, avec 60 abstentions, la proposition de la commission des immunités.

22. Dans un mémoire du 26 février 1998, le requérant, estimant que la délibération de la Chambre des députés avait indûment envahi le champ d'attribution du pouvoir judiciaire, demanda à la Cour de cassation de soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle.

23. Par un arrêt du 6 mai 1998, dont le texte fut déposé au greffe le 17 juillet 1998, la Cour de cassation cassa les décisions de la cour d'appel de Reggio de Calabre et du juge d'instance de Palmi, les déclarant nulles et non avenues au motif que l'accusé avait agi dans l'exercice de la fonction parlementaire.

24. La Cour de cassation observa notamment que deux intérêts garantis par la Constitution se trouvaient en conflit : d'un côté, l'autonomie et l'indépendance du Parlement, de l'autre, le droit pour tout citoyen de saisir les juridictions judiciaires pour obtenir la sanction de son droit à la protection de sa réputation. La délibération par laquelle une chambre législative reconnaissait qu'un certain fait était couvert par l'article 68 § 1 de la Constitution empêchait la continuation de toute procédure pénale, civile ou administrative contre le parlementaire responsable du fait en question, et faisait donc prévaloir le premier intérêt sur le deuxième. Une telle délibération ne pouvait pas être censurée par les juridictions judiciaires. Ces dernières pouvaient cependant soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle lorsqu'elles estimaient que, dans les circonstances particulières d'une affaire donnée, le Parlement avait mal exercé son pouvoir, comprimant et réduisant de façon arbitraire les attributions institutionnelles des organes judiciaires.

25. En l'espèce, la délibération de la Chambre des députés du 22 octobre 1997 n'était, de l'avis de la Cour de Cassation, ni arbitraire ni manifestement illogique. Certes, elle avait élargi la garantie offerte par l'article 68 § 1 de la Constitution à des opinions exprimées en dehors des activités parlementaires *stricto sensu*, mais une interprétation extensive de la notion de «fonctions parlementaires », comprenant tous les actes d'inspiration politique, même accomplis en dehors du siège du Parlement, avait à plusieurs reprises été retenue et n'était pas, en soi, manifestement contraire à l'esprit de la Constitution. La Chambre des députés avait donc pu, sans outrepasser ses pouvoirs, choisir une telle interprétation. Dans ces conditions, la Cour de cassation estima qu'il ne s'imposait pas de soulever un conflit entre pouvoirs et annula la condamnation prononcée à l'encontre de M. Sgarbi.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

26. L'article 68 § 1 de la Constitution, tel que modifié par la loi constitutionnelle n° 3 de 1993, qui a abrogé la nécessité d'obtenir l'autorisation du Parlement pour procéder contre l'un de ses membres, est ainsi libellé :

« Les membres du Parlement ne peuvent être appelés à répondre des opinions et votes exprimés par eux dans l'exercice de leurs fonctions ».

27. La Cour constitutionnelle a précisé que la délibération d'une chambre législative affirmant que le comportement de l'un de ses membres entre dans le champ d'application de la disposition précitée empêche d'entamer ou de continuer toute procédure pénale ou civile visant à établir la responsabilité du parlementaire en question et à obtenir la réparation des dommages subis.

28. Si (normalement à la demande du parlementaire concerné) une telle délibération est adoptée, les juridictions judiciaires ne peuvent la censurer. Toutefois, si le juge estime qu'elle s'analyse en un exercice illégitime du pouvoir d'appréciation attribué aux chambres législatives, il peut soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle (voir l'arrêt de la Cour constitutionnelle n° 1150 de 1988). La même possibilité n'est pas reconnue aux parties au procès.

29. Les chambres législatives ont adopté une interprétation extensive de l'article 68 § 1, reconnaissant son applicabilité aux opinions exprimées en dehors du siège du Parlement, fussent-elles indépendantes de l'activité parlementaire proprement dite. Cette interprétation extensive se fonde sur l'idée que les jugements politiques exprimés hors du Parlement constituent une projection vers l'extérieur de l'activité parlementaire et relèvent du mandat confié par les électeurs à leurs représentants.

30. Saisie de la question à l'occasion de conflits entre pouvoirs de l'Etat soulevés par les juges, la Cour constitutionnelle a d'abord exercé un contrôle limité à la régularité formelle de la délibération parlementaire. Puis, progressivement, elle a établi des limites plus étroites à la garantie de l'immunité parlementaire, élargissant du même coup la portée du contrôle devant être exercé par elle quant à la compatibilité de la délibération parlementaire avec l'article 68 de la Constitution. Dans son arrêt n° 289 du 18 juillet 1998, elle a ainsi précisé que la « fonction parlementaire » (*funzione parlamentare*) ne peut pas couvrir toute l'activité politique d'un député ou d'un sénateur car « une telle interprétation (...) entraînerait le risque de transformer une garantie en un privilège personnel ». Et d'ajouter : « on ne saurait établir aucun lien entre de nombreuses allusions prononcées lors de réunions, conférences de presse, émissions télévisées (...) et une question parlementaire adressée par la suite au ministre de la Justice (...). En conclure autrement [équivaudrait à admettre] qu'aucune affirmation, même gravement diffamatoire et (...) tout à fait indépendante de la fonction ou activité parlementaire, ne peut être censurée ».

31. Dans sa jurisprudence ultérieure, qui peut maintenant être considérée comme bien établie, la Cour constitutionnelle a précisé que lorsqu'il s'agit d'opinions exprimées en dehors du Parlement, il faut vérifier s'il existe un lien avec les activités parlementaires. En particulier, il doit y avoir une correspondance substantielle entre les opinions en cause et un acte parlementaire préalable (voir les arrêts n^{os} 10, 11, 56, 58, et 82 de 2000, n^{os} 137 et 289 de 2001, et n^{os} 50, 51, 52, 79 et 207 de 2002).

EN DROIT

I. SUR L'EXCEPTION PRÉLIMINAIRE DU GOUVERNEMENT

32. Dans son mémoire du 30 août 2002, le Gouvernement notait que le requérant n'avait pas interjeté appel contre «le jugement du juge d'instance de Messine », ce qui pouvait avoir des conséquences sous l'angle de l'article 35 § 1 de la Convention.

33. A l'audience devant la Cour, toutefois, son agent a déclaré que cette question avait été soulevée par erreur dans le mémoire et qu'il ne souhaitait pas la poursuivre.

34. La Cour note que le Gouvernement a renoncé à son exception préliminaire et ne juge pas nécessaire de se pencher sur elle.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

35. Le requérant se plaint du manque d'équité de la procédure suivie devant la Cour de cassation. Il invoque l'article 6 § 1 de la Convention, qui, dans ses parties pertinentes, se lit comme suit :

« 1. Toute personne a droit à ce que sa cause soit entendue (...) par un tribunal (...) qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) ».

1. Les arguments des parties

a) Le requérant

36. Le requérant soutient que la décision d'annuler la condamnation de M. Sgarbi est fondée sur des erreurs de droit et dépendait en dernier ressort d'une délibération de la Chambre des députés, organe ne pouvant être considéré comme impartial.

37. Il estime notamment que la délibération de la Chambre des députés du 22 octobre 1997 est clairement contraire à la lettre et à l'esprit de l'article 68 § 1 de la Constitution, puisqu'elle considère comme exprimées dans l'exercice des fonctions parlementaires des affirmations injurieuses adressées à un particulier dans le cadre d'une querelle de personnes.

38. Il observe que, dans son affaire, la Cour de cassation – dont la décision était sans appel – a refusé de soulever un conflit entre pouvoirs de l'Etat, le privant ainsi d'un recours apte à protéger les victimes de déclarations diffamatoires de parlementaires. Il souligne par ailleurs que seule la jurisprudence la plus récente de la Cour constitutionnelle (arrêts n^{os} 10, 11, 58 et 82 de 2000) reconnaît que l'immunité prévue à l'article 68 § 1 ne couvre que les opinions liées à l'exercice de fonctions parlementaires *stricto sensu*. En l'espèce, selon lui, les propos de M. Sgarbi n'avaient aucun rapport avec l'activité de parlementaire de leur auteur, mais visaient simplement à l'offenser et à l'insulter. Il considère qu'interpréter l'immunité parlementaire comme couvrant également ce type d'atteinte à la réputation d'autrui équivaudrait à octroyer aux sénateurs et aux députés une « autorisation d'insulter librement » (*licenza per il libero insulto*) pour des motifs personnels.

39. Le requérant rappelle en outre que la délibération de la Chambre des députés du 22 octobre 1997, doublée du refus par la Cour de cassation de soulever un conflit entre pouvoirs de l'Etat, l'a privé de toute possibilité non seulement d'obtenir la condamnation de M. Sgarbi au pénal, mais aussi d'introduire au civil une action en réparation des dommages subis. Cette situation s'analyserait en une absence totale de contrôle de la justice sur les décisions prises par le Parlement.

b) Le Gouvernement

40. Le Gouvernement rappelle que l'immunité reconnue aux membres du Parlement pour leurs votes et opinions poursuit le but d'assurer aux représentants du peuple, dans l'exercice de leurs fonctions, la liberté d'expression la plus complète, en marge des limites imposées aux autres citoyens. Toute interférence avec cette liberté devrait être exclue.

41. Ce principe serait d'ailleurs reconnu par toutes les démocraties parlementaires et devrait être considéré comme l'une des règles caractérisant les systèmes démocratiques, où

règnent la séparation des pouvoirs et la prééminence du droit. Comme il ne serait pas raisonnable de croire qu'en signant la Convention les Hautes Parties contractantes ont souhaité y renoncer, sa compatibilité avec les droits fondamentaux de l'individu ne saurait être mise en question. Le Gouvernement se réfère, sur ce point, à la jurisprudence développée par la Commission dans les affaires *X c. Autriche*, *Young c. Irlande* et *Ó'Faolain c. Irlande* (voir, respectivement, les requêtes n^{os} 3374/67, 25646/94 et 29099/95, décisions de la Commission des 4 février 1969 et 17 janvier 1996) et par la Cour dans l'affaire *Fayed c. Royaume-Uni* (voir l'arrêt du 21 septembre 1994, série A n^{o} 294-B).

42. Le Gouvernement considère que, justifiée par son rattachement à une fonction prévue par la Constitution, l'immunité en question ne se heurte ni au principe de l'égalité des citoyens devant la loi ni à l'interdiction de la discrimination. Elle ne viserait ni à créer une catégorie « privilégiée » ni à permettre aux parlementaires de faire un usage arbitraire de leurs prérogatives. Elle poursuivrait au contraire le but légitime de permettre au Parlement de débattre librement et ouvertement sur toute question concernant la vie publique, sans que ses membres aient à craindre des persécutions ou de possibles conséquences sur le plan judiciaire.

43. De plus, en cas de doute quant à l'applicabilité ou à l'étendue de l'immunité, les délibérations des chambres législatives adoptées en la matière pourraient être contestées par le pouvoir judiciaire devant la Cour constitutionnelle, compétente pour vérifier, dans chaque cas d'espèce, si les opinions incriminées ont été exprimées dans l'exercice de fonctions parlementaires. Pour décider de l'opportunité de saisir la Cour constitutionnelle, les juridictions judiciaires se prononceraient, au moins implicitement, sur le caractère correct et légitime de la délibération litigieuse. En tout état de cause, elle ne pourraient à elles seules priver le juge du fond du pouvoir d'examiner le différend.

44. A la lumière de ce qui précède, le Gouvernement estime qu'aucune restriction du droit du requérant à un tribunal ne saurait être décelée en l'espèce. Garantissant la possibilité de saisir une autorité judiciaire pour faire statuer sur une contestation relative à un droit de caractère civil, ledit droit à un tribunal n'impliquerait pas l'obligation, pour le juge, de conduire le procès dans le sens souhaité par le demandeur ou d'écarter les questions préliminaires susceptibles d'empêcher une décision sur le fond. En l'espèce, le requérant a pu s'adresser à un tribunal et se constituer partie civile dans la procédure ouverte contre M. Sgarbi. L'affaire a ensuite été tranchée par trois juridictions successives. En dernier ressort, la Cour de cassation, après avoir soigneusement examiné la question, a estimé que l'interprétation retenue par la Chambre des députés était correcte et qu'un recours pour conflit entre pouvoirs de l'Etat n'offrait pas des chances raisonnables de succès.

45. Le Gouvernement soutient par ailleurs qu'à supposer même que le requérant ait subi une atteinte à son droit d'accès à un tribunal, celle-ci a de toute façon été proportionnée au but légitime poursuivi, à savoir la liberté et la spontanéité des débats parlementaires. A cet égard, il observe qu'au moins à partir de 1997 (voir notamment les arrêts n^{os} 265 et 375 de 1997, n^{o} 289 de 1998, n^{o} 329 de 1999, n^{os} 10, 11, 56, 58, 82, 320 et 420 de 2000, n^{os} 137 et 289 de 2001, n^{os} 50, 51, 52, 79 et 207 de 2002) la Cour constitutionnelle a annulé de nombreuses délibérations du Parlement concernant l'immunité en question au motif que les comportements dénoncés, même justifiés par une querelle de nature politique, ne présentaient aucun rapport avec les actes caractérisant la fonction parlementaire. Le type de contrôle exercé par la haute juridiction italienne dans le cadre des conflits entre pouvoirs de l'Etat constituerait donc un instrument de protection en faveur des citoyens victimes d'une infraction pénale commise par un député ou un sénateur que le Parlement aurait illégitimement estimée couverte par l'article 68 § 1 de la Constitution. La jurisprudence récente montrerait en outre que l'étendue de l'immunité parlementaire est maintenant soigneusement ajustée au but poursuivi, la Cour constitutionnelle tenant compte de l'importance de garantir une protection judiciaire des droits fondamentaux à l'honneur et à la réputation de ceux qui s'estiment offensés par les déclarations d'un parlementaire. Dans ces conditions, on ne saurait conclure que le droit des particuliers à un tribunal peut se trouver

atteint dans sa substance même, s'agissant, tout au plus, d'une réglementation dudit droit rentrant dans la marge d'appréciation devant, en la matière, être reconnue aux Etats contractants.

46. Le Gouvernement relève qu'il est vrai qu'un particulier ne peut ni saisir directement la Cour constitutionnelle ni obliger le juge du fond à le faire, mais seulement solliciter une décision en ce sens. Il estime toutefois que ce système ne peut passer pour contraire à la Convention, puisque le conflit entre pouvoirs de l'Etat vise à protéger la fonction de sauvegarde de la prééminence du droit dont le pouvoir judiciaire est investi. Par ailleurs, comme il ressort de l'arrêt de la Cour constitutionnelle n° 76 de 2001, les parties privées peuvent intervenir dans la procédure devant la haute juridiction italienne.

47. Le Gouvernement allègue enfin qu'à supposer même qu'une violation puisse s'être produite dans la présente affaire, elle ne peut être attribuée qu'à un dysfonctionnement ponctuel du système italien, qui offre normalement des garanties suffisantes et doit être réputé conforme à la Convention. En effet, si le conflit entre pouvoirs avait été soulevé, il est fort probable que la Cour constitutionnelle, au vu de sa jurisprudence, aurait annulé la délibération de la Chambre des députés du 22 octobre 1997.

2. L'appréciation de la Cour

48. Dans sa décision sur la recevabilité de la requête, la Cour a estimé que le grief tiré de l'article 6 de la Convention posait avant tout la question de savoir si le requérant avait pu exercer son droit d'accès à un tribunal (voir *Golder c. Royaume-Uni*, arrêt du 21 février 1975, série A n° 18, pp. 17-18, §§ 35-36).

a) Sur l'existence d'une ingérence dans l'exercice par le requérant de son droit d'accès à un tribunal

49. La Cour rappelle que, d'après sa jurisprudence, l'article 6 § 1 consacre le « droit à un tribunal », dont le droit d'accès, à savoir le droit de saisir le tribunal en matière civile, ne constitue qu'un aspect (*Osman c. Royaume-Uni*, arrêt du 28 octobre 1998, *Recueil des arrêts et décisions* 1998-VIII, p. 3166, § 136). Ce droit ne vaut que pour les « contestations » relatives à des « droits et obligations de caractère civil » que l'on peut dire, au moins de manière défendable, reconnus en droit interne (voir, entre autres, *James et autres c. Royaume-Uni*, arrêt du 21 février 1986, série A n° 98, pp. 46-47, § 81, et *Powell et Rayner c. Royaume-Uni*, arrêt du 21 février 1990, série A n° 172, p. 16, § 36).

50. En l'espèce, la Cour relève que, s'estimant diffamé par les propos de M. Sgarbi, le requérant avait porté plainte à l'encontre du parlementaire en question et s'était constitué partie civile dans la procédure pénale qui avait par la suite été entamée. Dès lors, celle-ci portait sur un droit de caractère civil – à savoir le droit à la protection de sa réputation – dont le requérant pouvait, d'une manière défendable, se prétendre titulaire (voir *Tomasi c. France*, arrêt du 27 août 1992, série A n° 241-A, p. 43, § 121).

51. La Cour note ensuite que, par sa délibération du 22 octobre 1997, la Chambre des députés a déclaré que les propos de M. Sgarbi étaient couverts par l'immunité consacrée par l'article 68 § 1 de la Constitution (voir les paragraphes 20 et 21 ci-dessus), ce qui empêchait de continuer toute procédure pénale ou civile visant à établir la responsabilité du parlementaire en question et à obtenir la réparation des dommages subis (voir le paragraphe 27 ci-dessus).

52. Il est vrai que, comme l'affirme le Gouvernement, la légitimité de ladite délibération a fait l'objet d'un examen de la part de la Cour de cassation, qui, dans son arrêt du 6 mai

1998, a estimé qu'elle n'était ni arbitraire ni manifestement illogique et que la Chambre des députés n'avait pas outrepassé ses pouvoirs (voir les paragraphes 23-25 ci-dessus).

53. On ne saurait toutefois comparer une telle appréciation à une décision sur le droit du requérant à la protection de sa réputation, ni considérer qu'un degré d'accès au juge limité à la faculté de poser une question préliminaire suffisait pour assurer au requérant le « droit à un tribunal », eu égard au principe de la prééminence du droit dans une société démocratique (voir, *mutatis mutandis*, *Waite et Kennedy c. Allemagne* [GC], n° 26083/94, § 58, CEDH 1999-I). A ce sujet, il convient de rappeler que l'effectivité du droit en question demande qu'un individu jouisse d'une possibilité claire et concrète de contester un acte portant atteinte à ses droits (voir *Bellet c. France*, arrêt du 4 décembre 1995, série A n° 333-B, p. 42, § 36). Dans la présente affaire, à la suite de la délibération du 22 octobre 1997, doublée du refus par la Cour de cassation de soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle, les condamnations prononcées contre M. Sgarbi en première et en deuxième instance ont été annulées, et le requérant s'est vu priver de la possibilité d'obtenir quelque forme de réparation que ce soit pour son préjudice allégué.

54. Dans ces conditions, la Cour considère que le requérant a subi une atteinte à son droit d'accès à un tribunal.

55. Elle rappelle de surcroît que ce droit n'est pas absolu, mais peut donner lieu à des limitations implicitement admises. Néanmoins, ces limitations ne sauraient restreindre l'accès ouvert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même. En outre, elles ne se concilient avec l'article 6 § 1 que si elles poursuivent un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (voir, parmi beaucoup d'autres, *Khalfaoui c. France*, n° 34791/97, §§ 35-36, CEDH 1999-IX, et *Papon c. France*, n° 54210/00, § 90, 25 juillet 2002, non publié ; voir également le rappel des principes pertinents dans *Fayed c. Royaume-Uni*, arrêt du 21 septembre 1994, série A n° 294-B, pp. 49-50, § 65).

b) But de l'ingérence

56. La Cour relève que le fait pour les Etats d'accorder généralement une immunité plus au moins étendue aux parlementaires constitue une pratique de longue date, qui vise à permettre la libre expression des représentants du peuple et à empêcher que des poursuites partisanes puissent porter atteinte à la fonction parlementaire. Dans ces conditions, la Cour estime que l'ingérence en question, qui était prévue par l'article 68 § 1 de la Constitution, poursuivait des buts légitimes, à savoir la protection du libre débat parlementaire et le maintien de la séparation des pouvoirs législatif et judiciaire (voir *A. c. Royaume-Uni*, n° 35373/97, §§ 75-77, 17 décembre 2002).

57. Il reste à vérifier si les conséquences subies par le requérant étaient proportionnées aux buts légitimes visés.

c) Proportionnalité de l'ingérence

58. La Cour doit apprécier la restriction litigieuse à la lumière des circonstances particulières de l'espèce (voir *Waite et Kennedy c. Allemagne*, précité, § 64). Elle rappelle à cet égard qu'il lui incombe non pas d'examiner *in abstracto* la législation et la pratique pertinentes, mais de rechercher si la manière dont elles ont touché le requérant a enfreint la Convention (voir, *mutatis mutandis*, *Padovani c. Italie*, arrêt du 26 février 1993, série A n° 257-B, p. 20, § 24). En particulier, la Cour n'a pas pour tâche de se substituer aux juridictions internes. C'est au premier chef aux autorités nationales, notamment aux cours et tribunaux, qu'il incombe d'interpréter la législation interne (voir, entre autres, *Pérez de Rada Cavanilles c. Espagne*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, p. 3255, § 43). Le rôle

de la Cour se limite à vérifier la compatibilité avec la Convention des effets de pareille interprétation.

59. La Cour observe que lorsqu'un Etat reconnaît une immunité aux membres de son Parlement, la protection des droits fondamentaux peut s'en trouver affectée. Toutefois, il serait contraire au but et à l'objet de la Convention que les Etats contractants, en adoptant l'un ou l'autre des systèmes normalement utilisés pour assurer une immunité aux membres du Parlement, soient ainsi exonérés de toute responsabilité au regard de la Convention dans le domaine d'activité concerné. Il y a lieu de rappeler que la Convention a pour but de protéger des droits non pas théoriques ou illusoires, mais concrets et effectifs. La remarque vaut en particulier pour le droit d'accès aux tribunaux, vu la place éminente que le droit à un procès équitable occupe dans une société démocratique (voir *Aït-Mouhoub c. France*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, p. 3227, § 52). Il serait incompatible avec la prééminence du droit dans une société démocratique et avec le principe fondamental qui sous-tend l'article 6 § 1, à savoir que les revendications civiles doivent pouvoir être portées devant un juge, qu'un Etat pût, sans réserve ou sans contrôle des organes de la Convention, soustraire à la compétence des tribunaux toute une série d'actions civiles ou exonérer de toute responsabilité des catégories de personnes (voir *Fayed c. Royaume-Uni*, précité, *ibidem*).

60. La Cour rappelle que, précieuse pour chacun, la liberté d'expression l'est tout particulièrement pour un élu du peuple ; il représente les électeurs, signale leurs préoccupations et défend leurs intérêts. Dans une démocratie, le Parlement ou les organes comparables sont des tribunes indispensables au débat politique. Une ingérence dans la liberté d'expression exercée dans le cadre de ces organes ne saurait donc se justifier que par des motifs impérieux (*Jerusalem c. Autriche*, n° 26958/95, §§ 36 et 40, CEDH 2001-II).

61. On ne peut dès lors, de façon générale, considérer l'immunité parlementaire comme une restriction disproportionnée au droit d'accès à un tribunal tel que le consacre l'article 6 § 1. De même que ce droit est inhérent à la garantie d'un procès équitable assurée par cet article, de même certaines restrictions à l'accès doivent être tenues pour lui être inhérentes ; on en trouve un exemple dans les limitations généralement admises par les Etats contractants comme relevant de la doctrine de l'immunité parlementaire (voir *A. c. Royaume-Uni*, précité, § 83, et, *mutatis mutandis*, *Al-Adsani c. Royaume-Uni* [GC], n° 35763/97, § 56, CEDH 2001-XI).

62. A cet égard, il convient de rappeler que la Cour a estimé compatible avec la Convention une immunité qui couvrait les déclarations faites au cours des débats parlementaires au sein des chambres législatives et tendait à la protection des intérêts du Parlement dans son ensemble, par opposition à ceux de ses membres pris individuellement (voir *A. c. Royaume-Uni*, précité, §§ 84-85).

63. La Cour relève toutefois en l'occurrence que, prononcées au cours d'une réunion électorale et donc en dehors d'une chambre législative, les déclarations litigieuses de M. Sgarbi n'étaient pas liées à l'exercice de fonctions parlementaires *stricto sensu*, paraissant plutôt s'inscrire dans le cadre d'une querelle entre particuliers. Or, dans un tel cas, on ne saurait justifier un déni d'accès à la justice par le seul motif que la querelle pourrait être de nature politique ou liée à une activité politique.

64. De l'avis de la Cour, l'absence d'un lien évident avec une activité parlementaire appelle une interprétation étroite de la notion de proportionnalité entre le but visé et les moyens employés. Il en est particulièrement ainsi lorsque les restrictions au droit d'accès découlent d'une délibération d'un organe politique. Conclure autrement équivaudrait à restreindre d'une manière incompatible avec l'article 6 § 1 de la Convention le droit d'accès à un tribunal des particuliers chaque fois que les propos attaqués en justice ont été émis par un membre du Parlement.

65. Aussi la Cour estime-t-elle en l'espèce que la décision d'annuler les jugements favorables au requérant et de paralyser toute autre action tendant à assurer la protection de sa réputation n'a pas respecté le juste équilibre qui doit exister en la matière entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu.

66. La Cour attache également de l'importance au fait qu'après la délibération de la Chambre des députés du 22 octobre 1997 le requérant ne disposait pas d'autres voies raisonnables pour protéger efficacement ses droits garantis par la Convention (voir, *a contrario*, *Waite et Kennedy c. Allemagne*, précité, §§ 68-70, et *A. c. Royaume-Uni*, précité, § 86). En effet, le refus par la Cour de cassation de soulever un conflit entre pouvoirs de l'Etat a empêché la Cour constitutionnelle de se prononcer sur la compatibilité entre la délibération litigieuse et les attributions du pouvoir judiciaire. A cet égard, il convient de noter que la jurisprudence de la Cour constitutionnelle a connu sur ce point une certaine évolution, et qu'à présent la haute juridiction italienne estime illégitime que l'immunité soit étendue à des propos n'ayant pas de correspondance substantielle avec des actes parlementaires préalables dont le représentant concerné pourrait passer pour s'être fait l'écho (voir les paragraphes 30, 31 et 45 ci-dessus).

67. Au vu de ce qui précède, la Cour conclut qu'il y a eu violation du droit d'accès à un tribunal garanti au requérant par l'article 6 § 1 de la Convention.

III. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 13 DE LA CONVENTION

68. Le requérant estime que le prononcé d'un non-lieu à l'égard de M. Sgarbi a également violé l'article 13 de la Convention, qui se lit ainsi :

« Toute personne dont les droits et libertés reconnus dans la (...) Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

69. Le requérant considère que l'application du système italien d'immunités et prérogatives l'a privé d'une protection juridictionnelle efficace. Il se plaint en outre de l'impossibilité pour le justiciable italien de saisir directement la Cour constitutionnelle.

70. Le Gouvernement estime que le grief tiré de l'article 13 doit être considéré comme absorbé par celui soulevé sous l'angle de l'article 6 § 1. En tout état de cause, se référant aux arguments développés sur le terrain du droit d'accès au tribunal, il soutient que cette disposition n'a pas été violée. Il observe également que l'affaire du requérant a été examinée par trois juridictions et qu'on ne saurait faire découler de l'article 13 de la Convention une obligation pour l'Etat de prévoir une voie de recours contre les décisions définitives rendues par la Cour de cassation ou de garantir aux justiciables un accès direct à la Cour constitutionnelle.

71. La Cour note que le grief soulevé par le requérant sur le terrain de l'article 13 concerne les même faits que ceux déjà examinés sous l'angle de l'article 6 § 1 de la Convention. De plus, il y a lieu de rappeler que lorsqu'une question d'accès à un tribunal se pose, les garanties de l'article 13 sont absorbées par celles de l'article 6 (*Brualla Gómez de la Torre c. Espagne*, arrêt du 19 décembre 1997, *Recueil* 1997-VIII, § 41).

72. Dès lors, la Cour estime qu'il n'y a pas lieu d'examiner s'il y a eu violation de l'article 13 de la Convention (voir *Posti et Rahko c. Finlande*, n° 27824/95, § 89, 24 septembre 2002, non publié).

IV. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 14 DE LA CONVENTION

73. Le requérant allègue que M. Sgarbi, en sa qualité de membre du Parlement, a pu exercer son droit à la liberté d'expression bien au-delà des limites qui sont normalement imposées aux autres citoyens, ce au détriment de ses droits fondamentaux à l'honneur et à la réputation. Il invoque l'article 14 de la Convention, ainsi libellé :

« La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

74. Le requérant soutient que l'immunité indûment reconnue à M. Sgarbi s'analyse en une grave discrimination devant la loi, qui a transformé une prérogative en un privilège injustifié. Il se dit « victime » de cet état de choses dans la mesure où, lésé dans son droit à l'honneur, il n'a pu obtenir réparation devant les juridictions nationales.

75. Le Gouvernement observe que les députés ne se trouvent pas dans une situation comparable à celle des autres particuliers et que l'étendue de la liberté d'expression qui leur est reconnue se justifie par la nécessité de protéger la liberté des débats parlementaires. Quoi qu'il en soit, il considère que le requérant ne peut être réputé victime d'une « discrimination » qui concerne la généralité des citoyens.

76. La Cour estime, au vu de la conclusion à laquelle elle est parvenue sous l'angle de l'article 6 § 1 de la Convention (voir paragraphe 67 ci-dessus), qu'il ne s'impose pas d'examiner séparément le grief du requérant sous l'angle de l'article 14 de la Convention.

V. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

77. Aux termes de l'article 41 de la Convention,

« Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

78. Le requérant allègue avoir subi un tort moral et sollicite l'octroi d'une somme non inférieure à 50 000 euros (EUR).

79. Le Gouvernement estime qu'un arrêt concluant à la violation de la Convention constituerait en soi une satisfaction équitable suffisante.

80. La Cour juge que le requérant a subi un tort moral certain. Eu égard aux circonstances de la cause et statuant en équité comme le veut l'article 41 de la Convention, elle décide de lui octroyer la somme de 8 000 EUR.

B. Frais et dépens

81. S'appuyant sur une note d'honoraires, le requérant sollicite le remboursement de 8 745 EUR pour les frais encourus par lui devant la Commission et la Cour.

82. Le Gouvernement s'en remet sur ce point à la sagesse de la Cour.

83. La Cour observe que la présente affaire est similaire à l'affaire Cordova n° 1 (requête n° 40877/98), dans laquelle le requérant a été représenté devant les organes de la Convention par le même avocat. Les deux affaires ont été traitées conjointement lors de l'audience devant la Cour, et les questions juridiques adressées dans la formule de requête et dans les mémoires présentés à Strasbourg coïncidaient largement. La préparation de la présente requête ayant été facilitée par l'introduction préalable de la requête n° 40877/98, la Cour décide d'accorder au requérant 5 000 EUR pour les frais et dépens exposés par lui devant la Commission et la Cour.

C. Intérêts moratoires

84. La Cour juge approprié de baser le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À l'UNANIMITÉ,

1. *Dit* qu'il n'est pas nécessaire d'examiner l'exception préliminaire du Gouvernement ;

2. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;

3. *Dit* qu'il n'est pas nécessaire d'examiner s'il y a eu violation de l'article 13 de la Convention ;

4. *Dit* qu'il n'est pas nécessaire d'examiner s'il y a eu violation de l'article 14 de la Convention ;

5. *Dit*

a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 8 000 EUR (huit mille euros) pour dommage moral et 5 000 EUR (cinq mille euros) pour frais et dépens ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

6. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 30 janvier 2003 en application de l'article 77 §§ 2 et 3 du règlement.

Søren Nielsen Christos Rozakis

Greffier adjoint Président

COUR EUROPEENNE DES DROITS DE L'HOMME

Affaire Cordova c. Italie (no 1) (2003) (french only)

PREMIÈRE SECTION, Requête n° 40877/98, ARRÊT, 30 janvier 2003

En l'affaire Cordova c. Italie (n° 1),
La Cour européenne des Droits de l'Homme (première section), siégeant en une chambre composée de :

M. C.L. Rozakis, *président*,
Mme F. Tulkens,
M. G. Bonello,
Mmes N. Vajic,
S. Botoucharova,
MM. A. Kovler,
V. Zagrebelsky, *juges*,
et de M. S. Nielsen, *greffier adjoint de section*,

Après en avoir délibéré en chambre du conseil les 17 octobre 2002 et 23 janvier 2003,
Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE
1. A l'origine de l'affaire se trouve une requête (n° 40877/98) dirigée contre la République italienne et dont un ressortissant de cet Etat, M. Agostino **Cordova** (« le requérant »), avait saisi la Commission européenne des Droits de l'Homme (« la Commission ») le 26 mars 1998 en vertu de l'ancien article 25 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).
2. Le requérant alléguait, d'une part, que la décision d'annuler la condamnation d'un parlementaire jugé l'avoir diffamé s'analysait en une violation de ses droits d'accès à un tribunal et à l'octroi d'un recours effectif devant une instance nationale (articles 6 § 1 et 13 de la Convention), et, d'autre part, que l'étendue de la liberté d'expression reconnue au parlementaire en question était contraire à l'article 14 de la Convention.
3. La requête a été transmise à la Cour le 1er novembre 1998, date d'entrée en vigueur du Protocole n° 11 à la Convention (article 5 § 2 du Protocole n° 11).
4. Elle a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement). Au sein de celle-ci a été constituée, conformément à l'article 26 § 1 du règlement, la chambre chargée d'en connaître (article 27 § 1 de la Convention).
5. Le 1er novembre 2001, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). La requête a alors été transférée à la première section telle que remaniée (article 52 § 1).
6. Par une décision du 13 juin 2002, la Cour a déclaré la requête recevable.
7. Tant le requérant que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire (article 59 § 1 du règlement).
8. Une audience s'est déroulée en public au Palais des Droits de l'Homme, à Strasbourg, le 17 octobre 2002 (article 59 § 3 du règlement).

Ont comparu :
– *pour le Gouvernement*

M. F. Crisafulli, *coagent*,
– *pour le requérant*

M. G. Minieri, *conseil*.

La Cour les a entendus en leurs déclarations.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

9. Le requérant est né en 1936 et réside à Naples.

10. En 1993, il était procureur de la République au parquet de Palmi. Dans l'exercice de ses fonctions, il avait enquêté sur un certain M. C. Ce dernier avait entretenu des rapports avec M. Francesco Cossiga, ancien Président de la République italienne, qui, son mandat terminé, était devenu sénateur à vie en application de l'article 59 § 1 de la Constitution.

11. En août 1993, M. Cossiga adressa un téléfax et deux courriers au requérant. Il affirmait lui faire cadeau des droits d'auteur sur les communications écrites, téléphoniques et verbales qu'il avait eues avec M. C. « y compris aux fins de leur exploitation théâtrale et cinématographique » (« *anche ai fini di eventuale sfruttamento teatrale e cinematografico* »), « à titre de modeste contribution pour les frais [qu'allait] entraîner [son] transfert de Palmi à Naples » (« *come modestissimo contributo alle spese che Ella dovrà affrontare per il suo trasferimento da Palmi a Napoli* »). M. Cossiga annonçait en outre au requérant qu'il allait lui envoyer un petit cheval de bois et un tricycle « pour les divertissements auxquels vous avez, je crois, le droit de vous livrer » (« *per quegli svaghi che credo abbia diritto a concedersi* »). M. Cossiga envoya effectivement au requérant le petit cheval de bois et le tricycle, ajoutant à ces objets un jeu de détective nommé « Super Cluedo » ; le colis était accompagné d'un petit mot ainsi libellé : « Amusez-vous, Cher Procureur ! Cordialement, S. Cossiga » (« *Si prenda un po' di svago, gentile Procuratore! Cordialmente F. Cossiga* »).

12. Le requérant porta plainte contre M. Cossiga, estimant que les communications et cadeaux décrits ci-dessus avaient porté atteinte à son honneur et à sa réputation. Des poursuites furent alors entamées contre M. Cossiga pour outrage à officier public.

13. Le 12 juillet 1996, M. Cossiga fut renvoyé en jugement devant le juge d'instance de Messine. Le 23 juin 1997, le requérant se constitua partie civile.

14. Entre-temps, le président du Sénat avait informé le juge d'instance que la commission des immunités parlementaires (« *Giunta (...) delle immunità parlamentari* ») avait proposé à l'assemblée de déclarer que les faits dont M. Cossiga était accusé étaient couverts par l'immunité prévue à l'article 68 § 1 de la Constitution.

15. Par une délibération du 2 juillet 1997, le Sénat approuva à la majorité la proposition de la commission des immunités.

16. Le 23 septembre 1997, le requérant présenta au procureur de la République et au juge d'instance de Messine un mémoire dans lequel il critiquait la délibération du Sénat, observant qu'en l'espèce aucun rapport ne pouvait être décelé entre les faits dont M. Cossiga était accusé (lesquels s'analysaient selon lui en une querelle personnelle avec un magistrat) et l'exercice des fonctions parlementaires. Fort de cette constatation, le requérant alléguait que le Sénat, en applicant l'article 68 en dehors des conditions prévues par la Constitution, avait envahi les attributions du pouvoir judiciaire, et il sollicitait l'introduction devant la Cour constitutionnelle d'un recours pour conflit entre pouvoirs de l'Etat.

17. Par un jugement du 27 septembre 1997, dont le texte fut déposé au greffe le 10 octobre 1997, le juge d'instance de Messine prononça un non-lieu à l'égard de M. Cossiga « en application de l'article 68 § 1 de la Constitution ».

18. Le juge observa notamment qu'il appartenait au Sénat, dont le vote ne pouvait être censuré par une juridiction judiciaire, de vérifier si les conditions énoncées à l'article 68 étaient remplies. Par ailleurs, il n'estima pas nécessaire de soulever un conflit entre pouvoirs, considérant que la décision du Sénat n'était entachée d'aucun vice de procédure et n'était pas manifestement illogique.

19. Le 4 décembre 1997, le requérant demanda au procureur de la République de Messine d'interjeter appel contre le jugement du 27 septembre 1997. Cette démarche était censée permettre, par la suite, de soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle.

20. Par une ordonnance du 13 décembre 1997, le procureur rejeta la demande du requérant. Il observa notamment que la Cour constitutionnelle ne pouvait pas censurer la décision du Sénat, mais seulement évaluer si le Parlement avait ou non utilisé son pouvoir de façon arbitraire, en exerçant une interférence abusive dans la sphère de compétence des

juridictions judiciaires. Or il ressortait des travaux parlementaires qu'en l'espèce la délibération incriminée se fondait sur les motifs suivants :
- M. Cossiga avait préalablement critiqué, au travers d'une question parlementaire, les investigations menées par le requérant ;
- les faits dont M. Cossiga était accusé devaient être interprétés comme une critique polie et ironique de ces investigations ;
- la jurisprudence des chambres législatives appliquait l'immunité prévue à l'article 68 de la Constitution à tout jugement politique exprimé par un membre du Parlement et pouvant être considéré comme une projection vers l'extérieur des activités parlementaires *stricto sensu*.
21. Selon le procureur général de la République de Messine, ces motifs n'étaient ni illogiques ni manifestement arbitraires.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

1. L'immunité reconnue aux membres du Parlement

22. L'article 68 § 1 de la Constitution, tel que modifié par la loi constitutionnelle n° 3 de 1993, qui a abrogé la nécessité d'obtenir l'autorisation du Parlement pour procéder contre l'un de ses membres, est ainsi libellé :
« Les membres du Parlement ne peuvent être appelés à répondre des opinions et votes exprimés par eux dans l'exercice de leurs fonctions ».
23. La Cour constitutionnelle a précisé que la délibération d'une chambre législative affirmant que le comportement de l'un de ses membres entre dans le champ d'application de la disposition précitée empêche d'entamer ou de continuer toute procédure pénale ou civile visant à établir la responsabilité du parlementaire en question et à obtenir la réparation des dommages subis.
24. Si (normalement à la demande du parlementaire concerné) une telle délibération est adoptée, les juridictions judiciaires ne peuvent la censurer. Toutefois, si le juge estime qu'elle s'analyse en un exercice illégitime du pouvoir d'appréciation attribué aux chambres législatives, il peut soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle (voir l'arrêt de la Cour constitutionnelle n° 1150 de 1988). La même possibilité n'est pas reconnue aux parties au procès.
25. Les chambres législatives ont adopté une interprétation extensive de l'article 68 § 1, reconnaissant son applicabilité aux opinions exprimées en dehors du siège du Parlement, fussent-elles indépendantes de l'activité parlementaire proprement dite. Cette interprétation extensive se fonde sur l'idée que les jugements politiques exprimés hors du Parlement constituent une projection vers l'extérieur de l'activité parlementaire et relèvent du mandat confié par les électeurs à leurs représentants.
26. Saisie de la question à l'occasion de conflits entre pouvoirs de l'Etat soulevés par les juges, la Cour constitutionnelle a d'abord exercé un contrôle limité à la régularité formelle de la délibération parlementaire. Puis, progressivement, elle a établi des limites plus étroites à la garantie de l'immunité parlementaire, élargissant du même coup la portée du contrôle devant être exercé par elle quant à la compatibilité de la délibération parlementaire avec l'article 68 de la Constitution. Dans son arrêt n° 289 du 18 juillet 1998, elle a ainsi précisé que la « fonction parlementaire » (*funzione parlamentare*) ne peut pas couvrir toute l'activité politique d'un député ou d'un sénateur car « une telle interprétation (...) entraînerait le risque de transformer une garantie en un privilège personnel ». Elle a ajouté : « on ne saurait établir aucun lien entre de nombreuses allusions prononcées lors de réunions, conférences de presse, émissions télévisées (...) et une question parlementaire adressée par la suite au ministre de la Justice (...). En conclure autrement [équivaudrait à admettre] qu'aucune affirmation, même gravement diffamatoire et (...) tout à fait indépendante de la fonction ou activité parlementaire, ne peut être censurée ».
27. Dans sa jurisprudence ultérieure, qui peut maintenant être considérée comme bien établie, la Cour constitutionnelle a précisé que lorsqu'il s'agit d'opinions exprimées en dehors du Parlement, il faut vérifier s'il existe un lien avec les activités parlementaires. En particulier, il doit y avoir une correspondance substantielle entre les opinions en cause et un acte parlementaire préalable (voir les arrêts n^{os} 10, 11, 56, 58, et 82 de 2000, n^{os} 137 et 289 de 2001, et n^{os} 50, 51, 52, 79 et 207 de 2002).

2. La possibilité pour la partie civile d'interjeter appel contre la décision de première instance
28. Aux termes de l'article 576 du code de procédure pénale (ci-après le « CPP »),
« La partie civile peut attaquer, par le biais du recours prévu pour le parquet (...), seulement aux fins de la responsabilité civile [de l'accusé], le jugement d'acquittement (...) ».

EN DROIT
I. SUR L'EXCEPTION PRÉLIMINAIRE DU GOUVERNEMENT
29. Dans son mémoire du 30 août 2002, le Gouvernement demande que la requête soit rejetée pour non-épuisement des voies de recours internes au motif que le requérant n'a ni entamé au civil une action en réparation des dommages subis ni fait usage du remède prévu à l'article 576 du CPP, qui lui permettait d'interjeter appel contre le jugement du juge d'instance de Messine (voir le paragraphe 28 ci-dessus). Le requérant aurait pu par la suite demander au juge civil ou à la juridiction d'appel de soulever un conflit entre pouvoirs de l'Etat.
30. Le Gouvernement reconnaît qu'une exception similaire a été écartée par la Cour au stade de la recevabilité. Il conteste toutefois la décision en cause, estimant qu'elle ne tient pas dûment compte de l'évolution de la jurisprudence de la Cour constitutionnelle sur ce point, qui aurait pu amener le juge civil ou la juridiction d'appel à estimer nécessaire de soulever un conflit entre pouvoirs. Dans le cadre de ce dernier, la Cour constitutionnelle aurait pu annuler la délibération du Sénat du 2 juillet 1997 et porter ainsi remède à la situation dénoncée par le requérant.
31. La Cour rappelle que si l'article 35 § 4 de la Convention lui permet de rejeter à tout stade de la procédure une requête qu'elle considère comme irrecevable par application de l'article 35, elle a en revanche jugé que seuls des éléments nouveaux et des circonstances exceptionnelles pouvaient l'amener à reconsidérer son rejet d'une exception présentée au stade de l'examen de la recevabilité de la requête (*Cisse c. France,* n° 51346/99, § 32, 9 avril 2002).
32. Or, dans sa décision sur la recevabilité de la présente requête, la Cour a considéré qu'une action civile ou un appel aux sens de l'article 576 du CPP étaient dépourvus de chances raisonnables de succès car ils se seraient heurtés à la délibération du Sénat du 2 juillet 1997. Quant à la possibilité de soulever un conflit entre pouvoirs de l'Etat, la Cour a observé que, dans le système juridique italien, un individu ne jouit pas d'un accès direct à la Cour constitutionnelle et que, par conséquent, pareille démarche ne saurait s'analyser en un recours dont l'article 35 § 1 de la Convention exige l'exercice.
33. La Cour n'aperçoit, dans le mémoire du Gouvernement du 30 août 2002, aucun élément nouveau pouvant l'amener à reconsidérer la position qu'elle a prise dans sa décision du 13 juin 2002 rejetant l'exception relative au non-épuisement des voies de recours internes. Il s'ensuit que la demande du Gouvernement doit être rejetée.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION
34. Le requérant se plaint du manque d'équité de la procédure suivie devant le juge d'instance de Messine. Il invoque l'article 6 § 1 de la Convention, qui, dans ses parties pertinentes, se lit comme suit :
« 1. Toute personne a droit à ce que sa cause soit entendue (...) par un tribunal (...) qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) ».

1. Les arguments des parties
(a) Le requérant
35. Le requérant soutient que la décision de prononcer un non-lieu en faveur de M. Cossiga se fonde sur des erreurs de droit et dépendait en dernier ressort d'une délibération du Sénat, organe ne pouvant être considéré comme impartial.
36. Il estime notamment que la délibération du Sénat du 2 juillet 1997 est manifestement contraire à la lettre et à l'esprit de l'article 68 § 1 de la Constitution, puisqu'elle concerne non seulement des « opinions », mais aussi un fait matériel (l'envoi de « cadeaux »), qui, en tant

que tel, ne saurait être couvert par l'immunité en question. Par ailleurs, il ne peut accepter que, dans la mesure où elle porte sur des opinions écrites, la délibération incriminée considère comme exprimées dans l'exercice des fonctions parlementaires des affirmations offensantes adressées à un particulier dans le cadre d'une querelle de personnes.

37. Il observe que, dans son affaire, les autorités italiennes ont refusé de soulever un conflit entre pouvoirs de l'Etat, le privant ainsi d'un recours apte à protéger les victimes de déclarations diffamatoires de parlementaires. Il souligne par ailleurs que seule la jurisprudence la plus récente de la Cour constitutionnelle (arrêts n^{os} 10, 11, 58 et 82 de 2000) reconnaît que l'immunité prévue à l'article 68 § 1 ne couvre que les opinions liées à l'exercice de fonctions parlementaires *stricto sensu*. En l'espèce, selon lui, les propos de M. Cossiga n'avaient aucun rapport avec l'activité de parlementaire de leur auteur, mais visaient simplement à l'offenser et à l'insulter. Il considère qu'interpréter l'immunité parlementaire comme couvrant également ce type d'atteinte à la réputation d'autrui équivaudrait à octroyer aux sénateurs et aux députés une « autorisation d'insulter librement » (*licenza per il libero insulto*) pour des motifs personnels.

38. Le requérant rappelle en outre que la délibération du Sénat du 2 juillet 1997, doublée du refus par les autorités de soulever un conflit entre pouvoirs de l'Etat, l'a privé de toute possibilité non seulement d'obtenir la condamnation de M. Cossiga au pénal, mais aussi d'introduire au civil une action en réparation des dommages subis. Cette situation s'analyserait en une absence totale de contrôle de la justice sur les décisions prises par le Parlement.

(b) Le Gouvernement

39. Le Gouvernement rappelle que l'immunité reconnue aux membres du Parlement pour leurs votes et opinions poursuit le but d'assurer aux représentants du peuple, dans l'exercice de leurs fonctions, la liberté d'expression la plus complète, en marge des limites imposées aux autres citoyens. Toute interférence avec cette liberté devrait être exclue.

40. Ce principe serait d'ailleurs reconnu par toutes les démocraties parlementaires et devrait être considéré comme l'une des règles caractérisant les systèmes démocratiques, où règnent la séparation des pouvoirs et la prééminence du droit. Comme il ne serait pas raisonnable de croire qu'en signant la Convention les Hautes Parties contractantes ont souhaité y renoncer, sa compatibilité avec les droits fondamentaux de l'individu ne saurait être mise en question. Le Gouvernement se réfère, sur ce point, à la jurisprudence développée par la Commission dans les affaires *X c. Autriche*, *Young c. Irlande* et *Ó'Faolain c. Irlande* (voir, respectivement, les requêtes n^{os} 3374/67, 25646/94 et 29099/95, décisions de la Commission des 4 février 1969 et 17 janvier 1996) et par la Cour dans l'affaire *Fayed c. Royaume-Uni* (voir l'arrêt du 21 septembre 1994, série A n^{o} 294-B).

41. Le Gouvernement considère que, justifiée par son rattachement à une fonction prévue par la Constitution, l'immunité en question ne se heurte ni au principe de l'égalité des citoyens devant la loi ni à l'interdiction de la discrimination. Elle ne viserait ni à créer une catégorie « privilégiée » ni à permettre aux parlementaires de faire un usage arbitraire de leurs prérogatives. Elle poursuivrait au contraire le but légitime de permettre au Parlement de débattre librement et ouvertement sur toute question concernant la vie publique, sans que ses membres aient à craindre des persécutions ou de possibles conséquences sur le plan judiciaire.

42. De plus, en cas de doute quant à l'applicabilité ou à l'étendue de l'immunité, les délibérations des chambres législatives adoptées en la matière pourraient être contestées par le pouvoir judiciaire devant la Cour constitutionnelle, compétente pour vérifier, dans chaque cas d'espèce, si les opinions incriminées ont été exprimées dans l'exercice de fonctions parlementaires. Pour décider de l'opportunité de saisir la Cour constitutionnelle, les juridictions judiciaires se prononceraient, au moins implicitement, sur le caractère correct et légitime de la délibération litigieuse. En tout état de cause, elle ne pourraient à elles seules priver le juge du fond du pouvoir d'examiner le différend.

43. A la lumière de ce qui précède, le Gouvernement estime qu'aucune restriction du droit du requérant à un tribunal ne saurait être décelée en l'espèce. Garantissant la possibilité de saisir une autorité judiciaire pour faire statuer sur une contestation relative à un droit de

caractère civil, ledit droit à un tribunal n'impliquerait pas l'obligation, pour le juge, de conduire le procès dans le sens souhaité par le demandeur ou d'écarter les questions préliminaires susceptibles d'empêcher une décision sur le fond. En l'espèce, le requérant a pu s'adresser à un tribunal et se constituer partie civile dans la procédure ouverte contre M. Cossiga. Le juge d'instance de Messine a ensuite examiné la délibération du Sénat et considéré qu'elle était légitime ; en dernier ressort, le parquet a estimé que la décision du juge d'instance était correcte et qu'il n'y avait pas lieu d'interjeter appel contre elle.

44. Le Gouvernement soutient par ailleurs qu'à supposer même que le requérant ait subi une atteinte à son droit d'accès à un tribunal, celle-ci a de toute façon été proportionnée au but légitime poursuivi, à savoir la liberté et la spontanéité des débats parlementaires. A cet égard, il observe qu'au moins à partir de 1997 (voir notamment les arrêts n^{os} 265 et 375 de 1997, n^{o} 289 de 1998, n^{o} 329 de 1999, n^{os} 10, 11, 56, 58, 82, 320 et 420 de 2000, n^{os} 137 et 289 de 2001, n^{os} 50, 51, 52, 79 et 207 de 2002) la Cour constitutionnelle a annulé de nombreuses délibérations du Parlement concernant l'immunité en question au motif que les comportements dénoncés, même justifiés par une querelle de nature politique, ne présentaient aucun rapport avec les actes caractérisant la fonction parlementaire. Le type de contrôle exercé par la haute juridiction italienne dans le cadre des conflits entre pouvoirs de l'Etat constituerait donc un instrument de protection en faveur des citoyens victimes d'une infraction pénale commise par un député ou un sénateur que le Parlement aurait illégitimement estimée couverte par l'article 68 § 1 de la Constitution. La jurisprudence récente montrerait en outre que l'étendue de l'immunité parlementaire est maintenant soigneusement ajustée au but poursuivi, la Cour constitutionnelle tenant compte de l'importance de garantir une protection judiciaire des droits fondamentaux à l'honneur et à la réputation de ceux qui s'estiment offensés par les déclarations d'un parlementaire. Dans ces conditions, on ne saurait conclure que le droit des particuliers à un tribunal peut se trouver atteint dans sa substance même, s'agissant, tout au plus, d'une réglementation dudit droit rentrant dans la marge d'appréciation devant, en la matière, être reconnue aux Etats contractants.

45. Le Gouvernement relève qu'il est vrai qu'un particulier ne peut ni saisir directement la Cour constitutionnelle ni obliger le juge du fond à le faire, mais seulement solliciter une décision en ce sens. Il estime toutefois que ce système ne peut passer pour contraire à la Convention, puisque le conflit entre pouvoirs de l'Etat vise à protéger la fonction de sauvegarde de la prééminence du droit dont le pouvoir judiciaire est investi. Par ailleurs, comme il ressort de l'arrêt de la Cour constitutionnelle n^{o} 76 de 2001, les parties privées peuvent intervenir dans la procédure devant la haute juridiction italienne.

46. Le Gouvernement allègue enfin qu'à supposer même qu'une violation puisse s'être produite dans la présente affaire, elle ne peut être attribuée qu'à un dysfonctionnement ponctuel du système italien, qui offre normalement des garanties suffisantes et doit être réputé conforme à la Convention. En effet, si le conflit entre pouvoirs avait été soulevé, il est fort probable que la Cour constitutionnelle, au vu de sa jurisprudence, aurait annulé la délibération du Sénat du 2 juillet 1997.

2. L'appréciation de la Cour

47. Dans sa décision sur la recevabilité de la requête, la Cour a estimé que le grief tiré de l'article 6 de la Convention posait avant tout la question de savoir si le requérant avait pu exercer son droit d'accès à un tribunal (voir *Golder c. Royaume-Uni*, arrêt du 21 février 1975, série A n^{o} 18, pp. 17-18, §§ 35-36).

(a) Sur l'existence d'une ingérence dans l'exercice par le requérant de son droit d'accès à un tribunal

48. La Cour rappelle que, d'après sa jurisprudence, l'article 6 § 1 consacre le « droit à un tribunal », dont le droit d'accès, à savoir le droit de saisir le tribunal en matière civile, ne constitue qu'un aspect (*Osman c. Royaume-Uni*, arrêt du 28 octobre 1998, *Recueil des arrêts et décisions* 1998-VIII, p. 3166, § 136). Ce droit ne vaut que pour les « contestations » relatives à des « droits et obligations de caractère civil » que l'on peut dire, au moins de manière défendable, reconnus en droit interne (voir, entre autres, *James et autres c.*

Royaume-Uni, arrêt du 21 février 1986, série A n° 98, pp. 46-47, § 81, et *Powell et Rayner c. Royaume-Uni*, arrêt du 21 février 1990, série A n° 172, p. 16, § 36).

49. En l'espèce, la Cour relève que, s'estimant diffamé par la conduite de M. Cossiga, le requérant avait porté plainte à l'encontre du parlementaire en question et s'était constitué partie civile dans la procédure pénale qui avait par la suite été entamée. Dès lors, celle-ci portait sur un droit de caractère civil – à savoir le droit à la protection de sa réputation – dont le requérant pouvait, d'une manière défendable, se prétendre titulaire (voir *Tomasi c. France*, arrêt du 27 août 1992, série A n° 241-A, p. 43, § 121).

50. La Cour note ensuite que, par sa délibération du 2 juillet 1997, le Sénat a déclaré que la conduite de M. Cossiga était couverte par l'immunité consacrée par l'article 68 § 1 de la Constitution (voir les paragraphes 14 et 15 ci-dessus), ce qui empêchait de continuer toute procédure pénale ou civile visant à établir la responsabilité du parlementaire en question et à obtenir la réparation des dommages subis (voir le paragraphe 23 ci-dessus).

51. Il est vrai que, comme l'affirme le Gouvernement, la légitimité de ladite délibération a fait l'objet d'un examen de la part du juge d'instance de Messine, qui, dans son jugement du 27 septembre 1998, a estimé qu'elle n'était entachée d'aucun vice de procédure et n'était pas manifestement illogique (voir les paragraphes 17-18 ci-dessus).

52. On ne saurait toutefois comparer une telle appréciation à une décision sur le droit du requérant à la protection de sa réputation, ni considérer qu'un degré d'accès au juge limité à la faculté de poser une question préliminaire suffisait pour assurer au requérant le « droit à un tribunal », eu égard au principe de la prééminence du droit dans une société démocratique (voir, *mutatis mutandis*, *Waite et Kennedy c. Allemagne* [GC], n° 26083/94, § 58, CEDH 1999-I). A ce sujet, il convient de rappeler que l'effectivité du droit en question demande qu'un individu jouisse d'une possibilité claire et concrète de contester un acte portant atteinte à ses droits (voir *Bellet c. France*, arrêt du 4 décembre 1995, série A n° 333-B, p. 42, § 36). Dans la présente affaire, à la suite de la délibération du 2 juillet 1997, doublée du refus par le juge d'instance de Messine de soulever un conflit entre pouvoirs de l'Etat devant la Cour constitutionnelle, les poursuites entamées contre M. Cossiga ont été classées, et le requérant s'est vu priver de la possibilité d'obtenir quelque forme de réparation que ce soit pour son préjudice allégué.

53. Dans ces conditions, la Cour considère que le requérant a subi une atteinte à son droit d'accès à un tribunal.

54. Elle rappelle de surcroît que ce droit n'est pas absolu, mais peut donner lieu à des limitations implicitement admises. Néanmoins, ces limitations ne sauraient restreindre l'accès ouvert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même. En outre, elles ne se concilient avec l'article 6 § 1 que si elles poursuivent un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (voir, parmi beaucoup d'autres, *Khalfaoui c. France*, n° 34791/97, §§ 35-36, CEDH 1999-IX, et *Papon c. France*, n° 54210/00, § 90, 25 juillet 2002, non publié ; voir également le rappel des principes pertinents dans *Fayed c. Royaume-Uni*, arrêt du 21 septembre 1994, série A n° 294-B, pp. 49-50, § 65).

(b) But de l'ingérence

55. La Cour relève que le fait pour les Etats d'accorder généralement une immunité plus au moins étendue aux parlementaires constitue une pratique de longue date, qui vise à permettre la libre expression des représentants du peuple et à empêcher que des poursuites partisanes puissent porter atteinte à la fonction parlementaire. Dans ces conditions, la Cour estime que l'ingérence en question, qui était prévue par l'article 68 § 1 de la Constitution, poursuivait des buts légitimes, à savoir la protection du libre débat parlementaire et le maintien de la séparation des pouvoirs législatif et judiciaire (voir *A. c. Royaume-Uni*, n° 35373/97, §§ 75-77, 17 décembre 2002).

56. Il reste à vérifier si les conséquences subies par le requérant étaient proportionnées aux buts légitimes visés.

(c) Proportionnalité de l'ingérence

57. La Cour doit apprécier la restriction litigieuse à la lumière des circonstances particulières de l'espèce (voir *Waite et Kennedy c. Allemagne*, précité, § 64). Elle rappelle à cet égard qu'il lui incombe non pas d'examiner *in abstracto* la législation et la pratique pertinentes, mais de rechercher si la manière dont elles ont touché le requérant a enfreint la Convention (voir, *mutatis mutandis*, *Padovani c. Italie*, arrêt du 26 février 1993, série A n° 257-B, p. 20, § 24). En particulier, la Cour n'a pas pour tâche de se substituer aux juridictions internes. C'est au premier chef aux autorités nationales, notamment aux cours et tribunaux, qu'il incombe d'interpréter la législation interne (voir, entre autres, *Pérez de Rada Cavanilles c. Espagne*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, p. 3255, § 43). Le rôle de la Cour se limite à vérifier la compatibilité avec la Convention des effets de pareille interprétation.

58. La Cour observe que lorsqu'un Etat reconnaît une immunité aux membres de son Parlement, la protection des droits fondamentaux peut s'en trouver affectée. Toutefois, il serait contraire au but et à l'objet de la Convention que les Etats contractants, en adoptant l'un ou l'autre des systèmes normalement utilisés pour assurer une immunité aux membres du Parlement, soient ainsi exonérés de toute responsabilité au regard de la Convention dans le domaine d'activité concerné. Il y a lieu de rappeler que la Convention a pour but de protéger des droits non pas théoriques ou illusoires, mais concrets et effectifs. La remarque vaut en particulier pour le droit d'accès aux tribunaux, vu la place éminente que le droit à un procès équitable occupe dans une société démocratique (voir *Aït-Mouhoub c. France*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, p. 3227, § 52). Il serait incompatible avec la prééminence du droit dans une société démocratique et avec le principe fondamental qui sous-tend l'article 6 § 1, à savoir que les revendications civiles doivent pouvoir être portées devant un juge, qu'un Etat pût, sans réserve ou sans contrôle des organes de la Convention, soustraire à la compétence des tribunaux toute une série d'actions civiles ou exonérer de toute responsabilité des catégories de personnes (voir *Fayed c. Royaume-Uni*, précité, *ibidem*).

59. La Cour rappelle que, précieuse pour chacun, la liberté d'expression l'est tout particulièrement pour un élu du peuple ; il représente les électeurs, signale leurs préoccupations et défend leurs intérêts. Dans une démocratie, le Parlement ou les organes comparables sont des tribunes indispensables au débat politique. Une ingérence dans la liberté d'expression exercée dans le cadre de ces organes ne saurait donc se justifier que par des motifs impérieux (*Jerusalem c. Autriche*, n° 26958/95, §§ 36 et 40, CEDH 2001-II).

60. On ne peut dès lors, de façon générale, considérer l'immunité parlementaire comme une restriction disproportionnée au droit d'accès à un tribunal tel que le consacre l'article 6 § 1. De même que ce droit est inhérent à la garantie d'un procès équitable assurée par cet article, de même certaines restrictions à l'accès doivent être tenues pour lui être inhérentes ; on en trouve un exemple dans les limitations généralement admises par les Etats contractants comme relevant de la doctrine de l'immunité parlementaire (voir *A. c. Royaume-Uni*, précité, § 83, et, *mutatis mutandis*, *Al-Adsani c. Royaume-Uni* [GC], n° 35763/97, § 56, CEDH 2001-XI).

61. A cet égard, il convient de rappeler que la Cour a estimé compatible avec la Convention une immunité qui couvrait les déclarations faites au cours des débats parlementaires au sein des chambres législatives et tendait à la protection des intérêts du Parlement dans son ensemble, par opposition à ceux de ses membres pris individuellement (voir *A. c. Royaume-Uni*, précité, §§ 84-85).

62. Cependant, la Cour relève que, dans les circonstances particulières de la présente affaire, la conduite de M. Cossiga n'était pas liée à l'exercice de fonctions parlementaires *stricto sensu*. En effet, comme il résulte de l'ordonnance du procureur général de la République de Messine du 13 décembre 1997 (voir le paragraphe 20 ci-dessus), bien que M. Cossiga eût critiqué, dans une question parlementaire préalable, les enquêtes menées par le requérant, la Cour estime que des lettres au contenu ironique ou dérisoire accompagnées de jouets adressés personnellement à un magistrat, ne peuvent, par leur nature même, se comparer à un acte entrant dans les fonctions parlementaires. Cette conduite paraît plutôt s'inscrire dans le cadre d'une querelle entre particuliers. Or, dans un

tel cas, on ne saurait, justifier un déni d'accès à la justice par le seul motif que la querelle pourrait être d'une nature politique ou liée à une activité politique.

63. De l'avis de la Cour, l'absence d'un lien évident avec une activité parlementaire appelle une interprétation étroite de la notion de proportionnalité entre le but visé et les moyens employés. Il en est particulièrement ainsi lorsque les restrictions au droit d'accès découlent d'une délibération d'un organe politique. Conclure autrement équivaudrait à restreindre d'une manière incompatible avec l'article 6 § 1 de la Convention le droit d'accès à un tribunal des particuliers chaque fois que les propos attaqués en justice ont été émis par un membre du Parlement.

64. Aussi la Cour estime-t-elle en l'espèce que le non-lieu rendu en faveur de M. Cossiga et la décision de paralyser toute autre action tendant à assurer la protection de la réputation du requérant n'ont pas respecté le juste équilibre qui doit exister en la matière entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu.

65. La Cour attache également de l'importance au fait qu'après la délibération du Sénat du 2 juillet 1997 le requérant ne disposait pas d'autres voies raisonnables pour protéger efficacement ses droits garantis par la Convention (voir, *a contrario*, *Waite et Kennedy c. Allemagne*, précité, §§ 68-70, et *A. c. Royaume-Uni*, précité, § 86). En effet, le refus par le juge d'instance de Messine de soulever un conflit entre pouvoirs de l'Etat a empêché la Cour constitutionnelle de se prononcer sur la compatibilité entre la délibération litigieuse et les attributions du pouvoir judiciaire. A cet égard, il convient de noter que la jurisprudence de la Cour constitutionnelle a connu sur ce point une certaine évolution, et qu'à présent la haute juridiction italienne estime illégitime que l'immunité soit étendue à des propos n'ayant pas de correspondance substantielle avec des actes parlementaires préalables dont le représentant concerné pourrait passer pour s'être fait l'écho (voir les paragraphes 26, 27 et 44 ci-dessus).

66. Au vu de ce qui précède, la Cour conclut qu'il y a eu violation du droit d'accès à un tribunal garanti au requérant par l'article 6 § 1 de la Convention.

III. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 13 DE LA CONVENTION

67. Le requérant estime que le prononcé d'un non-lieu à l'égard de M. Cossiga a également violé l'article 13 de la Convention, qui se lit ainsi :

« Toute personne dont les droits et libertés reconnus dans la (...) Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

68. Le requérant considère que l'application du système italien d'immunités et prérogatives l'a privé d'une protection juridictionnelle efficace. Il se plaint en outre de l'impossibilité pour le justiciable italien de saisir directement la Cour constitutionnelle.

69. Le Gouvernement estime que le grief tiré de l'article 13 doit être considéré comme absorbé par celui soulevé sous l'angle de l'article 6 § 1. En tout état de cause, se référant aux arguments développés sur le terrain du droit d'accès au tribunal, il soutient que cette disposition n'a pas été violée. Il observe qu'on ne saurait faire découler de l'article 13 de la Convention une obligation pour l'Etat de prévoir une voie de recours contre les décisions définitives rendues par les juridictions judiciaires ou de garantir aux justiciables un accès direct à la Cour constitutionnelle.

70. La Cour note que le grief soulevé par le requérant sur le terrain de l'article 13 concerne les même faits que ceux déjà examinés sous l'angle de l'article 6 § 1 de la Convention. De plus, il y a lieu de rappeler que lorsqu'une question d'accès à un tribunal se pose, les garanties de l'article 13 sont absorbées par celles de l'article 6 (*Brualla Gómez de la Torre c. Espagne*, arrêt du 19 décembre 1997, *Recueil* 1997-VIII, § 41).

71. Dès lors, la Cour estime qu'il n'y a pas lieu d'examiner s'il y a eu violation de l'article 13 de la Convention (voir *Posti et Rahko c. Finlande*, n° 27824/95, § 89, 24 septembre 2002, non publié).

IV. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 14 DE LA CONVENTION

72. Le requérant allègue que M. Cossiga, en sa qualité de membre du Parlement, a pu exercer son droit à la liberté d'expression bien au-delà des limites qui sont normalement imposées aux autres citoyens, ce au détriment de ses droits fondamentaux à l'honneur et à la réputation. Il invoque l'article 14 de la Convention, ainsi libellé :

« La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

73. Le requérant soutient que l'immunité indûment reconnue à M. Cossiga s'analyse en une grave discrimination devant la loi, qui a transformé une prérogative en un privilège injustifié. Il se dit « victime » de cet état de choses dans la mesure où, lésé dans son droit à l'honneur, il n'a pu obtenir réparation devant les juridictions nationales.

74. Le Gouvernement observe que les députés ne se trouvent pas dans une situation comparable à celle des autres particuliers et que l'étendue de la liberté d'expression qui leur est reconnue se justifie par la nécessité de protéger la liberté des débats parlementaires. Quoi qu'il en soit, il considère que le requérant ne peut être réputé victime d'une « discrimination » qui concerne la généralité des citoyens.

75. La Cour estime, au vu de la conclusion à laquelle elle est parvenue sous l'angle de l'article 6 § 1 de la Convention (voir paragraphe 66 ci-dessus), qu'il ne s'impose pas d'examiner séparément le grief du requérant sous l'angle de l'article 14 de la Convention.

V. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

76. Aux termes de l'article 41 de la Convention,

« Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

77. Le requérant allègue avoir subi un tort moral et sollicite l'octroi d'une somme non inférieure à 50 000 euros (EUR).

78. Le Gouvernement estime qu'un arrêt concluant à la violation de la Convention constituerait en soi une satisfaction équitable suffisante.

79. La Cour juge que le requérant a subi un tort moral certain. Eu égard aux circonstances de la cause et statuant en équité comme le veut l'article 41 de la Convention, elle décide de lui octroyer la somme de 8 000 EUR.

B. Frais et dépens

80. S'appuyant sur une note d'honoraires, le requérant sollicite le remboursement de 8 745 EUR pour les frais encourus par lui devant la Commission et la Cour.

81. Le Gouvernement s'en remet sur ce point à la sagesse de la Cour.

82. La Cour décide qu'il convient d'accorder au requérant la somme (8 745 EUR) réclamée par lui pour la procédure devant la Commission et la Cour.

C. Intérêts moratoires

83. La Cour juge approprié de baser le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À l'UNANIMITÉ,
1. *Rejette* l'exception préliminaire du Gouvernement ;

2. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;

3. *Dit* qu'il n'est pas nécessaire d'examiner s'il y a eu violation de l'article 13 de la Convention ;

4. *Dit* qu'il n'est pas nécessaire d'examiner s'il y a eu violation de l'article 14 de la Convention ;

5. *Dit*
a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 8 000 EUR (huit mille euros) pour dommage moral et 8 745 EUR (huit mille sept cent quarante-cinq euros) pour frais et dépens ;
b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

6. *Rejette* la demande de satisfaction équitable pour le surplus.
Fait en français, puis communiqué par écrit le 30 janvier 2003 en application de l'article 77 §§ 2 et 3 du règlement.

Søren Nielsen Christos Rozakis
Greffier adjoint Président

EUROPEAN COURT OF HUMAN RIGHTS

Case of A. v. The United Kingdom (2002)

SECOND SECTION, *Application no. 35373/97,* JUDGMENT, 17 December 2002

In the case of A. v. the United Kingdom,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. Costa, *President*,
Mr A.B. Baka,
Sir Nicolas Bratza,
Mr Gaukur Jörundsson,
Mr L. Loucaides,
Mr C. Bîrsan,
Mr M. Ugrekhelidze, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 5 March and 3 December 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35373/97) against the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") lodged with the European Commission on Human Rights ("the Commission") under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on behalf of a British National, A. ("the applicant"), on 13 January 1997.

2. The applicant, who had been granted legal aid, was represented by Ms G. Ismail of Liberty, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. A. Whomersley, Foreign and Commonwealth Office, London. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant alleged that the absolute parliamentary immunity which prevented her from taking legal action in respect of statements made about her in Parliament violated her right of access to court under Article 6 § 1 and her right to privacy under Article 8 of the Convention, as well as discriminating against her contrary to Article 14 of the Convention. She complained further under Article 6 § 1 about the unavailability of legal aid in defamation proceedings. She also invoked Article 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. On 1 November 2001, following the new composition of the Court's Sections, the application was re-allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of

Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

7. The applicant and the Government each filed observations on admissibility and the merits (Rule 54 § 3).

8. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 5 March 2002 (Rule 54 § 4 of the Rules of Court).

There appeared before the Court:

(a) *for the Government*

Mr C. Whomersley, Foreign and Commonwealth Office, *Agent*,

Mr B. Emmerson, QC, *Counsel*,

Mr C. Bird,

Ms E. Samson,

Mr J. Vaux,

Ms N. Pittam,

Mr J. Grainger, *Advisers*;

(b) *for the Applicant*

Mr A. Nicol, QC, *Counsel*,

Mr A. Hudson,

Ms G. Ismail, *Advisers*.

The Court heard addresses by Mr Emmerson and Mr Nicol.

9. By a decision of 5 March 2002 the Chamber declared the application admissible.

10. The applicant and the Government each filed further observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*). In addition, third-party comments were received from the Austrian, Belgian, Dutch, French, Finnish, Irish, Italian and Norwegian Governments, which had been given leave by the President to intervene in the written procedure (Art. 36 § 2 of the Convention and Rule 61 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant is a British national, born in 1971 and living in Bristol. She lives with her two children in a house owned by the local housing association, Solon Housing Association ("SHA").

12. The SHA moved the applicant and her children to 50 Concorde Drive in 1994 following a report that she was suffering serious racial abuse at her then current address.

13. Concorde Drive is in the parliamentary constituency of Bristol North-West. On 17 July 1996, the Member of Parliament ("MP") for the Bristol North-West constituency, Mr Michael Stern, initiated a debate on the subject of municipal housing policy (and the SHA in particular) in the House of Commons. During the course of his speech, the MP referred specifically to the applicant several times, giving her name and address and referring to members of her family. He commented as follows:

"The subject of anti-social behaviour by what newspapers frequently call 'neighbours from hell' has been a staple of social housing throughout the country for some time, and the Government are, of course, in the process of taking steps to provide local authorities with the power to do something about such behaviour. Whether authorities such as Bristol will actually use the power is another matter.

My reason for raising the subject of 50 Concorde Drive in my constituency and the behaviour of its shifting population is not just to draw attention to another example of neighbours from hell; it is also to note that housing practices by local authorities, which it appeared had been stamped out in the 1970s, are beginning to re-emerge in the voluntary housing movement. ...

Solon Housing Association (South-West) Ltd. purchased 50 Concorde Drive in my constituency in the early 1990s ... and in early 1994 it moved in as the new tenants [the applicant] and her two children, who are now aged three and six. Her brother, currently in prison, also gives 50 Concorde Drive as his permanent address. ...

The Government's own Green Paper, 'Anti-Social Behaviour on Council Estates', published in April 1995, noted:

'Such behaviour manifests itself in many different ways and at varying levels of intensity. This can include vandalism, noise, verbal and physical abuse, threats of violence, racial harassment, damage to property, trespass, nuisance from dogs, car repairs on the street, joyriding, domestic violence, drugs and other criminal activities such as burglary.'

Inevitably, the majority – if not all – of these activities have been forced on the neighbours of 50 Concorde Drive during the tenancy of that property and the garage further up the street that goes with it, by [the applicant], her children and their juvenile visitors, who seem strangely reluctant to attend school during normal hours, and even more adult visitors who come to the house at all times of the day and night, frequently gaining entry by unorthodox means such as the bathroom window. Indeed, it is fair to say that there have been times when occupation of the house by the visitors has been more frequent than that of [the applicant].

So far as the garages grouped further along Concorde Drive are concerned – one of the garages automatically comes with the tenancy of No. 50 – complaints consist of numerous youths hanging around, vandalising cars, climbing on and damaging the garage roofs, under the apparent leadership, or at least the spirited concurrence of the [applicant's] family, adult and children, which makes improvement of those garages by other owners a complete waste

of time. More seriously, arson inside the garage belonging to No. 50, and the regular destruction of its doors, have led other legitimate users of the garage to park their vehicles elsewhere for safety reasons.

But it is the conduct of [the applicant] and her circle which gives most cause for concern. Its impact on their immediate neighbours extends to perhaps a dozen houses on either side. Since the matter was first drawn to my attention in 1994, I have received reports of threats against other children; of fighting in the house, the garden and the street outside; of people coming and going 24 hours a day – in particular, a series of men late at night; of rubbish and stolen cars dumped nearby; of glass strewn in the road in the presence of [the applicant] and regular visitors; of alleged drug activity; and of all the other common regular annoyances to neighbours that are associated with a house of this type."

14. The applicant denies the truth of the majority of the allegations. The MP has never tried to communicate with her regarding the complaints made about her by her neighbours and has never attempted to verify the accuracy of his comments made in his speech either before or after the debate. Shortly before the debate, the MP issued a press release to several newspapers, including the Bristol-based Evening Post and the national Daily Express. The press release was subject to an embargo prohibiting disclosure until the precise time when the speech commenced. The contents of the press release were substantially the same as those of the MP's speech. The following day, both newspapers carried articles consisting of purported extracts of the speech, although these were based upon the press release. Both articles included photographs of the applicant and mentioned her name and address. The main headline in the Evening Post was: "MP Attacks 'Neighbours From Hell'".

In the Daily Express the headline was: "MP names nightmare neighbour".

15. The applicant was approached by journalists and television reporters asking for her response to the MP's allegations and her comments were summarised in each newspaper the same day, although they were not given as much prominence.

16. The applicant subsequently received hate-mail addressed to her at 50 Concorde Drive. One letter stated that she should "be in houses with your own kind, not in amongst decent owners". Another letter stated:

"You silly black bitch, I am just writing to let you know that if you do not stop your black nigger wogs nuisance, I will personally sort you and your smelly jungle bunny kids out."

17. The applicant was also stopped in the street, spat at and abused by strangers as "the neighbour from hell".

18. On 7 August 1996 a report was prepared for the SHA by a group which monitors racial harassment and attacks. The report found that "it has now come to the point where [the applicant] has been put in considerable danger as a result of her name being released to the public". The report recommended that the applicant be re-housed as a matter of urgency. She was re-housed in October 1996 and her children were obliged to change schools.

19. On 2 August 1996 the applicant wrote through her solicitors to the MP outlining her complaints and seeking his comments thereon. The letter was referred to the Office of the Parliamentary Speaker by the MP. The Speaker's representative replied to the MP on 12 August 1996 to the effect that the MP's remarks were protected by absolute parliamentary privilege:

"Subject to the rules of order in debate, Members may state whatever they think fit in debate, however offensive it may be to the feelings or injurious to the character of

individuals, and they are protected by this privilege from any action for libel, as well as from any other molestation."

This letter was copied and forwarded to the applicant's solicitors in September 1996.

20. Also on 2 August 1996, the applicant's solicitors wrote to the then Prime Minister, Mr John Major, asking that, as leader of the political party to which Mr Stern belonged, he investigate the applicant's complaints and take appropriate action. The Prime Minister's office replied on 6 August 1996, stating that:

"It is a matter for individual Members of Parliament to decide how they deal with their constituents and it is not for the Prime Minister to comment. There is a strict Parliamentary convention that Members of Parliament do not intervene in the affairs of other Members' constituencies and this applies equally to the Prime Minister."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Privilege

21. Words spoken by MPs in the course of debates in the House of Commons are protected by absolute privilege. This is provided by Article 9 of the Bill of Rights 1689, which states:

"... the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in a court or place out of Parlyament".

22. The effect of this privilege was described by Lord Chief Justice Cockburn in the case of *Ex parte Watson* (1869) QB 573 at 576:

"It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party".

23. Statements made by MPs outside the Houses of Parliament are subject to the ordinary laws of defamation and breach of confidence, save where they are protected by qualified privilege.

24. The question whether or not qualified privilege applies to statements made in any given political context turns upon the public interest. In the case of *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, which concerned allegations made in the British press about an Irish political crisis in 1994, Lord Nicholls of Birkenhead stated in the House of Lords, at page 204:

"The common law should not develop 'political information' as a new 'subject matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious political concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegations may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing."

25. Press coverage, to the extent that it fairly and accurately reports parliamentary debates, is generally protected by a form of qualified privilege which is lost only if the publisher has acted "maliciously". "Malice", for this purpose, is established where the report concerned is published for improper motives or with "reckless indifference" to the truth. A failure to make proper enquiries is not sufficient in itself to establish malice, but it may be evidence from which malice (in the sense of reckless indifference to the truth) can reasonably be inferred.

26. MPs can waive the absolute immunity which they enjoy in Parliament as a result of section 13 of the Defamation Act 1996, which provides:

"(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection –

(a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and

(b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament".

27. General control is exercised over debates by the Speaker of each House of Parliament. Each House has its own mechanisms for disciplining Members who deliberately make false statements in the course of debates. Deliberately misleading statements are punishable by Parliament as a contempt. Alternatively, as the Parliamentary Select Committee on Procedure (1988-89) has observed:

"... there already exists a wide range of avenues which can be pursued by an aggrieved person who wishes to correct or rebut remarks made about him in the House. He can

approach his Member of Parliament with a view to his tabling an Early Day Motion, or an amendment where appropriate; there may be cases which can be raised through Questions if some ministerial responsibility can be established; he can petition the House, through a Member; and he can approach directly the Member who made the allegations in the hope of persuading him that they are unfounded and that a retraction would be justified. We believe that in these circumstances, the House would not expect a rigid adherence to the convention that one Member does not take up a case brought by the constituent of another, particularly if the latter was the source of the statement complained of, and so long as the courtesies of proper notification were observed."

B. Legal aid, "Green Form" assistance and conditional fees

28. Under Schedule 2, Part II of the Legal Aid Act 1988, "[p]roceedings wholly or partly in respect of defamation" are excepted from the scope of the civil legal aid scheme.

29. "Green Form" assistance is available to potential litigants with insufficient means in order to allow them to receive two hours' free legal advice from a solicitor in cases of alleged defamation. The time can be extended upon application.

30. Under section 58 of the Courts and Legal Services Act 1990, solicitors may enter into conditional fee agreements in respect of any type of proceedings specified in an Order made by the Lord Chancellor. A conditional fee agreement is defined under that section as an agreement in writing between a solicitor and his client which provides that the solicitor's fees and expenses, or any part of them, are to be payable only in specified circumstances. The Conditional Fee Agreements Order 1998 (Statutory Instrument 1860 of 1998) permitted conditional fee agreements in relation to "all proceedings". The Order entered into force on 30 July 1998. A conditional fee agreement cannot prevent an unsuccessful litigant from being potentially liable to pay all or part of his opponent's costs in connection with the proceedings.

C. Limitation period

31. The limitation period applicable to defamation proceedings in respect of statements made in July 1996 was three years pursuant to section 4A of the Limitation Act 1980, as inserted by section 57(2) of the Administration of Justice Act 1985.

D. Report of the Joint Committee on Parliamentary Privilege

32. A Joint Committee of both Houses of Parliament was set up in July 1997 and tasked with reviewing the law of parliamentary privilege. The Committee received written and oral evidence from a wide variety of sources from within the United Kingdom and abroad and held fourteen sessions of evidence in public. Its report was published in March 1999. Chapter 2 sets out its conclusions on parliamentary immunity:

"38. The immunity is wide. Statements made in Parliament may not even be used to support a cause of action arising out of Parliament, as where a plaintiff suing a member for an alleged libel on television was not permitted to rely on statements made by the member in the House of Commons as proof of malice. The immunity is also absolute: it is not excluded by the presence of malice or fraudulent purpose. Article 9 protects the member who knows what he is saying is untrue as much as the member who acts honestly and responsibly. ... In

more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

39. A comparable principle exists in court proceedings. Statements made by a judge or advocate or witness in the course of court proceedings enjoy absolute privilege at common law against claims for defamation. The rationale in the two cases is the same. The public interest in the freedom of speech in the proceedings, whether parliamentary or judicial, is of a high order. It is not to be imperilled by the prospect of subsequent inquiry into the state of mind of those who participate in the proceedings even though the price is that a person may be defamed unjustly and left without a remedy.

40. It follows that we do not agree with those who have suggested that members of Parliament do not need any greater protection against civil actions than the qualified privilege enjoyed by members of elected bodies in local government. Unlike members of Parliament, local councillors are liable in defamation if they speak maliciously. We consider it of utmost importance that there should be a national public forum where all manner of persons, irrespective of their power or wealth, can be criticised. Members should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts. The legal immunity principle is as important today as ever. The courts have a duty not to erode this essential constitutional principle."

III. THE COUNCIL OF EUROPE AND THE EUROPEAN UNION

33. Article 40 of the Statute of the Council of Europe provides:

"a. 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 Parliamentary Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.

b. The members undertake as soon as possible to enter into agreement for the purpose of fulfilling the provisions of paragraph a above. For this purpose the Committee of Ministers shall recommend to the governments of members the acceptance of an agreement defining the privileges and immunities to be granted in the territories of all members. In addition, a special agreement shall be concluded with the Government of the French Republic defining the privileges and immunities which the Council shall enjoy at its seat."

34. In pursuance of paragraph b above, the Member States, on 2 September 1949, entered into the General Agreement on Privileges and Immunities of the Council of Europe. This provides, as relevant, as follows:

"Article 14

Representatives to the Parliamentary Assembly and their substitutes shall be immune from all official interrogation and from arrest and from all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions.

Article 15

During the sessions of the Parliamentary Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:

a. on their national territory, the immunities accorded in those countries to members of Parliament;

b. on the territory of all other member States, exemption from arrest and prosecution. ..."

35. Article 5 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe provides:

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

36. Article 9 of the Protocol on the Privileges and Immunities of the European Communities, adopted in accordance with Article 28 of the Treaty establishing a Single Council and a Single Commission of the European Communities, provides:

"Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties."

IV. THIRD-PARTY INTERVENTIONS

A. The Austrian Government

37. Under Article 57 paragraph 1 of the Federal Constitutional Law members of *Nationalrat* (the lower house of Parliament) could never be held liable for votes cast in the exercise of their functions or on the ground of oral or written statements made in the course of their functions – so-called "professional immunity". In these matters, members enjoy immunity from criminal, civil and administrative proceedings. The President however may require a member to keep to the subject or call the member to order if he/she violates the decency and dignity of the House or makes defamatory statements (s.102 of the Standing Orders Act).

38. Under Article 57 paragraph 3, criminal prosecution and civil proceedings against an MP could be taken without the consent of the *Nationalrat* only where it is "manifestly not connected with the political activity of the member in question" – so-called "non-professional immunity". MPs may therefore be subject to civil proceedings, the issue of whether the matter has no manifestly connection with their duties being determined by the prosecuting authorities. Where the authority considers that that connection is manifest or unclear, it must seek the consent of the *Nationalrat*. Where the MP concerned or one third of the members of the Immunity Committee require it, consent must also be asked of the *Nationalrat*. According to the prevailing view, this level of immunity merely prevents legal action for a limited period of time, proceedings becoming possible once the MP loses his/her immunity status.

39. The Government emphasised that these provisions had strong historical continuity in their legal system, serving to guarantee the protection of MPs in their political activity, in particular their freedom to vote and state their views.

B. The Belgian Government

40. Articles 58 and 59 of the Belgian Constitution prohibit proceedings against a member of the federal chambers of Parliament concerning the expression of opinion or votes cast. Save in the case of "flagrant délit", no member of chamber could be summoned before a court or arrested during a parliamentary session unless the Chamber has given consent. This immunity, even against acts infringing the rights of citizens, is regarded in domestic law and practice as an essential guarantee for the functioning of the legislature and its absolute nature as essential to the efficacy of that guarantee. Private rights have to be regarded as ceding to the overriding public interest.

C. The Dutch Government

41. The Dutch Government drew attention to Article 71 of the Dutch Constitution, which confers upon members of the Senate and House of Representatives of the States General an immunity from every category of legal proceedings.

42. They pointed out that the right to parliamentary immunity in the Netherlands is not absolute. The Rules of Procedure of both the Senate and the House of Representatives cover cases in which an MP abuses the protection afforded by Article 71. The President in each Chamber may admonish any member who violates the Rules of Procedure and then offer the member concerned a chance to retract the offending remark. If the member refuses to make a retraction, or persists in violating the Rules of Procedure, the President may forbid him or her from speaking further or from attending the rest of the sitting or further sittings the same day. Similar immunities and disciplinary procedures apply at the provincial and municipal level.

43. The Dutch Government submitted that parliamentary immunity is indispensable to the operation of democracy and that to give the judiciary authority over what MPs say in their deliberations would represent an unacceptable infringement of the separation of powers.

D. The Finnish Government

44. According to section 30(1) of the Constitution (1999), an MP shall not be prevented from carrying out his or her duties as a representative. Section 30(2) provides that an MP cannot be charged in a court of law or be deprived of liberty owing to opinions expressed by the representative in Parliament or owing to conduct in the consideration of a matter, unless Parliament gives consent by a majority of five sixths of the votes cast. The provisions concerning parliamentary privilege and immunities have a long tradition in the work of Parliament, dating back to 1723. The only restriction on the exercise of the freedom of expression of a representative is the requirement in section 31(2) that a representative conduct himself or herself with decorum and not act offensively towards another person. If a representative breaches this condition, the Speaker may issue a warning or prohibit the representative from continuing to talk. Parliament may caution a representative who has repeatedly breached the order or suspend him or her for a maximum of two weeks.

45. A waiver of immunity may be requested by any person having the right to prosecute or to request prosecution. The Speaker examines whether the party has such a right and whether the intended prosecution concerns the MP's official actions. Parliament decides on

such a request in ordinary session and the decisive question is whether the intended prosecution is of such a nature that there is a public or private interest to refer the matter to a court of law. In most cases, the Parliament has deemed such requests manifestly ill-founded and rejected them. In no case based on alleged damage to another person's reputation or allegedly incorrect information given by an MP has a prosecution been authorised.

46. The Government considered that freedom of speech and the general freedom to act were essential for the performance of the duties of an MP.

E. The French Government

47. The provisions in the French system which protect the representatives of the people in the performance of their functions date back to 1789, deriving from respect for the expression of the will of the people and the necessity in a democratic state for elected representatives to exercise their mandate freely without fear of legal action or interference from either the executive or the judiciary. The immunity bestowed is absolute in that it covers all acts carried out by MPs in the exercise of their functions regarding criminal and civil liability and permanent since it continues after expiry of their mandates. The immunity is not concerned with the private interests of the MP but with the function that he or she exercises. Thus, it cannot be waived by an individual MP.

48. However, the immunity conferred is strictly interpreted and does not extend to acts outside the exercise of the MP's mandate, including speech in a private capacity within the Assembly or statements in press articles in so far as these did not repeat statements made during an Assembly debate. Parliamentary immunity carries with it a requirement of discretion ("*devoir de réserve*") and unacceptable forms of expression may be subject to internal admonition.

F. The Irish Government

49. The Irish Government submitted that parliamentary immunity has developed throughout the world not as a constraint upon the rights of the citizen, but as a fundamental liberty. They argued that a cursory consideration of the history of the principle, its widespread domestic and international constitutional entrenchment and the case-law of the Court all suggest that parliamentary immunity is protected by the Convention. They supported this argument by reference to the preamble to the Convention.

50. The Irish Government pointed to, *inter alia*, Articles 15.10 and 15.13 of the 1937 Constitution of Ireland, which provide:

"[15.10] Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, ...

[15.13] The Members of each House of the Oireachtas [Parliament] ... shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

51. Article 40.3.2 of the Constitution expressly recognises, and imposes upon the State, an obligation to defend and vindicate the citizen's right to his or her good name. However, the Irish Government indicated that there is no absolute right to reputation or protection from defamatory utterances under Irish law.

52. They drew attention also to the privileges and immunities enjoyed by Representatives to the Parliamentary Assembly of the Council of Europe and Members of the European

Parliament (see paragraphs 33-36 above). They submitted that it was difficult to see how such immunities could be consistent with the Convention if the conferring by individual States of similar immunities in respect of their own Parliaments itself violated the Convention.

53. The Irish Government argued that the importance of the legitimate objectives pursued by parliamentary immunity was difficult to overstate and that it was for the national authorities to seek to balance the right of individual citizens to a good name with the right of free parliamentary expression. In reviewing the proportionality of the balance struck, they said that the Court must have regard to the fact that States were in principle better placed than an international court to evaluate local needs and conditions.

G. The Italian Government

54. The Italian Government pointed out that parliamentary privilege is recognised by a large number of democratic countries across Europe and the rest of the world, including Italy, together with international bodies such as the Council of Europe and the European Union. They submitted that such a privilege is a fundamental aspect of the separation of powers and the rule of law, both of which are political traditions upon which the Convention and the Council of Europe were founded.

55. They stated that, notwithstanding a recent revision in Italy of the rules of parliamentary privileges and immunities, the protection of free speech in Parliament against interference by the courts has never been questioned there and continues to be considered essential to parliamentary government. In the event of any dispute between Parliament and the judiciary as to the application of a privilege, it is a "neutral" authority, in the form of the Italian Constitutional Court, which has the final decision. That court is made up of fifteen judges, five of whom have been appointed by each of the Parliament, the supreme courts and the President of the Republic.

56. The Italian Government submitted that parliamentary privilege pursues its legitimate aim in a proportionate manner, particularly since its scope is limited to parliamentary activity. They argued that MPs would not be able to speak their mind freely in Parliament in the absence of an absolute immunity.

H. The Norwegian Government

57. There is no general provision granting members of the national assembly (the *Storting*) immunity from judicial processes. However, Article 66 of the Constitution confers immunity in two limited situations. Members cannot be arrested on the way to or from the assembly (unless apprehended in "public crimes") and cannot be called to account outside the meetings of the assembly for opinions expressed there. This immunity comprises both criminal and civil liability, and extends even to speech where it is alleged that the member has intentionally expressed untruths or where the member has expressed himself or herself on a subject unconnected with the issue under debate. An individual member cannot waive the immunity. The absolute nature of the immunity is regarded as necessary to prevent undermining the general purpose of the provision, which is to guarantee the unfettered exchange of information and ideas in the assembly, being considered indispensable in the Norwegian democratic system.

58. However, a member may be held accountable within the assembly, improper or insulting behaviour being prohibited and subject to the potential sanction of a warning from the President of the Assembly or exclusion by the Assembly from the right to speak or participate in the proceedings for the rest of the day.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Parliamentary Privilege

59. The applicant complained that the absolute nature of the privilege which protected the MP's statements about her in Parliament violated her right of access to court under Article 6 § 1 of the Convention.

Article 6 § 1 provides (as relevant):

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

1. Applicability of Article 6 § 1

60. The Government argued that the substantive content of the civil right to reputation in domestic law was delimited by the rules of parliamentary privilege, and that a person whose reputation was damaged by a parliamentary speech therefore had no actionable claim so as to engage the procedural safeguards of Article 6 § 1 of the Convention.

61. The applicant argued that the absolute immunity which MPs enjoy from legal action in respect of words spoken in parliamentary proceedings was an aspect of procedural law which fell within the scope of Article 6 § 1.

62. The Court recalls that in *Agee v. the United Kingdom* (no. 7729/76, Commission decision of 17 December 1976, Decisions and Reports (DR) 7, p. 164) the Commission considered that the applicant did not have any right under United Kingdom law to the protection of his reputation in so far as it might be affected by statements made in Parliament. As a result, it stated that Article 6 § 1 did not guarantee a right to bring defamation proceedings in respect of such statements and concluded that the applicant's complaint about his inability to do so was incompatible *ratione materiae* with the Convention.

63. However, the Court has subsequently established that whether a person has an actionable domestic claim so as to engage Article 6 § 1 may depend not only on the substantive content of the relevant civil right, as defined under national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case, Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, § 65; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 47, ECHR 2001-XI).

64. In the present case, the Court observes that Article 9 of the Bill of Rights is framed not in terms of a substantive defence to civil claims, but rather in terms of a procedural bar to the determination by a court of any claim which derives from words spoken in Parliament.

65. However, the Court considers it unnecessary to settle the precise nature of the privilege at issue for the purposes of Article 6 § 1, since it is devoid of significance in the particular circumstances. This is because the central issues of legitimate aim and

proportionality which arise under the applicant's procedural complaint under Article 6 § 1 of the Convention are the same as those arising in relation to the applicant's substantive complaint going to the right to respect for private life under Article 8 (see the above-mentioned *Fayed* case, § 67).

The Court will therefore proceed on the basis that Article 6 § 1 is applicable to the facts of this case.

2. Compliance with Article 6 § 1

66. The Government regarded it as a fundamental constitutional principle that statements made in Parliament should be protected by absolute privilege. They stated that such a privilege served the dual public interests of free speech in Parliament and the separation of powers. They indicated that such legitimate aims were of sufficient importance to outweigh any harm to the rights of individuals which might result from words spoken in Parliament. Absolute privilege was designed not to protect individual members, but Parliament as a whole, and operated only where it was strictly necessary, namely within Parliament itself. They drew attention also to the fact that Parliament had its own internal mechanisms for disciplining an MP who deliberately made a false statement during a debate.

67. The Government submitted that all Contracting States to the Convention, together with most other democracies, have some system of parliamentary immunity, although the precise features of such systems vary, showing that it was a virtually universal principle. They referred also to the immunity enjoyed by members of various international institutions, including the Parliamentary Assembly of the Council of Europe and the European Parliament (see paragraphs 33-36 above).

68. The Government highlighted the conclusions reached by the recent review of parliamentary privilege by a Joint Committee of the House of Commons and House of Lords in support of retaining the rule of absolute parliamentary immunity (see paragraph 32 above).

69. In all the circumstances, the Government argued that the rule of absolute parliamentary immunity was justified in principle in the public interest. They maintained that, once such a justification was recognised, there was no basis for distinguishing between the facts of individual cases.

70. The Government contrasted the absolute immunity enjoyed by MPs in Parliament with the qualified immunity enjoyed by the press when reporting parliamentary proceedings. They indicated that the public interest in free reporting of such proceedings was not considered strong enough to justify absolute privilege, and so the domestic law had qualified the privilege by requiring the publisher to report in a “fair and accurate” manner and without improper motive.

71. The applicant argued that Article 9 of the Bill of Rights left her unable to bring domestic proceedings in respect of both the defamatory and the true elements of the MP's parliamentary speech. She highlighted the fact that, under the Defamation Act 1996, MPs could effectively waive Parliamentary immunity where it suited them to do so by having evidence relating to statements made in Parliament admitted to court in litigation which they had initiated. Although she accepted that parliamentary privilege pursued the legitimate aims of free debate and regulation of the relationship between legislature and judiciary, she submitted that it did so in a disproportionate manner. She contended that the broader an immunity, the more compelling must be its justification, and that an absolute immunity such as that enjoyed by MPs must be subjected to the most rigorous scrutiny. Thus, she argued that the proportionality of the immunity could only be determined in the light of the facts of her case. She drew attention to the severity of the allegations made in the MP's speech and

his repeated reference to the applicant's name and address, both of which she claimed were unnecessary in the context of a debate about municipal housing policy. She also pointed to the consequences of the allegations for both her and her children, which she said were utterly predictable. The Government had failed convincingly to establish why a lesser form of protection than absolute privilege could not meet the needs of a democratic society, in particular why it is necessary to protect those MPs who on rare occasion speak maliciously making gravely damaging statements.

72. The applicant submitted that the parliamentary avenues of redress identified by the Government did not offer access to an independent court and failed to provide her with any effective remedy. She contrasted the position in Parliament with that in other democratic institutions in the United Kingdom such as local councils, where only qualified privilege applied. She argued that the parallel drawn between national Parliaments and international bodies such as the Council of Europe was inexact. As regards the position in Europe generally, she noted that in many countries immunity could be lifted or did not extend to defamatory remarks or insults. In her view, freedom of speech in Parliament must, as in the local government and other contexts, carry with it duties and responsibilities, as confirmed by Article 10 § 2 of the Convention.

73. The Court recalls that the right of access to court constitutes an element which is inherent in the right to a fair hearing under Article 6 § 1 of the Convention (see, among other authorities, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 36).

74. However, the right of access to court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other cases, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I).

75. The Court must first examine whether the limitation pursued a legitimate aim. It recalls in this connection that, in application no. 25646/94, *Young v. Ireland* (DR 84, p. 122), the Commission identified an underlying aim of the immunity accorded to members of the lower house of the Irish legislature as being to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.

76. The Court notes that the applicant recognises that aim in connection with the operation of parliamentary immunity in the United Kingdom. She recognises also that the immunity pursues a second legitimate aim, namely that of regulating the relationship between the legislature and the judiciary.

77. The Court concludes that the parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.

78. The Court must next assess the proportionality of the immunity enjoyed by the MP. In this regard, the Court notes that the immunity concerned was absolute in nature and applied to both criminal and civil proceedings. The Court agrees with the applicant's submission that

the broader an immunity, the more compelling must be its justification in order that it can be said to be compatible with the Convention. However, it recalls its analysis in the above-mentioned *Fayed* case (*op. cit.,* § 77), as followed by the Commission in the *Young* case, to the effect that, when examining the proportionality of an immunity, its absolute nature cannot be decisive. Thus, for example, in the above-mentioned *Al-Adsani* case, the Court stated that measures taken by signatory States which reflected generally recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1 (see also *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 36, ECHR 2001-XI; *McElhinney v. Ireland* [GC], no. 31253/96, § 37, ECHR 2001-XI).

79. It is also recalled that, in the recent case of *Jerusalem v. Austria* (no. 26958/95, §§ 36 and 40, ECHR 2001-II), the Court stated that, while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential *fora* for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.

80. The Court notes that most, if not all, signatory States to the Convention have in place some form of immunity for members of their national legislatures. In particular, the domestic law of each of the eight States to have made a third-party intervention in the present case makes provision for such an immunity (see paragraphs 37-58 above), although the precise detail of the immunities concerned varies.

81. Measures are also in place granting privileges and immunities to, *inter alios*, Representatives to the Parliamentary Assembly of the Council of Europe and Members of the European Parliament (see paragraphs 33-36 above).

82. The Court observes the conclusions reached by the Joint Committee of both Houses of Parliament in its report of March 1999 following its review of parliamentary privilege in the United Kingdom (see paragraph 32 above). In particular, it notes the reasons given at paragraph 40 of the report in support of the retention by members of the national Parliament of the protection afforded by absolute immunity, in contrast to the qualified immunity enjoyed by members of local government bodies.

83. In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1 (see, *mutatis mutandis*, the above-mentioned *Al-Adsani* judgment, § 56). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity (*ibid*).

84. Furthermore, the immunity afforded to MPs in the United Kingdom appears to the Court to be in several respects narrower than that afforded to members of national legislatures in certain other signatory States and those afforded to Representatives to the Parliamentary Assembly of the Council of Europe and Members of the European Parliament. In particular, the immunity attaches only to statements made in the course of parliamentary debates on the floor of the House of Commons or House of Lords. No immunity attaches to statements made outside Parliament, even if they amount to a repetition of statements made during the course of Parliamentary debates on matters of public interest. Nor does any immunity attach to an MP's press statements published prior to parliamentary debates, even if their contents are repeated subsequently in the debate itself.

85. The absolute immunity enjoyed by MPs is moreover designed to protect the interests of Parliament as a whole as opposed to those of individual MPs. This is illustrated by the fact that the immunity does not apply outside Parliament. In contrast, the immunity which protects those engaged in the reporting of parliamentary proceedings, and that enjoyed by elected representatives in local government, are each qualified in nature.

86. The Court observes that victims of defamatory misstatement in Parliament are not entirely without means of redress (see paragraph 27 above). In particular, such persons can, where it is their own MP who has made the offending remarks, petition the House through any other MP with a view to securing a retraction. In extreme cases, deliberately misleading statements may be punishable by Parliament as a contempt. General control is exercised over debates by the Speaker of each House. The Court considers that all of these factors are of relevance to the question of proportionality of the immunity enjoyed by the MP in the present case.

87. It follows that, in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to court.

88. The Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.

89. There has, accordingly, been no violation of Article 6 § 1 of the Convention as regards the parliamentary immunity enjoyed by the MP.

B. Legal Aid

90. The applicant complained further under Article 6 § 1 that the absence of legal aid for defamation proceedings in the United Kingdom violated her right of access to court.

91. The Government argued that this aspect of the applicant's complaint should be restricted to the MP's press statement, since any cause of action in respect of his speech would have been bound to fail and thus could not have required the provision of legal aid. They submitted that the national authorities had determined within their margin of appreciation that it was not in the public interest to allocate limited legal aid resources to the pursuit of defamation actions. However, they pointed out that, as of July 1998, it had been open to the applicant to seek legal assistance by way of a conditional fee arrangement. The “Green Form” scheme would also, they said, have allowed the applicant to secure initial advice on the strength of any claim.

92. The applicant submitted that her inability to secure legal aid for the purposes of bringing defamation proceedings in respect of the untrue allegations made against her violated her right of access to court under Article 6 § 1. She argued that the Commission's case-law dismissing complaints against the United Kingdom about the non-availability of legal aid in defamation proceedings was limited to the facts of each case. She maintained that it would have been wholly unrealistic to expect her to commence proceedings as a litigant in person, since she had no formal qualifications and was an unmarried mother of two young children. She argued that publicly-funded legal assistance was particularly warranted

on the facts of her case due to her financial situation and the severity of the consequences of the MP's allegations both for her and for her children.

93. The applicant accepted that, after July 1998, it had been open to her to seek lawyers to act for her on a contingency fee basis, but pointed out that she would have remained exposed to potential liability for her opponent's costs had she lost and that, at the time in question, contingency fee arrangements were still a novelty. Although in some cases insurance against the costs risk was available, the applicant said that it was expensive and beyond her means and that, so far as she was aware, such insurance only became available after the relevant limitation period had expired in July 1999. As for the "Green Form" scheme, she highlighted that this did not pay for legal representation in court.

94. The Court observes first that the MP's parliamentary statements, and the subsequent press reports of them, were each protected by a form of privilege. Since any legal proceedings brought by the applicant in relation to those statements or reports would have had no prospects of success, the Court will restrict its analysis of this complaint to the unavailability of legal aid for the purposes of bringing defamation proceedings in respect of the unprivileged press release.

95. The Court has recalled (at paragraph 73 above) that the right of access to court constitutes an element which is inherent in the right to a fair hearing under Article 6 § 1 of the Convention.

96. It recalls further that, despite the absence of a clause similar to Article 6 § 3(c) of the Convention in the context of civil litigation, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26).

97. However, as the *Airey* case itself made clear (at §§ 24 and 26), Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case. There may be occasions for example when the possibility of appearing before the High Court in person will meet the requirements of Article 6 § 1, and where the guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance, may be sufficient to provide an applicant with an effective opportunity to put his or her case (see also *McVicar v. the United Kingdom*, no. 46311/99, §§ 46-62, ECHR 2002-III).

98. The Court notes that the applicant was entitled to an initial two hours' free legal advice under the "Green Form" scheme and, after July 1998, could have engaged a solicitor under conditional fee arrangements (see paragraphs 29 and 30 above). Although she would have remained exposed to a potential costs order in the event that any legal proceedings were unsuccessful, she would have been able to evaluate the risks in an informed manner before deciding whether or not to proceed had she taken advantage of the "Green Form" scheme.

99. In all the circumstances, the Court concludes that the unavailability of legal aid for the purposes of bringing defamation proceedings in respect of the unprivileged press statement did not prevent the applicant from having effective access to court.

100. There has, accordingly, been no violation of Article 6 § 1 of the Convention as regards the unavailability of legal aid.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

101. The applicant also complained that the absolute nature of the privilege which protected the MP's statements about her in Parliament violated her right to respect for private life under Article 8 of the Convention.

Article 8 provides (as relevant):

"1. Everyone has the right to respect for his private and family life, ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

102. The Court has already commented (see paragraph 65 above) that the central issues of legitimate aim and proportionality that arise in relation to the applicant's Article 8 complaint are the same as those arising in relation to her Article 6 § 1 complaint about the parliamentary immunity enjoyed by the MP.

103. It therefore follows from the Court's conclusion on that aspect of the applicant's Article 6 § 1 complaint that there has been no violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 1

104. The applicant argued that she was disadvantaged as compared to a person subject to statements equivalent to those of the MP, but which are made in an unprivileged context.

Article 14 provides:
"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

105. The Government commented that the applicant's Article 14 complaint added nothing to her complaints under Articles 6 § 1 and 8 of the Convention. In particular, they submitted that, if privileges are compatible with the requirements of Article 6 of the Convention alone, then they must be equally compatible with the requirements of Article 6 taken in conjunction with Article 14. They argued further that a person about whom damaging remarks have been made in Parliament is not in a relevantly similar position to a person about whom such remarks have been made outside Parliament.

106. The Court considers that the applicant's Article 14 complaint raises issues which are identical to those already examined above in relation to Article 6 § 1. In any event, it concludes that no analogy can be drawn between what is said in parliamentary debates and what is said in ordinary speech so as to engage Article 14 in this context.

107. It follows that there has been no violation of Article 14 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicant contended that the absolute privilege enjoyed by MPs in Parliament, together with the qualified privilege enjoyed by the press, led to the absence of any effective remedy in respect of her complaints, contrary to Article 13 of the Convention.

Article 13 provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

109. The Government contended that the applicant's only arguable complaints related to the allegations made in the MP's unprivileged press release. In respect of that release, they stated that the applicant had had an unfettered right of access to court by way of proceedings in defamation or breach of confidence.

110. According to the Court's case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

111. The Court has found above that there has been no violation of Articles 6 § 1, 8 or 14 of the Convention in this case. Nevertheless, having previously declared the applicant's complaints admissible, the Court is satisfied that the applicant had an "arguable claim" that those Articles had been violated.

112. However, the Court recalls that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention (see *James and others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 85). The applicant's complaints related to the immunity conferred by Article 9 of the Bill of Rights 1689 and to the unavailability of legal aid under Schedule 2, Part II of the Legal Aid Act 1988.

113. The Court thus concludes that the facts of the present case disclose no violation of Article 13 of the Convention.

FOR THESE REASONS THE COURT

1. *Holds* by six votes to one that, as regards the parliamentary immunity enjoyed by the MP, there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* by six votes to one that, as regards the unavailability of legal aid, there has been no violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention;

4. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Article 6 of the Convention;

5. *Holds* by six votes to one that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 17 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ J.-P. COSTA

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Mr Costa;
(b) dissenting opinion of Mr Loucaides.

J.-P.C. S.D.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

In the present case, like the majority of my colleagues, I found that there had been no violation of the Convention. I should like, however, to express a different opinion on certain points from the reasoning set out in the judgment, and to make some observations of a more general nature.

The line of reasoning in the judgment may be summarised as follows: the absolute nature of the immunity enjoyed by members of parliament in respect of their statements serves an interest that is so important as to justify the denial of access to a court to seek redress. Accordingly, irrespective of the seriousness (see paragraphs 14-18) of the interference with the applicant's private and family life as a result of the speech by a Member of Parliament, her rights under Article 6 § 1 and Article 8 of the Convention were not infringed. Thus far, I have no reservations about the approach followed.

However, I am not persuaded by the considerations set out in paragraph 86 to the effect that victims of defamatory misstatement in Parliament are not entirely without means of redress. In actual fact, the means in question, which are outlined in paragraph 27, appear to me to be more theoretical and illusory than practical and effective. This "justification" is, moreover, unnecessary, for if, as the majority consider, parliamentary immunity – even where absolute – is not contrary to the Convention (see paragraph 88), what is the use of seeking to show that it is not absolute? It would have been better to say nothing, or to point out that the applicant was a voter in the constituency of the MP who had made critical comments in the House of Commons identifying her by name, and that it would ultimately be for the voters to decide at the next election whether his attacks had been unjustified or excessive.

Similarly, I still find it odd that an impairment of the very essence of the right of access to a court should be measured according to the principle of proportionality (a point I have already raised in my concurring opinion annexed to the *Prince Hans-Adam II of Liechtenstein v. Germany,* no. 42527/98, judgment of 12 July 2001 – see also, along similar lines, the concurring opinion of Judge Ress, joined by Judge Zupancic). It is certainly consistent with the case-law to accept in cases which, to my mind, should be exceptional that an *absolute* restriction on the right of access to a court does not breach Article 6 § 1. But in such cases I find it illogical that a review of proportionality should be conducted *besides*. I shall not labour the point.

I should now like to make some more general remarks. As the third-party interventions make clear, parliamentary immunities exist throughout Europe, with slight variations, and I do not wish in any way to question the grounds for their existence. It is certainly essential for democracy that the

elected representatives of the people should be able to speak freely in Parliament (whether they should outside Parliament is a different matter), without the slightest fear of being prosecuted for their opinions (or for the way in which they vote). But should this sacrosanct principle not be tempered? Since the 1689 Bill of Rights or the 1791 French Constitution (in which the principle was first established in France), relations between parliaments and the outside world have changed. Parliaments are no longer solely or chiefly concerned with protecting their members from the Sovereign or the Executive. Their concern should now be to affirm the complete freedom of expression of their members, but also, perhaps, to reconcile that freedom with other rights and freedoms that are worthy of respect.

In spite of the very serious accusations made against the applicant and the severe damage sustained by her and her children as a result, the case of *A. v. the United Kingdom* did not,

in my view, appear to lend itself to efforts to bring about such a reconciliation. In fact, I am not at all sure that it should be for a court, even one with the task of applying the Convention, "an instrument of European public order (*ordre public*) for the protection of individual human beings" (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 31, § 93), to impose any particular model on the Contracting States in such a politically sensitive field. However, I am convinced that some progress in that field is desirable and possible on their part, and I was anxious to convey that point.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the majority as regards the complaints under Article 6 § 1 and Articles 8 and 13 of the Convention and, as far as the reasoning is concerned, the complaint under Article 14.

The case concerns primarily the question of the compatibility of an absolute privilege protecting defamatory parliamentary statements about private individuals with Article 6 § 1 and Article 8 of the Convention. I will come to the other questions later.

I consider it important to stress from the outset those facts of the case which demonstrate the problem and provide the necessary guidance in determining the question of proportionality of the immunity in question as a possible restriction on the rights under Article 6 and 8 of the Convention (access to a court and respect for private life).

The applicant, a young black woman, lives with her two children in a house owned by the local housing association. The association moved the applicant and her children to 50 Concorde Drive in 1994 following a report that she was suffering serious racial abuse at her then current address.

The applicant was specifically referred to by her Member of Parliament ("MP") during a debate in the House of Commons about municipal housing policy in July 1996. The MP named the applicant, repeatedly stated that her brother was in prison, and gave her precise address, again repeatedly, in the course of making derogatory remarks about the behaviour of both her and her children in and around her home. He referred to them as the "neighbours from hell", a phrase which was subsequently picked up by local and national newspapers and used to describe the applicant in articles published about her. The applicant stated that none of the allegations which the MP had made against her had ever been substantiated and that many of them had originated from neighbours who were motivated by racism and spite. The MP stated in his speech, *inter alia*:

"'Such behaviour manifests itself in many different ways and at varying levels of intensity. This can include vandalism, noise, verbal and physical abuse, threats of violence, racial harassment, damage to property, trespass, nuisance from dogs, car repairs on the street, joyriding, domestic violence, drugs and other criminal activities such as burglary.'

Inevitably, the majority – if not all – of these activities have been forced on the neighbours of 50 Concorde Drive ... by [the applicant], her children and their juvenile visitors, who seem strangely reluctant to attend school during normal hours, and even more adult visitors who come to the house at all times of the day and night, frequently gaining entry by unorthodox means such as the bathroom window."

The MP has never tried to communicate with the applicant regarding the complaints made about her by her neighbours and has never attempted to verify the accuracy of his comments made in his speech either before or

after the debate. Shortly before the debate, the MP issued a press release to several newspapers

The following day certain newspapers carried articles consisting of extracts of the speech based upon the press release. There were also television interviews on the same subject. The articles included photographs of the applicant and mentioned her name and address. The main headline in the Evening Post was: *"MP Attacks 'Neighbours From Hell'".*

In the Daily Express the headline was: *"MP names nightmare neighbour"*.

The applicant subsequently received hate-mail addressed to her at 50 Concorde Drive. One letter stated that she should "be in houses with your own kind, not in amongst decent owners".

Another letter stated:

"You silly black bitch, I am just writing to let you know that if you do not stop your black nigger wogs nuisance, I will personally sort you and your smelly jungle bunny kids out."

The applicant was also stopped in the street, spat at and abused by strangers as "the neighbour from hell".

Following the MP's speech, the lives of the applicant and her children were put at risk. The responsible housing association advised that the applicant and her children should be moved as a matter of urgency just 3 months after the speech was given. They were re-housed in October 1996 and the children were obliged to change schools.

The applicant wrote through her solicitors to the MP outlining her complaints and seeking his comments thereon. She received in reply a copy of the letter prepared by the Parliamentary Speaker, which read as follows:

"Subject to the rules of order in debate, Members may state whatever they think fit in debate, however offensive it may be to the feelings or injurious to the character of individuals, and they are protected by this privilege from any action for libel, as well as from any other molestation."

The applicant complained that the absolute privilege enjoyed by the MP blocked her access to the courts in order to assert her rights in respect of defamation proceedings, contrary to Articles 6 and 8 of the Convention. According to the applicant, this privilege was a disproportionate restriction on her rights under these Articles.

Before entering into the merits I must consider the preliminary objection of the Government that the complaint regarding absolute privilege in respect of the speech in the House of Commons was incompatible *rationae materiae* on the ground that an applicant had no civil right to the protection of his reputation in respect of statements covered by absolute privilege. In this connection, the Government relied on a decision of the Commission in 1976 in the case of *Agee v. the United Kingdom* (no. 7729/76, Decisions and Reports (DR) 7, p. 164). However, this case was superseded by the case of *Young v. Ireland*, decided in 1996 (no. 25646/94), by the case of *Fayed v. the United Kingdom*, decided by the Court in 1994 (Series A no. 294-B, p. 26), and by the cases of *Osman v. the United Kingdom* (*Reports of Judgments and Decisions* 1998-VIII, p. 3124) and *Z. and Others v. the United Kingdom* (no. 29392/95, ECHR 2001-V), which to my mind deal with immunities as being procedural bars on access to court, rather than delimiting of the relevant cause of action. In any case, I believe that it is clear from the exposition of the United Kingdom law on this subject that the privilege is simply a defence to an action for libel. Therefore it only operates as a procedural shield against an action in the same way as other defences such as truth. For example, in

the case of the defence of truth, it cannot seriously be argued that there is no cause of action in respect of a defamatory statement because it will be proved that the statement was true. A defence does not extinguish a right. It simply serves to neutralise responsibility for a cause of action if and when the prerequisites of the specific defence are satisfied.

Therefore I find that the relevant objection of the Government must be dismissed.

As regards the merits of the case, it is true that absolute privilege in England serves the legitimate aim of protecting free debate in the public interest and of regulating the relationship between the legislature and judiciary. And this is conceded by the applicant.

Coming now to the question of whether absolute privilege is a proportionate restriction to the right of access to a court, the position of the parties is the following.

The Government argued that absolute privilege was proportionate to the importance of the public interest which it was intended to serve. The Government relied in this connection on the following statement in an English judgment:

"The important public interest protected by such privilege is to ensure that the member ... at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he was saying. Therefore he would not have the confidence the privilege is designed to protect".

The argument regarding encouragement of an uninhibited debate on public issues is understandable. But the opposite argument appears to me to be more convincing: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible parliamentarians.

The Government argued that once it was recognised that the rule of absolute parliamentary immunity was justified in principle in the public interest, there was no basis for distinguishing between the facts of individual cases.

Both parties, in support of their positions, referred to the above-cited case of *Young v. Ireland*, decided by the Commission in 1996. The Government suggested that this case was an authority for the proposition that where a public interest was of sufficient importance an immunity from suit for defamation was proportionate even if it was absolute in nature. On the other hand, the applicant submitted that that decision supported the proposition that the question of proportionality of a privilege to the aim pursued should be decided in the light of the facts of each case. I believe that the text of the relevant decision of the Commission supports the latter view.

Like myself, the majority agreed with the applicant's submissions to the effect that:

"the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable... the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable."(paragraph 88 of the judgment)

However, the majority go on to state that:
"these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the

application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued."(*ibid*.)

I entirely disagree with this approach. I believe that, as in the case of the freedom of the press, there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals. The general absolute privilege of parliamentarians has an ancient history. It was established about 400 years ago when the legal protection of the personality of the individual was in its infancy and therefore extremely limited. In the meantime such protection has been greatly enhanced, especially through the case-law of this Court. This is exemplified by the expansion of the protection of privacy. The right to reputation is nowadays considered to be protected by the Convention as part of private life (see *N. v. Sweden*, no. 11366/85, Commission decision of 16 October 1986, DR 50, p. 173, and *Fayed v. the United Kingdom*, cited above, pp. 50-51, § 67). Therefore "the State must find a proper balance between the two Convention rights involved, namely the right to respect for private life guaranteed by Article 8 and the right to freedom of expression guaranteed by Article 10 of the Convention". (*N. v. Sweden*, *op. cit*., p. 175). This balance can only be achieved through a system which takes account of the individual facts of particular cases on the basis of the relevant conditions and exceptions attached to both rights. Such balancing implies that neither of the two rights should be allowed to prevail absolutely over the other. There should be a harmonious reconciliation, through appropriate qualification, so that the necessary protection is given to both rights. If freedom of speech were to be absolute under any circumstances it would not be difficult to imagine possible abuses which could in effect amount to a licence to defame or, as the US Supreme Court Justice Stevens described, "an obvious blueprint for character assassination".[1]

As is rightly pointed out by the US Supreme Court Justice Stewart, "the right of redress for harm to reputation reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty".[2]

The Government highlighted the conclusions reached by the recent review of parliamentary privilege by a Joint Committee of the House of Commons and House of Lords in support of retaining the rule of absolute parliamentary immunity (see paragraph 32 of the judgment). This review does not affect my approach because (a) it was not carried out by any organ independent of the persons enjoying the privilege in question, and (b) it does not seem to address the question that we face in this case in terms of the European Convention on Human Rights and in the light of developments regarding the right to reputation.

On the facts of the present case I believe that absolute immunity is a disproportionate restriction of the right to access to a court. In this respect I take into account the following:

(a) the fact that the defamatory allegations, in which the applicant was named and her address identified, were "clearly unnecessary in the context of a debate about municipal housing policy" (paragraph 88 of the judgment);
(b) the severity of the defamatory allegations (*ibid*.);
(c) the foreseeable harsh consequences for the applicant and her family, including even the publication of the photographs of the applicant and her children (*ibid*.);
(d) the reaction of the MP to the letter from the applicant;
(e) the fact that the MP has never tried to verify the accuracy of his defamatory allegations and did not give the applicant an opportunity to comment on them before uttering them;
(f) the lack of any effective alternative remedies.

I would even go as far as to support the view that even without any regard to the facts of the case, the immunity is a disproportionate restriction on the right of access to a court because of its absolute nature, which precludes the balancing of competing interests.

It is true that there are several other countries with absolute privilege, for example Norway, the Netherlands and Turkey. But it is equally true that there are other countries in Europe (the majority) where the privilege is not absolute, either because it does not apply to defamatory statements or because it can be lifted. In the case of the Council of Europe it can be waived by the country concerned.

As regards the complaint concerning the unavailability of legal aid for the purposes of bringing defamation proceedings in respect of the unprivileged press release, I again find myself in disagreement with the majority. Defamation proceedings entail various legal issues for which legal advice and assistance is necessary in order to have effective access to court and pursue the proceedings. The arrangements set out in paragraph 98 of the judgment do not seem to be a satisfactory solution to the problem, with the result that the applicant could not in my opinion exercise effectively her right of access to court in this case. Consequently I consider that there has also been a breach of Article 6 § 1 of the Convention on this ground.

Furthermore, the absolute privilege, which protected the MP's statements in Parliament about the applicant, in my opinion violated her right to respect for her private life under Article 8 of the Convention because it amounted to a disproportionate restriction of that right. In this connection, I refer to the reasons given above in relation to the applicant's Article 6 complaint.

I agree that there has been no violation of Article 14 in this case but my reasoning differs from that of the majority. As everybody in the situation of the applicant was treated in the same way under the legal system of the respondent State as regards the operation of the parliamentary immunity under consideration, no question of a violation of Article 14 arises on that basis.

Finally, the undisputed lack of any remedy against the defamatory statements in this case, arising from the absolute parliamentary privilege, does amount, in my opinion, to a violation of Article 13.

1. Philadelphia Newspapers Inc. v. Hepps, 89 L Ed 2d 783 (1986).
2. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)

Case 149/85

Roger Wybot
v
Edgar Faure and Others

(reference for a preliminary ruling
from the cour d'appel de Paris)

(Immunity of Members of the European Parliament)

Summary

Privileges and immunities of the European Communities — Members of the European Parliament — Immunity 'during the sessions of the Assembly' — Meaning of the term 'session' — Interpretation — Reference to national law — Not permissible

(Protocol on the Privileges and Immunities of the European Communities, Art. 10)

European Parliament — Annual sessions — Duration — Determination — Power to adopt rules for its own internal organization

(ECSC Treaty, Arts 22 and 25; EEC Treaty, Arts 139 and 142; EAEC Treaty, Arts 109 and 112; Merger Treaty, Art. 27)

Privileges and Immunities of the European Communities — Members of the European Parliament — Immunity 'during the sessions of the Assembly' — Meaning of the term 'session'

(ECSC Treaty, Art. 22; EEC Treaty, Art. 139; EAEC Treaty, Art. 109; Protocol on the Privileges and Immunities of the European Communities, Art. 10)

For the purposes of the application of Article 10 of the Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities, under which the Members of the European Parliament enjoy, 'during the sessions of the Assembly . . . in the territory of their own State, the immunities accorded to members of their parliament', the duration of sessions of the European Parliament can be determined only in the light of Community law. To refer to national law in order to interpret the concept of a session of the European

Parliament would be incompatible not only with the wording of the Protocol but also with the very objective of that provision, which is intended to ensure immunity for the same period for all Members of the European Parliament, whatever their nationality.

2. Although under the first paragraph of Article 22 of the ECSC Treaty, the first paragraph of Article 139 of the EEC Treaty and the first paragraph of Article 109 of the EAEC Treaty, as amended by Article 27 of the Merger Treaty, the European Parliament is to 'hold an annual session' and 'meet, without requiring to be convened, on the second Tuesday in March', no indication as to the duration of that session can be inferred, even indirectly, from the other provisions of the Treaties concerning the European Parliament. In the absence of any provision in the Treaties on the subject, the determination of the duration of its sessions falls within the European Parliament's power to adopt rules for its own internal organization. The decision on the date of closure of each annual session is therefore within its discretion.

3. Since the activities of the European Parliament and its permanent and temporary organs go far beyond merely holding sessions and continue throughout the year, an interpretation of the word 'session' as used in Article 10 of the Protocol of 8 April 1965 which limited the immunity of Members to the periods when Parliament was actually sitting might prejudice the carrying on of the Parliament's activities as a whole. Since the consistent practice of the Parliament under which a session lasts for the whole year and is closed only on the eve of the opening of a new session is not incompatible with the provisions of the Treaties on the sessions of the Parliament or with the Protocol of 8 April 1965, Article 10 of the Protocol must be interpreted as meaning that the European Parliament must be considered to be in session, even if it is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 June 1986 *

Mr President,
Members of the Court,

1. When are Members of the Assembly of the European Communities covered by parliamentary immunity? That is the key issue in these proceedings for a preliminary ruling.

Defamation proceedings were brought against Edgar Faure by Roger Wybot before the tribunal de grande instance, Paris, a Member of the European Parliament.

Faure argued that on the basis of Article 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (Official Journal 152 of 13 July 1967, p. 13, hereinafter referred to as 'the Protocol') the action should be declared inadmissible.

The court of first instance held that the date on which the writ of summons was served, 27 January 1983, was during the 1982/83 Parliamentary Session. It therefore upheld the objection, although Parliament was not actually sitting on the date in question. The civil claimant in the main proceedings appealed to the cour d'appel, Paris, which referred the following question to the Court:

'On the basis of the present wording of the relevant provisions and the European Parliament's practice, must [Article 10 of the Protocol] be interpreted as granting to Members of the European Parliament permanent immunity for the whole duration of their term of office, subject to waiver of that immunity by the Parliament, or merely immunity during certain periods of the annual sessions?'

2. According to Article 28 of the 'Merger Treaty' of 8 April 1965 (Official Journal 152 of 13 July 1967, p. 2),

'The European Communities shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performances of their tasks, under the conditions laid down in the Protocol annexed to this Treaty.'

Chapter III of the Protocol sets out the privileges and immunities of the Members of the Assembly. Article 8 guarantees their freedom of movement when travelling to or from the Assembly, and frees them from administrative obstacles, in particular those regarding customs and exchange control. Article 9 embodies the principle that Members incur no liability in respect of 'opinions expressed or votes cast by them in the performance of their duties'. Finally, Article 10 provides for what is generally referred to as parliamentary immunity, that is to say the immunity of Members in respect of acts carried out in the territory of their own State or in that of another Member State unrelated to the performance of their duties.

That article is worded as follows:

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

(a) in the territory of their own State, the immunities accorded to members of their parliaments;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the Assembly.

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

As the tribunal de grande instance pointed out, the Court of Justice has already had occasion, in its judgment of 12 May 1964 in Case 101/63 (*Wagner* v *Fohrmann* [1964] ECR 195), for the precise purpose of determining the temporal extent of parliamentary immunity, to rule on the meaning of the phrase 'during the sessions' as used in

* Translated from the French.

Article 9 of the Protocol on Privileges and Immunities attached to the ECSC, EEC and EAEC Treaties, identical in substance to the present Article 10.

That judgment must be viewed in the context of the particular legal framework which then governed the sessions of the Assembly. Until the adoption of the Merger Treaty, Article 22 of the ECSC Treaty placed a time-limit on the sessions of the Parliament, providing that the session was to end 'at the latest at the end of the current financial year', while Article 139 of the EEC Treaty and Article 109 of the EAEC Treaty simply indicated the date of commencement of the sessions.

The Court therefore arrived at the following twofold conclusion:

First of all, 'the Assembly holds an "annual session" on the second Tuesday in May ending at the end of the ECSC financial year at the latest, that is, 30 June, and another annual session beginning on the third Tuesday in October',

however, 'in the intervals between these "annual sessions", the Assembly may also, under the same articles, meet in "extraordinary session" for one or other of the three Communities . . . '.

(Case 101/63 *Wagner*, referred to above, at p. 201).

In his Opinion in that case, Mr Advocate General Lagrange compared the Assembly's practice of holding an annual session which was never closed but only adjourned with the provisions referred to above.

That system did not appear to him to be contrary to the Treaties. The Treaties did not provide for the *closure* of a session. Furthermore, the fact that sessions were adjourned, under the Assembly's rules of procedure, clearly excluded a system of permanent sessions. Mr Lagrange concluded that during such adjournments the Parliament was to be regarded as not in session and Members thus did not enjoy immunity from proceedings.

The Court did not adopt that interpretation but considered that since neither Article 139 of the EEC Treaty nor Article 109 of the EAEC Treaty contained any express provision such as that in Article 22 of the ECSC Treaty setting a limit on the annual session, to identify 'the expression "adjournment" with the concept of closure would be a distortion of the meaning of the former', so that

'subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European *Assembly must be considered in session, even if it is not actually sitting, up to the time of the closure of the annual or extraordinary sessions*'. (Case 101/63, referred to above, at p. 202; my emphasis).

3. The judgment of the cour d'appel, Paris, and the observations submitted to the Court raise the question whether that interpretation is still entirely valid, in view in particular of the subsequent amendments to the relevant provisions.

First of all, Article 27 of the 1965 Merger Treaty repealed the first paragraph of Article 22 of the ECSC Treaty, the third paragraph of Article 139 of the EEC Treaty and the first paragraph of Article 109 of the EAEC Treaty and substituted the following provision:

'The Assembly shall hold an annual session. It shall meet, without requiring to be convened, on the second Tuesday in March'.

The new wording thus omits any reference to a final date for the closure of the session, such as existed in the ECSC Treaty.

Secondly, although the Rules of Procedure of the European Parliament, as adopted in their revised form on 26 March 1981 (Official Journal 1981, C 90, p. 49), state, as did their predecessors, that the Parliament alone has the power of decision with regard to adjournment of its sessions (Article 9 (2)), they provide, in accordance with the 'Act concerning the election of the representatives of the Assembly by direct universal suffrage' of 20 September 1976 (Official Journal 1976, L 278, hereinafter referred to as 'the Act'), that

(a) the *'electoral period* shall run concurrently with the term of office of Members provided for in the Act of 20 September 1976', that is to say, five years, pursuant to Article 3 (1) of the Act,

(b) the *'session* shall be the annual period' laid down in the Act (Article 10 (3)) and the Treaties (Article 27 of the Merger Treaty, quoted above),

(c) the *'part-session* shall be the meeting of the European Parliament convened as a rule each month and subdivided into *daily sittings'*

(Article 9 (1); my emphasis).

I should add, finally, that Article 4 (2) of the Act makes the Protocol applicable to representatives elected by direct universal suffrage.

Those provisions establish the context in which the observations of the parties in the main proceedings and of the Commission and the reply of the European Parliament to the question put to it by the Court must be examined.

4. According to the civil claimant in the main proceedings, the *Wagner* judgment is based on provisions which necessarily imply a break in the continuity of the sessions (ECSC on the one hand, EEC and EAEC on the other) from 30 June until the second Tuesday in October of each year, and it cannot therefore be applied in the present situation, where there is no longer a date set for the end of the Assembly's annual session. The Treaty no longer lays down a period during which the Assembly necessarily cannot be in session. Indeed, in practice there is now no interval between annual sessions, since the closure of one session merely precedes the opening of the following one.

In those circumstances, the civil claimant in the main proceedings argues that to continue to hold that the Parliament is in session when it is not actually sitting would give rise to four inconsistencies.

(1) The provision making it possible to convene extraordinary sessions would have no effect, since by definition it can only come into play during the interval between two ordinary annual sessions. That would be contrary to the judgment referred to, in which the Court held that:

'The concept of "annual sessions" must . . . be regarded in such a way as to reconcile it with the possibility of extraordinary sessions, which no provision prohibits from being fixed a long time in advance'. (Case 101/63, *Wagner*, referred to above, at p. 201).

Article 9 (5) of the Rules of Procedure of the Parliament, according to which 'exceptionally, the President shall . . . convene Parliament' at the request of the Members, would also become meaningless.

(2) The duration of parliamentary immunity would coincide *de facto* with the term of office of a Member of the Assembly of the European Communities. Since the Assembly has the sole power to waive the immunity of a Member, the result would be that for five years it alone would be able to decide on the expediency of legal proceedings brought against a Member. That would constitute a transfer to the European Parliament of prerogatives of national sovereignty the possibility of which has been expressly excluded by the French Conseil Constitutionnel [Constitutional Council].

(3) The rule that Members of the European Parliament must be treated in the same manner as members of national parliaments, which follows from the reference to national provisions on parliamentary immunity, would not be observed in France, where that protection corresponds to sessions, not to the term of office of a member.

(4) Finally, the provision regarding the immunity of Members travelling to or from meetings of the Assembly would no longer serve any purpose.

The civil claimant in the main proceedings concludes that the European Parliament should not therefore be regarded as being in session during adjournments of the session, that is to say, during the period between two actual sittings.

5. According to the defendant in the main proceedings and the Commission, no new factor has arisen since 1965 of such a nature as to call in question the interpretation of the concept of sessions of the European Assembly given in Case 101/63.

According to the *Commission*, a comparative analysis of the rules applicable both before and after 1965 shows that the independence of the European Parliament in deciding on the holding, the duration and the closing of sessions has remained unchanged. The possibility of inserting an extraordinary session has been maintained. The concept of 'session' has retained the same meaning despite the amendments to the relevant provisions. In practice, the conditions governing the opening, closing and adjournment of sessions have remained the same, and annual sessions follow each other without a break; that has the effect of making it unnecessary to hold extraordinary sessions.

In short, it must be concluded that a Member of the European Parliament enjoys immunity for the whole duration of the annual session, and that immunity can neither be restricted to the periods of part-sessions nor extended to cover the whole electoral period.

6. The *European Parliament*, asked by the Court to state its views on the effects of the relevant provisions and of its own practice, considers that since the session is continuous and the activity of Members is uninterrupted, Article 10 of the Protocol must be applicable to them throughout the year.

In support of its interpretation it submits four arguments. It points out in the first place that parliamentary immunity, inasmuch as it guarantees the independence of the institution, constitutes a principle common to the Member States, and it is only its extent that may vary.

...

Secondly, it argues that under the Treaties and the Act the Assembly has a discretionary power to determine the duration of its sessions; its sole constraint is the opening date of the annual session, the second Tuesday in March, laid down by Article 27 of the Merger Treaty. Accordingly, Article 9 of the Rules of Procedure lays down rules regarding the organization of the annual session, taking into account the requirements of the Assembly's work. Furthermore, the Court has held that the Parliament has the independence necessary to carry out its duties.

...

Thirdly, the European Parliament states that immunity of this kind corresponding to the term of office is in no way contrary to the *Wagner* judgment since the sole limit on the duration of sessions, contained in the ECSC Treaty, was repealed by Article 27 of the Merger Treaty, referred to above, and the Act sets the duration of an electoral period at five years but does not affect the Assembly's power to organize its own activities. The Parliament states that at its prompting the Commission has submitted to the Council a 'Draft for a Protocol' revising the Protocol, dated 30 November 1984, which would amend Article 10 by removing any reference to the duration of sessions.

Finally, it emphasizes that the requirements of its activities impose a particularly full work schedule on its Members. The workload connected with, for example, the budgetary procedure and the examination of agricultural prices is increased by the constraints inherent in the Parliament's supervisory functions and the need to provide for preparatory meetings of committees and political groups.

Those are the main arguments submitted to the Court by the parties in the main proceedings and by the Commission and the Parliament.

7. It appears from the information provided by the European Parliament that it sits for one week each month, except in August. Those 'part-sessions', according to the definition in Article 9 of its Rules of Procedure, are separated by adjournments which allow time in particular for meetings of parliamentary committees and political groups. The President of the European Parliament closes each annual session on the eve of the opening of the following session: in practice, therefore, there is no break in continuity between annual sessions within one electoral period.

That practice is consistent with the legal framework outlined by the Court in the *Wagner* case, with regard to the interpretation of the phrase 'during the sessions of the Assembly' in Article 10 of the Protocol. It is clear that the Assembly considers itself to be in session, even if it is not actually sitting, so long as the President has not formally closed the session so that, like the annual session itself, the immunity of Members of the European Parliament continues without a break.

In order to determine when the Members enjoy the immunity provided for by Article 10 of the Protocol, is it sufficient to find that the practice described is consistent with the Court's interpretation? An examination of the observations submitted to the Court shows that the debate focuses on two questions, obviously linked by the Parliament's practice as described above, namely whether the principles laid down in the Court's judgment in Case 101/63 are

still applicable and whether that practice is in conformity with Community law. Before going into those questions, it is necessary to examine the preliminary issues whether the concept of 'sessions' is a concept of Community law and whether the power to organize its own activities granted to the Assembly by the Treaties permits it to determine the duration of its sessions.

8. According to the civil claimant in the main proceedings, if the period of Members' immunity corresponded to their term of office that would place French Members of the European Parliament in a more privileged situation than members of the French parliament, who enjoy immunity only during the two annual sessions of the parliament. Such discrimination, he says, is contrary to Article 10 (a) of the Protocol which lays down the principle of equal treatment for members of parliaments.

That argument runs counter to the wording, the scheme and the purpose of Article 10 of the Protocol. That provision refers to national law only in relation to the *substantive* extent of the immunity of Members of the European Parliament. It establishes a system of immunity which varies according to the nationality of the Member when proceedings are brought against him in his own country but is *common* to all Members in respect of proceedings brought in other Member States.

The content of the immunity is determined in the one case by reference to national law and in the other by exemption from any measure of detention or legal proceedings. Its duration, on the other hand, depends on that of the 'sessions of the Assembly', that is to say, it is determined by reference to the organization by the Parliament of its own activities.

Article 10 of the Protocol thus distinguishes between the *temporal and substantive extent* of immunity. That differentiation reflects the desire of the Community legislature to ensure institutional independence for the European Assembly. Article 28 of the Merger Treaty, inasmuch as it expressly refers to the Protocol, makes immunity a condition for the European Parliament's performance of its tasks. Another fundamental condition is the freedom which the Parliament must have to organize its own activities. As we shall see, the Treaties have provided for that by giving the Parliament full power to establish its own rules of procedure.

It follows that the duration of immunity, which is made necessary in order for Parliament to carry out its activities, must be the same for all Members concerned; the period of immunity is a Community matter.

It is therefore in primary Community law that the meaning of the phrase 'during the sessions of the Assembly' must be found.

9. Article 10 of the Protocol provides no further assistance in that regard. Reference must therefore be made to the Assembly's power to organize its own activities, granted to it by the Treaties. From the Treaties, and from the Court's case-law, it must be inferred that the Assembly has full discretion to decide when to hold its sessions and how long they should last.

That conclusion is based first of all on the identical provisions in the first paragraph of Article 25 of the ECSC Treaty, the first paragraph of Article 142 of the EEC Treaty and the first paragraph of Article 142 of the EAEC Treaty, according to which:

'The Assembly shall adopt its rules of procedure, acting by a majority of its Members.'

As the Court emphasized in its judgment in Case 230/81 (*Luxembourg* v *Parliament* [1983] ECR 255, paragraph 38), the Parliament

'is authorized, pursuant to the power to determine its own internal organization given to it by the abovementioned provisions], to adopt appropriate measures to ensure the due functioning and conduct of its proceedings'.

That power to organize its own activities is an aspect of the European Parliament's institutional independence and in so far as it concerns the determination of the duration of sessions it is not limited to any great extent by the Treaties.

Article 22 of the ECSC Treaty, Article 139 of the EEC Treaty and Article 109 of the EAEC Treaty, as amended by the Merger Treaty, state that:

'(i) the Parliament 'shall hold an annual session',

(ii) it 'shall meet, without requiring to be convened, on the second Tuesday in March',

(iii) it may meet in extraordinary session at the request of the majority of its Members, of the Council or of the Comission.

There are thus two principles which govern the internal rules which the Parliament may adopt in this respect:

(i) there is to be a single session, unless an extraordinary session is held,

(ii) a session is to be held each year, and is to begin in March.

On the other hand, the Treaties do not impose on the Assembly any time limit for ending the single annual session. The latitude which it thus enjoys permits the Parliament to decide, in its own discretion and according to the needs of its activities, when each annual session is to be closed.

10. That second conclusion makes it possible to define more closely the basic elements of the problem of interpretation with which we are faced. According to what criterion must the duration of a Member's immunity be determined?

In the *Wagner* case the Court based its decision on a criterion drawn from primary Community law which left the Assembly absolute discretion, at least with regard to the EEC and the EAEC, to decide when to close its ordinary and extraordinary sessions.

Unlike the civil claimant in the main proceedings, I think that the purpose of parliamentary immunity on the one hand and the compatibility with the Treaty of the Parliament's practice on the other are grounds for upholding the Court's previous interpretation.

The object of the immunity of Members of the Parliament is to prevent any interference with the proper functioning of that institution, that is to say with the exercise of its powers, and particularly its supervisory powers.

Taking a strict view, one might conclude from that that a Member should be protected only where his participation in sittings of the Assembly might be jeopardized by legal proceedings brought against him. Such a restrictive approach hardly seems to me to be justified. It tends to ignore the diversity of the Parliament's activities, which stems in particular from the

increasing need to keep the Community executive under constant supervision. Thus the Assembly's activities include not only its sittings, where proposed legislation is discussed, but also the meetings of the various permanent and *ad hoc* parliamentary committees.

As may be seen, the Court's criterion based on the wording of the Treaties conforms as closely as possible to the actual functioning of the institution. The immunity enjoyed by a Member of the European Parliament must correspond to his parliamentary activities in the broadest sense, since the Parliament's role cannot be reduced merely to the sum of its actual sittings.

That, moreover, is the accepted view in most Member States of the Community in which members of parliament enjoy immunity. In Germany, Denmark, Italy, Spain, Greece and Portugal members of parliament are exempt from legal proceedings throughout their term of office. The same principle applies *de facto* in Belgium and Luxembourg, by the operation of a practice similar to that of the European Parliament. In the case of France, although Article 26 of the Constitution limits parliamentary immunity to the duration of the session strictly so-called, it does make the arrest of a member outside the periods of session subject to the permission of the assembly of which he is a member, and the assembly may have a detention order or any legal proceedings against a member suspended.

As may be seen, therefore, those national systems differ only in their details.

11. In view of the purpose of immunity, is that view contrary to primary Community law, as the civil claimant contends, taking into account the practice of holding annual sessions which succeed each other without a break?

In that regard the argument concerning extraordinary sessions requires particular attention. Mr Wybot argues that before 1965 the Assembly was not in session between the end of the ECSC session in June each year and the opening of the EEC/EAEC session in October. That period constituted the 'interval' during which, as the Court stated in Case 101/63, extraordinary sessions might be held. Since the unification resulting from the 1965 Merger Treaty, all mention of the closure of sessions has been removed and in order to maintain the possibility of extraordinary sessions the Court's position as set out in *Wagner* must be modified so as to define the term 'session' by reference to the periods during which Parliament is actually sitting.

That reasoning, and the solution it leads to, must be rejected. First of all, as I have already pointed out, the Court's judgment stated that the annual EEC/EAEC session came to an end only when the Assembly adopted the decision closing the session. Consequently, even at that time there was nothing to prevent the Parliament from meeting without a break and closing the annual session on the eve of the following session.

That, furthermore, was the hypothesis underlying the Opinion of Mr Advocate General Lagrange.

As he pointed out,

'the system adopted by the European Parliament is ... based on the existence of an annual session, which is never closed (nor moreover suspended) but is 'adjourned' on dates and for a period fixed by the Assembly itself and exceptionally under certain conditions by the "enlarged Bureau" '.

He went on to raise the question of the compatibility of permanent sessions with

'the institution of a system of extraordinary sessions provided for by the Treaties'. (Case 101/63, cited above, Opinion, at pp. 206 and 207).

As may be seen, the nature of the problem of interpretation with which the Court was then faced was the same as that now before it.

That conclusion is not, however, sufficient. We must be certain that the Assembly's practice does not preclude the possibility of meeting in extraordinary session.

In that regard I would make the following two observations.

The rules laid down in the Treaty are binding on the Parliament just as they are on any other institution. The Rules of Procedure expressly comply with those rules since, in Article 9 (5), they provide that the Parliament may be convened 'exceptionally'. Moreover, the European Assembly is not the only body with the power to call extraordinary sessions, since they may be convened not only at the request of Members but also at the request of the Council or the Commission. The Parliament's practice cannot, therefore, deprive those institutions of a prerogative granted to them by the Treaties.

Leaving aside those questions of principle, let me add that the holding of extraordinary sessions is far from being a mere theoretical possibility. An extraordinary session is not intended merely to prolong the work of the Parliament for an additional period after the end of the ordinary session. It may also be an appropriate means of emphasizing the importance of the issues on its agenda. That is the explanation for the possibility afforded by Article 9 (5) and the rights given by the Treaties to the Council and the Commission, in addition to the provisions of the Rules of Procedure of the European Parliament regarding topical and urgent debates (Articles 48 and 57). The Court referred to that, in relation to the essential procedural requirement of consultation of the Parliament by the Council, in the *Roquette* case, where it is stated that

'the Council could have made use of the possibility it had under Article 139 of the Treaty to ask for an extraordinary session of the Assembly *especially as the Bureau of the Parliament on 1 March and 10 May 1979 drew its attention to that possibility*' (Case 138/79 [1980] ECR 3333, paragraphe 36, my emphasis).

It is thus conceivable that the Parliament might, in order to hold an extraordinary session, close the annual session early. Indeed, in Case 101/63 the Court held that 'no provision prohibits [extraordinary sessions] from being fixed a long time in advance' ([1964] ECR at p. 201).

Whatever the current practice may be, the existence of a continuous ordinary session does not prevent the Parliament from creating the intervals necessary for holding an extraordinary session and even requires it

to do so when the conditions laid down in the Treaties are met.

12. I shall deal much more briefly with the last two arguments advanced by the civil claimant in the main proceedings.

With regard, first of all, to the need to attach some useful effect to the second paragraph of Article 10, according to which immunity also applies to Members 'while they are travelling to and from the place of meeting of the Assembly', the following observation is called for. I have said that the result of the Parliament's practice is to give Members permanent immunity. That, however, is merely a practice which the Parliament may alter by closing its session at such a time as to leave an interval before the next. It is in those circumstances that 'travel immunity' might apply. Far from being contrary to it, the provision in question is explained by the Parliament's freedom of action under the Treaty.

As far as the European Assembly's power to waive the immunity of its Members is concerned, it will suffice to say that it stems from primary Community law and that the extent of its effects is merely an indication of the Parliament's institutional autonomy.

I therefore propose that the Court reaffirm the principles laid down in the *Wagner* case by ruling that:

For the purpose of applying the opening phrase in Article 10 of the Protocol on Privileges and Immunities, 'During the sessions of the Assembly', the European Parliament must be considered to be in session, even if it is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.

JUDGMENT OF THE COURT
10 July 1986 *

In Case 149/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the cour d'appel de Paris (11ème chambre des appels correctionnels) [11th Criminal Appeal Chamber of the Court of Appeal, Paris] for a preliminary ruling in the proceedings pending before that court between

Roger Wybot

and

1. Edgar Faure,

2. Librairie Plon,

3. Ministère Public [Public Prosecutor's Office]

on the interpretation of Article 10 of the Protocol on the Privileges and Immunities of the European Communities,

THE COURT

composed of: U. Everling, President of Chamber, acting as President, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

(a) Mr Wybot, by D. Soulez-Larivière and J. Labbé, of the Paris Bar,

* Language of the Case: French

(b) Mr Faure, by R. Bondoux, of the Paris Bar,

(c) Librairie Plon, in the oral procedure, by J. Lisbonne, of the Paris Bar,

(d) the Commission of the European Communities, by H. van Lier, a member of its Legal Department, acting as agent,

and the information provided on behalf of the European Parliament by its Jurisconsult F. Pasetti Bombardella and by its Legal Adviser R. Bieber,

after hearing the Opinion of the Advocate General delivered at the sitting on 3 June 1986, gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

By a judgment of 9 May 1984 which was received at the Court on 17 May 1984, the cour d'appel, Paris, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 10 of the Brussels Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities (hereinafter referred to as 'the Protocol').

That question was raised in the course of the hearing of an appeal brought by Roger Wybot against a judgment of the tribunal correctionnel [Criminal Court] Paris, which had declared inadmissible defamation proceedings initiated by Mr Wybot in so far as they were directed against Edgar Faure, who on the date of the summons was a Member of the European Parliament.

The tribunal correctionnel had found that the writ of summons was served on 27 January 1983 and that the European Parliament was in session from 9 March 1982 until 7 March 1983, although it was not actually sitting on 27 January 1983, and had referred to Article 10 of the Protocol, according to which: 'During the sessions of the Assembly, its Members shall enjoy . . . in the territory of their own State, the immunities accorded to members of their parliament'.

The cour d'appel, however, was unsure of the actual scope of the word 'session'. It referred to the judgment of the Court of 12 May 1964 (Case 101/63 *Wagner* v *Fohrmann* [1964] ECR 195) in which it was held that 'the European Assembly must be considered in session, even if it is not actually sitting, up to the time of the closure of the annual or extraordinary sessions'. It thought it possible, however, that that interpretation might have to be reconsidered in view of the change in the legal situation after the entry into force of the Brussels Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (hereinafter referred to as 'the Merger Treaty'), which *inter alia* amended a number of provisions of the Treaties regarding the sessions of the European Parliament. On the basis of those amendments, it held, the Parliament had established a practice according to which the sessions lasted the whole year.

By its judgment of 9 May 1984 the cour d'appel de Paris referred the following question to the Court for a preliminary ruling:

'On the basis of the present wording of the relevant provisions and the European Parliament's practice, must Article 10 of the Protocol on the Privileges and Immunities of the European Communities be interpreted as granting to Members of the European Parliament permanent immunity for the whole duration of their term of office, subject to waiver of that immunity by the Parliament, or merely immunity during certain periods of the annual sessions?'

In his observations Mr Wybot, the civil claimant in the main proceedings, argues that the judgment of 12 May 1964 interpreting the word 'session' was based on a legal situation which was subsequently fundamentally changed by the Merger

Treaty. Under the provisions in force before 1965, that is to say Article 22 of th ECSC Treaty, which provided for an annual session opening on the secon Tuesday in May and closing at the latest at the end of the financial year, that is t say, 30 June of each year, and Article 139 of the EEC Treaty and Article 109 o the EAEC Treaty, which provided for the opening of a session on the thir Tuesday in October but did not lay down a closing date, there was necessarily period during which Parliament was not in session and its Members were no entitled to immunity. Article 27 (1) of the Merger Treaty, amending thos provisions, provides for a single annual session which, in the practice of th European Parliament, now lasts the whole year.

According to Mr Wybot, the provisions in force since 1965 coupled with th practice of the European Parliament make the convening of extraordinar sessions as provided for in Article 22 of the ECSC Treaty, Article 139 of the EE Treaty and Article 109 of the EAEC Treaty impossible, although in its judgmen of 12 May 1964 the Court clearly stated that 'the concept of "annual session must . . . be regarded in such a way as to reconcile it with the possibility of extra ordinary sessions'. Moreover, if the session were held to be a period covering th whole year, the result would be: (a) to confuse the system of immunity 'durin the sessions' provided for by the Treaties with a system of immunity during Member's term of office; (b) to prevent any legal proceedings against Members o the European Parliament in their own country for the whole duration of thei term of office; (c) to create a difference between the immunity enjoyed by th Members of the European Parliament and the immunity enjoyed by members national parliaments, contrary to the first paragraph of Article 10 of the Protoco (d) to make redundant the second paragraph of Article 10 of the Protocol whic grants immunity to Members of the European Parliament 'while they a travelling to and from the place of meeting of the Assembly'. He submits th such a result can be avoided only by interpreting the word 'session' as bei confined to the periods during which the European Parliament is actually sitting

Mr Faure, the accused in the main proceedings, considers that the relevan provisions of the Treaties and the Protocol, in the version in force since 196 have made no alteration in the previously existing situation, and that the practi followed by the European Parliament since that date is no different from previous practice, so that there is no reason to change the interpretation of word 'session' given by the Court in its judgment of 12 May 1964.

The Commission of the European Communities points out that even before 1965 it was the practice of the European Parliament to close its annual session only on the eve of the opening of the following annual session. The Commission explains that the sessions could be adjourned and reconvened. It adds that there is no basis for concluding that after 1965 the provisions concerning the sessions or the practice of the Parliament were substantially changed in relation to the previous period. As at the time of the facts which gave rise to Case 101/63, the annual sessions of the Parliament follow each other without a break.

In accordance with Article 21 of the Statute of the Court of Justice of the EEC, the European Parliament was invited to provide information on the conclusions in relation to the scope of parliamentary immunity which in its view follow from the legal provisions concerning the organization of its sessions and from its own practice in that regard. It stated that in the absence of any definition of the word 'session' in the Treaties or any limit placed on their duration by the Treaties, it was for the Parliament itself to determine the duration of its sessions; it had done so by deciding that each session should last for a year. The Parliament emphasizes that that decision corresponds to the actual situation since, leaving aside the month of August and the Christmas and New Year holiday period, the activity of the European Parliament and its various organs (the Bureau, the enlarged Bureau, the College of Quaestors, *ad hoc* committees, parliamentary delegations) in fact continues without interruption throughout the year.

In order to reply to the cour d'appel's question, it is necessary in the first place to consider whether the first paragraph of Article 10 of the Protocol, according to which the Members of the European Parliament enjoy, 'during the sessions of the Assembly . . . (a) in the territory of their own State, the immunities accorded to members of their parliament', requires that reference should be made to national law not only in order to establish the actual scope of the immunity of Members of the European Parliament but also in order to interpret the word 'session'.

It must be pointed out in that regard that Article 10 expressly refers to the concept of a session of the European Parliament. It follows that to refer to national law in order to interpret that concept would be incompatible not only with the wording of the Protocol but also with the very objective of that provision, which is intended to ensure immunity for the same period for all Members of the European Parliament, whatever their nationality.

In view of the foregoing considerations it must therefore be held that the duration of sessions of the European Parliament can be determined only in the light of Community law.

It is therefore necessary to ascertain whether there are provisions of Community law determining the duration of sessions of the European Parliament.

It must be pointed out first of all that the first paragraph of Article 22 of the ECSC Treaty, the first paragraph of Article 139 of the EEC Treaty and the first paragraph of Article 109 of the EAEC Treaty were repealed by Article 27 of the Merger Treaty and replaced by the following provision: 'The Assembly shall hold an annual session. It shall meet, without requiring to be convened, on the second Tuesday in March'. No indication as to the duration of that session can be inferred, even indirectly, from the other provisions of the Treaties concerning the European Parliament.

It follows that in the absence of any provision in the Treaties on the subject, the determination of the duration of its sessions falls within the European Parliament's power to adopt rules for its own internal organization under the first paragraph of Article 25 of the ECSC Treaty, the first paragraph of Article 142 of the EEC Treaty and the first paragraph of Article 112 of the EAEC Treaty, which provide that 'The Assembly shall adopt its rules of procedure, acting by a majority of its Members'. As appears from the judgment of 10 February 1983 (Case 230/81 *Grand Duchy of Luxembourg* v *European Parliament* [1983] ECR 255), that power to decide on its internal organization authorizes the European Parliament to take 'appropriate measures to ensure the due functioning and conduct of its proceedings'.

The decision on the date of closure of each annual session is therefore within the discretion of the European Parliament. The consistent practice of the Parliament until now has been that a session lasted for the whole year and was closed only on the eve of the opening of a new session.

It must be observed in that regard that Parliament's activities are not confined to the conduct of sittings which, according to its practice, are held for one week each month, with the exception of August.

As the Parliament has explained to the Court in great detail, its activities, in fulfilment of its duties under the Treaties and under secondary law, go far beyond merely holding sittings and extend over virtually the whole year.

It must be observed first of all that, as in the case of any assembly with a large number of members, the dispatch of business in plenary sittings must be preceded by preparatory meetings of parliamentary committees, whose task is to prepare draft resolutions to be submitted to the assembly, and of political groups. Inasmuch as the Parliament has, in the exercise of its power to determine its internal organization, set aside one week a month for meetings of committees and one week a month for meetings of groups, it follows that the work of the Parliament is spread over at least three weeks a month throughout the year, with the exception of the month of August and the Christmas and New Year holiday period.

Furthermore, in order to carry out the tasks assigned to it by the Treaties the European Parliament has established a number of permanent or temporary organs, such as the Bureau, the enlarged Bureau, the College of Quaestors, *ad hoc* committees and parliamentary delegations which perform specific tasks independently of the plenary sittings.

In view of those findings it must be held that the activities of the European Parliament and of its organs in fact continue throughout the year without interruption, except for the month of August and the Christmas and New Year holiday period. An interpretation of the word 'session' limiting immunity to the periods when Parliament is actually sitting might thus prejudice the carrying on of the Parliament's activities as a whole.

It remains to be determined whether the practice followed by the European Parliament does not render nugatory the third paragraph of Article 22 of the ECSC Treaty, the second paragraph of Article 139 of the EEC Treaty and the second paragraph of Article 109 of the EAEC Treaty, under which not only a majority of its Members but also other institutions, namely the Council and the Commission, have the right to request that an extraordinary session should be convened. In accordance with the balance of powers between the institutions provided for by the Treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves.

Article 9 (5) of the Rules of Procedure of the European Parliament expressly provides that Parliament may be convened 'exceptionally'. On at least one occasion the Parliament itself, before the adoption by the Council of Regulation No 1293/79, declared void by the Court in its judgment of 29 October 1980 (Case 138/79 *Roquette* v *Council* [1980] ECR 3333), drew the attention of the Council to the possibility available to it under Article 139 of the EEC Treaty of requesting an extraordinary session of the European Parliament in order to obtain the necessary opinion of the Parliament on the contemplated measure, which had to be adopted at very short notice. It must therefore be held that the provisions of the Treaties referred to above retain their entire effect where the European Parliament, as is its prerogative, decides to close its annual session early.

The second paragraph of Article 10 of the Protocol, according to which Members of the European Parliament are also entitled to immunity 'while they are travelling to and from the place of meeting of the Assembly', cannot be relied on in order to challenge an interpretation of the word 'session' which, having regard to the practice of the European Parliament, ensures that the all the objectives of that paragraph are achieved, albeit by means of another provision. Moreover, that paragraph is not without utility, for instance in the event that the European Parliament were to close its annual session early.

Finally, with regard to the objection that so extensive an immunity for Members of the European Parliament in fact makes it impossible, sometimes for a very long period, to bring legal proceedings in the national courts against a Member, it should be recalled that, like national parliaments, the European Parliament always has the right to waive a Member's immunity under Article 10 of the Protocol.

The answer to the cour d'appel's question should therefore be that Article 10 of the Protocol of 8 April 1965, which grants Members of the European Parliament immunity 'during the sessions of the Assembly', is to be interpreted as meaning that the European Parliament must be considered to be in session, even if it is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.

Costs

The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, and by the European Parliament, which provided information to the Court under Article 21 of the Statute of the Court of Justice of the EEC, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the cour d'appel, Paris, by judgment of 9 May 1984, hereby rules:

Article 10 of the Protocol of 8 April 1965, which grants Members of the European Parliament immunity 'during the sessions of the Assembly', is to be interpreted as meaning that the European Parliament must be considered to be in session, even if is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.

Everling Bahlmann Joliet

Bosco Due Galmot O'Higgins

Delivered in open court in Luxembourg on 10 July 1986.

P. Heim
Registrar

U. Everling
President of Chamber acting as President

JUDGMENT OF THE COURT
12 MAY 1964[1]

Albert Wagner
v Jean Fohrmann and Antoine Krier[2]
(reference for a preliminary ruling by the Tribunal d'Arrondissement de Luxembourg, Chambre Correctionnelle)

Case 101/63

Summary

1. Common institutions — Provisions affecting them — Interpretation

2. European Assembly — Session — Concept
(ECSC Treaty, Article 22; EEC Treaty, Article 139; EAEC Treaty, Article 109)

1. The provisions of the Treaties and the Protocols which apply to a common institution must be interpreted together and, if necessary, reconciled.
2. Subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European Assembly must be considered in session, even if it is not actually sitting, up to the time of the closure of the annual or extraordinary sessions.

In Case 101/63

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community and Article 150 of the Treaty establishing the European Atomic Energy Community by the Tribunal d'Arrondissement, Luxembourg, (Chambre Correctionnelle) for a preliminary ruling in the action pending before that court between

ALBERT WAGNER, a tradesman, residing at Esch-sur-Alzette and assisted by André Elvinger, Advocate of the Luxembourg Bar,

plaintiff,

and

1 — Language of the Case: French.
2 — CMLR.

JEAN .FOHRMANN, a director, residing at Dudelange, and Antoine Krier, President and Secretary-General of the Letzeburger Arbechterverband, residing at Esch-sur-Alzette, both assisted by Jean Gremling, Advocate of the Luxembourg Bar,

defendants,

on the interpretation of the treaties and provisions laying down the duration of the sessions of the European Parliamentary Assembly to resolve the question of the parliamentary immunity of Messrs Fohrmann and Krier on 6 November 1962;

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux (Rapporteur), R. Rossi, R. Lecourt and W. Strauβ, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I—Facts and procedure

The facts and procedure may be summarized as follows:

On 23 February 1962 and 13 March 1962, on the application of Albert Wagner, a businessman in Esch-sur-Alzette, Jean Herber, huissier, residing at Esch-sur-Alzette issued a summons against Jean Fohrmann and Antoine Krier, residing respectively at Dudelange and Esch-sur-Alzette, to appear before the tribunal correctionnel of the arrondissement, Luxembourg. The reason for this summons was that the periodical 'C.G.T.', in its issue no 13 of 23 December 1961, had published an unsigned article entitled 'Kooperativen sind doch billiger', which, in the view of Albert Wagner, amounted to a libel upon him. This article in fact accused him among other things of having falsified prices and weights and of having paid wages in his business which were below the legal minimum. Mr Fohrmann was summoned in his capacity as director of the Imprimerie coopérative luxembourgeoise and Mr Krier as the editor responsible. Mr Wagner claimed 100000 francs damages and publication of the judgment in the press. A judgment of 2 June 1962 declared the action inadmissible because of the immunity enjoyed by Mr Krier during the parliamentary session and so a new summons was issued on 6 November 1962. Messrs Fohrmann and Krier asserted before the tribunal that they were both members of the Chambre des Députés of the Grand Duchy of Luxembourg and of the Parliamentary Assembly of the European Communities.

The Tribunal d'Arrondissement of Luxembourg, Chambre Correctionnelle, in its judgement of 29 May 1963, found:

1. That, by Article 9 of the Protocols on the Privileges and Immunities of the ECSC, EEC and EAEC, the members of the Assembly during its sessions enjoy, in the territory of their own State, the immunities accorded to members of their Parliament;
2. That Articles 22 of the ECSC Treaty, 139 of the EEC Treaty and 109 of the EAEC Treaty set out the dates of the sessions of the European Parliamentary Assembly;
3. That these provisions, however, do not allow a court or tribunal faced with the question of immunity to decide, as a matter of law, what is the duration of the sessions of the European Parliamentary Assembly nor whether the Assembly was in ordinary or extraordinary session at the date of the summons (6 November 1962);
4. That Articles 177 of the EEC Treaty and 150 of the EAEC Treaty allow the national court to request the Court of Justice for a preliminary ruling on the interpretation of the Treaties and on the validity and interpretation of acts of the institutions of the Communities.

Consequently, the judgment refers the parties to the Court of Justice for an interpretation of the Treaties and the provisions determining the duration of the sessions of the European Parliamentary Assembly so as to resolve the question of the parliamentary immunity of Messrs Fohrmann and Krier on 6 November 1962.

The judgment of the tribunal correctionnel of Luxembourg dated 29 May 1963 was lodged at the Court Registry on 15 November 1963. The file relating to the case was lodged on 22 November 1963. The judgment of 29 May 1963 was notified on 25 November 1963 to the parties to the main action, to the Commissions of the EEC and of the EAEC and to the Ministers of Foreign Affairs of the six Member States. A period of two months from the date of notification was fixed for the lodging of written observations.

To complete the notification of 25 November 1963 the Court Registry sent to the parties concerned on 9 December 1963 the judgment of 17 December 1962 of the tribunal of Luxembourg, containing the previous history of the case.

By registered letter of 20 December 1963 the Secretary-General of the European Assembly informed the Court that the Minister of Foreign Affairs of the Grand Duchy of Luxembourg had, on 16 September 1963, requested the European Assembly to suspend the parliamentary immunity of Messrs Fohrmann and Krier and that in its session of 14 October 1963 the European Assembly had referred this request to its legal committee for examination.

By powers of attorney lodged on 17 January 1964 the Commissions of the EEC and of the EAEC chose H. J. Glaesner, Legal Adviser of the European Executives, to represent them in this case.

Written observations were lodged:

1. on 17 January 1964 by the plaintiff in the main action;
2. on 22 January 1964 by the Belgian Government;
3. on 25 January 1964 by the Commission of the EEC and on the same day by the Commission of the EAEC;
4. on 28 January 1964 by the defendants in the main action.

Having heard the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided at the hearing on 10 March 1964 to ask the European Parliamentary Assembly to reply to the following two questions before 15 April 1964:

(a) What was the result of the Luxembourg Government's request to the European Assembly to withdraw the parliamentary immunity of Messrs Fohrmann and Krier?
(b) Has the appropriate committee of the European Assembly given any opinion with regard to the time at which a session comes to an end?

By two letters lodged at the Court Registry on 15 and 16 April 1964, the Secretary-General of the European Assembly replied that the question of withdrawal of the parliamentary immunity of Messrs Fohrmann and Krier would be included in the agenda of the European Assembly's plenary session on 11 and 12 May 1964. He also sent the Court the text of Article 1 of the Regulations of the European Assembly with the preparatory documents and the amendment adopted on 28 June 1963.

The parties to the main action and the Commissions of the EEC and of the EAEC were heard at the hearing in open court on 23 April 1964.

The Advocate-General delivered his reasoned oral opinion at the hearing on 30 April 1964.

II — Observations submitted under Article 20 of the Statute of the Court of Justice of the EEC

The observations submitted may be summarized as follows:

A. *The plaintiff in the main action* first of all expresses particular doubts concerning the *validity of the reference* to the Court of Justice. He states that in reality the tribunal referred the parties to the Court without specifying whether the action should be brought before the Court by the parties or by the tribunal itself, whereas Article 20 of the Statute of the Court of Justice of the EEC and Article 21 of the EAEC Statute prescribe clearly that the decision of the national court or tribunal shall be notified to the Court of Justice by the court or tribunal concerned.

As to the substance of the case, the plaintiff considers that the Assembly of the ECSC was not in session on 6 November 1962, whereas in respect of the Assemblies of the EEC and EAEC it is for the defendants in the main action to prove that the latter Assemblies were in session on 6 November 1962.

B. *The Belgian Government* is of the opinion that the question of the date of closure of the annual sessions of the Assembly of the European Communities has not been legally resolved. It does however consider that the authors of the Treaties and the Protocols assumed that the sessions would be of limited duration and that consequently the Court of Justice must give a decision based on considerations of equity, which should induce the Communities to amend the existing provisions in deference to the decision of the Court in this dispute.

C. *The Commissions of the EEC and of the EAEC* assume that the judgment of 29 May 1963 raises the following three questions:

(a) What immunities did Messrs Fohrmann and Krier enjoy on 6 November 1962 as members of the European Assembly?
(b) Was the Assembly in session on 6 November 1962?
(c) How must the expression 'session of Assembly' in Article 9 of the Protocol on the Privileges and Immunities be interpreted?

As to (a) The first question is concerned with the interpretation of domestic law, since Article 9 (1) (a) of the Protocol on the Privileges and Immunities refers to domestic law the question of the extent of the immunities of members of the European Assembly during the sessions.

As to (b) The second question is concerned with circumstances of fact which are subject to examination by the Court. (Rec. 1962, p. 102).

As to (c) The sole admissible question is that relating to the interpretation of the words 'session of the Assembly' in Article 9 of the Protocols on the Privileges and Immunities of the EEC and the EAEC. The opening of the annual session of the European Assembly is fixed by the Treaties (Articles 139 of the EEC and 109 of the EAEC). The Assembly itself decides on the duration, in other words the closing date of the annual session. It follows that Parliament is to be considered in session, even if it is not actually sitting, until the official closure of the annual session.

D. *The defendants in the main action* submit that, in a letter sent on 24 July 1963 to the Minister of Foreign Affairs of the Grand Duchy of Luxembourg, the plaintiff in the main action recognized the existence of the parliamentary immunity invoked but asked for its withdrawal. In their opinion the plaintiff in the main action has thus submitted to the judgment of 29 May 1963 by recognizing the defendants' argument to be correct. According to the defendants in the main action the European Parliamentary Assembly was in session on 6 November 1962.

Grounds of judgment

I — Procedure

The plaintiff in the main action submits that the Tribunal d'Arrondissement of Luxembourg referred the parties to the Court of Justice, whereas according to Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty it should itself have referred the matter to this Court.

However, the aforementioned Articles were in this instance satisfied by the direct transmission of the request and the file of the case by the Chief Registrar of the Tribunal d'Arrondissement to the Registrar of this Court.

Therefore the reference must be considered as proper.

II — The question put

A — *The court's jurisdiction*

The Treaty establishing the ECSC did not lay down the procedure for reference to this Court as was later done by the Treaties establishing the EEC and the EAEC.

There appears to be no point in raising the matter of the possible lack of jurisdiction of the Court, which in any event has not been questioned in this

case, to give a preliminary ruling on the question put in so far as it concerns the interpretation of the Treaty establishing the ECSC. Article 9 of the Protocol on the Privileges and Immunities of the ECSC is identical to Articles 9 of the Protocols on the Privileges and Immunities of the EEC and the EAEC and, as it applies to an institution common to the three Communities, it must be interpreted jointly with Articles 22 of the ECSC Treaty, 139 of the EEC Treaty and 109 of the EAEC Treaty.

In the second place, the request for withdrawal of parliamentary immunity made on 16 September 1963 to the European Assembly by the Foreign Minister of the Grand Duchy of Luxembourg has not disseised this Court of the question put by the Tribunal d'Arrondissement of Luxembourg.

In the third place, it is for the Court to examine the grounds and the operative part of the judgment delivered on 29 May 1963 by the Tribunal d'Arrondissement of Luxembourg so as to establish the exact scope of the question put. This concerns the duration of the sessions of the European Assembly under Articles 9 of each of the Protocols on the Privileges and Immunities of the ECSC, the EEC and the EAEC. As these provisions are identical, they must be interpreted jointly without its being necessary to distinguish between Article 9 of the ECSC Protocol and Articles 9 of the EEC and the EAEC Protocols. This interpretation is within the jurisdiction of the Court under Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty.

This request for interpretation is contained by implication in the question put by the Tribunal d'Arrondissement of Luxembourg, which involves not only the interpretation of the provisions of the aforementioned Treaties but all other provisions which might bring about the solution of the question in dispute.

B — *On the substance of the case*

The European Assembly is an institution common to the three Communities. It is therefore necessary to reconcile, on the one hand, Article 22 of the ECSC Treaty with, on the other hand, Articles 139 of the EEC Treaty and 109 of the EAEC Treaty, the tenor of these latter two Articles being identical.

In the ECSC Treaty, in fact, the meeting without the requirement of being convened is fixed at a date different from that contained in the EEC and EAEC Treaties. Furthermore, although the ECSC Treaty provides a time limit for the annual session, the other two Treaties contain no specific provision on this subject.

Under Articles 22 of the ECSC Treaty, 139 of the EEC Treaty and 109 of the EAEC Treaty, the Assembly holds an 'annual session' on the second Tuesday in May ending at the end of the ECSC financial year at the latest, that is, 30 June, and another annual session beginning on the third Tuesday in October.

In the intervals between these 'annual sessions', the Assembly may also, under the same Articles, meet in 'extraordinary session' for one or other of the three Communities, at the request of the majority of its members, of the High Authority, of the Councils or of the Commissions.

The concept of 'annual sessions' must thus be regarded in such a way as to reconcile it with the possibility of extraordinary sessions, which no provision prohibits from being fixed a long time in advance.

The fact that Article 22 of the ECSC Treaty states that the annual session opens on the second Tuesday in May and ends at the latest at the end of the current ECSC financial year implies that the session in question ends at the latest on 30 June, which is the end of the ECSC financial year.

As a result, however, of the absence of equivalent provisions in Articles 139 of the EEC Treaty and 109 of the EAEC Treaty, the annual session which opens on the third Tuesday in October, under the Articles in question, must be considered as in progress on 6 November, unless closed before that date.

In the absence of any provision, an identification of the expression 'adjournment' with the concept of closure would be a distortion of the meaning of the former.

The result of the foregoing considerations is that, subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European Assembly must be considered as being in session, even if it is not in fact sitting, until the moment of closure of the annual or extraordinary sessions.

III — Costs

The costs incurred by the Belgian Government and the Commissions of the

EEC and the EAEC, which submitted their observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Tribunal d'Arrondissement of Luxembourg, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties to the main action and the Commissions of the EEC and the EAEC;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 22 and 31 of the Treaty establishing the European Coal and Steel Community;
Having regard to Articles 139 and 177 of the Treaty establishing the European Economic Community;
Having regard to Articles 109 and 150 of the Treaty establishing the European Atomic Energy Community;
Having regard to Article 9 of the Protocol on the Privileges and Immunities of each of the three Communities;
Having regard to the Protocol on the Statute of the Court of Justice of each of the Communities;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it for a preliminary ruling by the Tribunal d'Arrondissement of Luxembourg, Chambre Correctionnelle, by order of that court dated 29 May 1963, hereby rules:

1. **The words 'during the sessions of the Assembly' in Article 9 of each of the three Protocols on the Privileges and Immunities must be interpreted as follows: subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European Assembly must be considered in session, even if it is not actually sitting, up to the time of the closure of the annual or extraordinary sessions.**

2. **It is for the Tribunal d'Arrondissement of Luxembourg (Chambre Correctionnelle) to decide on the costs in this action.**

Donner Hammes Trabucchi
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 12 May 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 30 APRIL 1964[1]

Mr President,
Members of the Court,

By its judgment of 29 May 1963, the Tribunal d'Arrondissement of Luxembourg (Chambre Correctionnelle) refers to this Court for a preliminary ruling on the interpretation of the European Treaties, that is (I quote) 'on the points and provisions stated and all others, if need be, which determine the duration of the sessions of the Assemblies of the European Communities and thus to settle the question of the parliamentary immunity of the defendants on 6 November 1962'.
You will remember in fact that two members of the Chambre des Députés of the Grand Duchy, who are also members of the European Assembly, relied on their parliamentary immunity in this dual capacity so as to have declared inadmissible an action for defamation brought against them. Following a rather complicated procedure, a summons was issued on 6 November 1962, that is to say, during the few hours of the year when the Luxembourg Chambre des Députés was not in session; the session had actually opened on 7 November 1961 and ended by Ministerial Decree of 29 October 1962 with effect on 5 November 1962, while the new ordinary session was to open on the first Tuesday after 3 November, that is, 6 November at 3 o'clock in the afternoon! So the immunity no longer applied as regards the Luxembourg parliament, but the question remained with regard to the status of the accused as members of the European Assembly. With regard to this matter, the tribunal had some doubts whether the European Assembly was in ordinary or extraordinary session on 6 November 1962, doubts which arose particularly from the lack of clarity of the provisions in the Treaties relating to the duration of the sessions. This question needed to be clarified since, under Article 9 of each of the three Protocols on the Privileges and Immunities, it is only '*during the sessions of the Assembly*' that its members enjoy 'in their national territory, the immunities accorded to members of their national parliament'. And that is why, considering that a preliminary decision was necessary before it could give judgment and using the option offered by Article 177 (2) of the EEC

1—Translated from the French.

Treaty and Article 150 (2) of the EAEC Treaty, the Court (I quote the operative part of the judgment) 'refers the parties to the Court of Justice of the European Communities to have interpreted by that Court the Treaties invoked by the defendants, namely, the points and provisions stated and all others, if need be, which determine the duration of the sessions of the Assemblies of the European Communities and thus to settle the question of the parliamentary immunity of the defendants on 6 November 1962'.

I

Several procedural and jurisdictional questions must first be settled.

A. The *first* relates to the *validity of the reference* to the Court. You have noticed in fact that the Court 'refers *the parties* to the Court of Justice', whereas it ought itself to have referred the matter to the Court. In this respect, however, there is no difficulty: the matter has been effectively brought before the Court by a direct communication from the Chief Registrar of the tribunal to the Registrar of this Court, and not by the parties. The reference is regular.

B. The *second* problem concerns the *purpose of the questions put*. This point is more delicate, for it bears directly upon the jurisdiction of this Court. This jurisdiction has a dual limit:

1. A limit arising from Article 177: the request must concern a question relating to the interpretation of the Treaty or to the validity and interpretation of acts of the institutions of the Community. Here it is a matter of an abstract interpretation, the Court being unable in any case to take the place of the national court in settling the litigation with which that court is faced;
2. A limit arising from the question put: the Court may only reply to that question and not to others, and without assessing whether the question is appropriate or relevant with regard to the judgment of the main issue.

First of all, what is the tribunal asking exactly? If we keep to the operative part of the judgment, we find that the court does not mention the provisions of which it seeks interpretation and does not set out the precise nature of the difficulties of interpretation with which it is faced. However, if we look at the grounds of judgment, we see clearly that the tribunal desires clarification of the problem of the *duration of the sessions* of the European Assembly, in so far as this problem is the key to settling the dispute with regard to the existence of immunity on 6 November 1962, and that the doubt which it feels relates to the interpretation of Article 22 of the ECSC Treaty and Articles 139 of the EEC Treaty and 109 of the Euratom Treaty, which provisions are expressly cited in the grounds of the judgment. One needs only to read these Articles to find that the lack of agreement between them, on the one hand, and, on the other, the absence in the Treaties of Rome of any provision concerning the *closure* of the ordinary session lead to difficulties of interpretation with regard to the duration of the sessions, difficulties which fall within the jurisdiction of the Court. And the Court, as was said in the oral procedure, has never hesitated to make the necessary effort to extract from the questions posed by the court of reference those which relate to its own interpretative jurisdiction. This effort does not appear very great in this case so far as the Treaties are concerned.

However, the interpretation of the provisions of the Treaties referred to in the judgment does not of itself allow the tribunal to settle the dispute. It is necessary, further, to take into account the Rules of Procedure of the European Assembly, adopted under Article 25 of the ECSC Treaty and Articles 142 of the EEC Treaty and 112 of the Euratom Treaty, which Rules contain provisions on the sessions of the Assembly. These provisions, also, raise questions of their interpretation and even the assessment of their validity in relation to the Treaties, all of which are questions equally within the jurisdiction of the Court by virtue of Article 177 of the EEC Treaty and Article 150 of the Euratom Treaty. Although the judgment does not contain an explicit request on these points, I consider that the Court should also give a reply to them. Furthermore, I think that in this way we shall be meeting the wishes of the tribunal, which requests an interpretation not only of the 'provisions stated' but of '*all others*' enabling it to settle the question in dispute.

C. *Third problem*: Has this Court jurisdiction to give a preliminary ruling on the questions put *in so far as they concern the interpretation of the ECSC Treaty*?

Although the Treaty of Paris did not institute a procedure of reference to the Court, as the Treaties of Rome did, an interpretation, admittedly bold but in my opinion justifiable, of Article 31 of that Treaty leads one to accept that that Article applies a general, if not exclusive, attribution of jurisdiction to the Court concerning the interpretation of the Treaty and the implementing regulations and, consequently, authorizes, if not requires, reference to the Court for a preliminary ruling on those questions when they are raised before national courts.

However, it is not necessary in this case to take up a position on this delicate question. The provisions of Article 22 of the ECSC Treaty are in fact perfectly clear and there is no need to interpret them. The difficulties lie entirely in the Treaties of Rome and in the Rules of Procedure of the European Assembly; the problem of the simultaneous application to a common institution of divergent provisions of the Treaties of Paris and of Rome relates solely to the interpretation of the latter Treaties, especially Article 232 of the EEC Treaty and the Convention on the Common Institutions. As for the 'obscure' provisions, in so far as they govern the opening of the sessions without saying anything about their closure, they are those of the Treaties of Rome. Finally, as regards the Rules of Procedure, the jurisdiction of the Court is sufficiently well founded, both regarding interpretation and assessment of validity, by Article 177 of the EEC Treaty and Article 150 of the Euratom Treaty and, of course, assessment of validity should if necessary be examined as against the ECSC Treaty as well as the two others.

D. Fourth problem: Has the question put by the Tribunal d'Arrondissement of Luxembourg *become pointless* as a result of the request made by the plaintiff to the European Assembly for the withdrawal of the immunity, which is at present being discussed before that institution?

I do not think so. The court before which the main case is pending is in fact the sole judge whether, in requesting the withdrawal of the immunity, the plaintiff should be regarded as having waived his argument that the European Assembly was not in session on 6 November 1962. Likewise, it is sole judge of the expediency of waiting, before giving judgment on the main action, for the Assembly itself to give a decision on the withdrawal requested. As for the Court, it is required to give a preliminary ruling on the question which has been properly referred to it and with regard to which it considers that it has jurisdiction.

The only problem for the Court is a problem of expediency: should it give a ruling immediately or wait for the decision of the European Assembly? I think, for my part, that the first solution is preferable. Everything depends, in fact, on the decision which is given. If it withdraws immunity, the question put to this Court must doubtless be considered as pointless but, if the opposite occurs, very delicate problems of conflict could arise, both for this Court and

for the referring tribunal, in respect of the authority of the decision of the Assembly with regard to the two courts — conflicts which there is every interest in avoiding. But we clearly cannot prejudge what the decision will be. In both cases the Assembly would be forced to adopt a position, at least by implication, on the questions of principle which have been put to you and there is, therefore, the greatest interest in these questions being settled *beforehand* by the Court.

II

Having thus cleared the ground, let us move on to the substance of the case.

The Convention on the Common Institutions achieved uniformity of the provisions relating to the Assembly on one point alone, namely the composition of the institution, which was the subject of an amendment of Article 21 of the ECSC Treaty; there was no amendment, in particular, of Article 22 which is of interest for us. Therefore, in accordance with the opinion of legal writers, which is based above all on Article 232 of the EEC Treaty and which has been followed hitherto in other fields, in budgetary matters for example, we must *apply* the three Treaties *concurrently*; and this is precisely the object of the Rules of Procedure of the European Assembly.

If we compare Article 22 of the ECSC Treaty with Article 139 of the EEC Treaty[1] we first find some common rules:

1. The existence of an annual session: 'The Assembly shall hold an annual session'.
2. Meeting 'without requiring to be convened' on a certain date.
3. The possibility for the Assembly to 'meet in extraordinary session at the request of a majority of its members' or of the Council, the High Authority (for the ECSC) or the Commission (for the EEC and Euratom).

There are however two differences:

1. The different date fixed for the meeting which is not required to be convened: the second Tuesday in May for the ECSC, the third Tuesday in October for the other two Communities.
2. The fixing of a time-limit for the annual session of the ECSC ('The session may not extend beyond the end of the financial year in question', that is, 30 June); the absence of any rule on this matter in the other two Treaties.

It is in these circumstances that the European Assembly has been led to set up the following system in its Rules of Procedure (Article 1 of the Rules).

'1. The Assembly shall hold an annual session.

2. It shall meet without requiring to be convened on the second Tuesday in May and the third Tuesday in October and shall itself determine the duration of adjournments of the session.

The enlarged Bureau provided for in Article 13 may alter the duration of such adjournments by a reasoned decision of a majority of its members taken at least two weeks before the date previously fixed by the Assembly for resuming the session; the date of resumption shall not, however, be postponed for more than two weeks (subparagraph added by a resolution of the Assembly of 28 June 1963, OJ of 12 July 1963).

3. Exceptionally, the President may, on behalf of the enlarged Bureau, convene the Assembly at the request of a majority of its current members or at the request of the High Authority, or one of the European Commissions or one of the Councils.'

The system adopted by the European Assembly is thus based on the existence of *an* annual session, which is never closed (nor moreover suspended) but is 'adjourned' on dates and for a period fixed by the Assembly itself and exceptionally under certain conditions by the 'enlarged Bureau'.

Is this system compatible with the Treaties? At first sight one might doubt it. It appears to give to the 'annual session' provided for in the Treaties a permanent character which is contrary to the relevant provisions: Article 22 of the ECSC Treaty expressly confines the duration of the annual session between two precise dates. As for Article 139 of the EEC Treaty, in not fixing a date for the closure of the annual session it simply intended to leave to the Assembly itself latitude to fix this date, but not to permit it to remain in permanent session. The opening of the session presupposes its closure, which Parliament never pronounces, and the permanence of the session is moreover incompatible with the institution of a system of extraordinary sessions provided for by the Treaties.

However, on reflexion I do not think that the Rules of Procedure of the European Assembly are, on the point with which we are concerned, contrary to the Treaties.

First, the Rules take care to lay down that the Assembly 'shall meet without requiring to be convened on the second Tuesday in May and the third Tuesday in October', in conformity with the provisions of the Treaties. It is true that it does not lay down any rule as to the *closure* of the session. But it should be remarked that the Treaties themselves do not speak of 'closure' (any more in fact than of 'opening') and it was not for the Assembly to legislate on this point which is of a constitutional nature. The opening of Parliament which, in some constitutions, is performed by a solemn act of the Head of State, especially in countries ruled by a monarchy, in general conflicts with the rule of a 'meeting without requiring to be convened' which constitutes a prerogative of sovereignty recognized in Parliament. As for the 'closure', that is also a constitutional prerogative, often recognized in the executive power. Such was the case with the French constitution of 1875; such is still the case with the Luxembourg constitution, to cite only those two examples.

The European Treaties which, in spite of many analogies, do not nevertheless have the character of a constitution in the full sense of the word, did not have to take account of such considerations. It was enough for them to determine under what conditions the Parliamentary Assembly should meet and disperse. In this respect, as we have seen, there is no doubt that they intended to exclude a system of *permanent* sessions, that is to say, a system in which the Assembly '*meets*' permanently. In organizing a system providing for 'adjournments' of the session, the European Assembly has conformed to that rule.

One cannot compare these periods during which the session is 'adjourned' with certain national practices which allow a parliamentary assembly to *suspend* its session, by means of a vacation or more simply by charging its President to convene it at a later date. In this case, the suspension of the work of the Assembly is hardly distinguishable from the fixing of the date of the next sitting during a session, the date merely being postponed.

Here the case is quite different. It is the *session itself* which is 'adjourned'. So, throughout the adjournments, the Assembly not only does not sit, but *is not in session*. On the other hand — and here we meet the essential difference from the examples of domestic law to which we have alluded — such a practice does not break any constitutional principle. While in domestic constitutional law a procedure allowing the Assembly itself to fix the duration of its sessions, under the pretext of 'adjourning' them (and so resuming them) at its sovereign will,

1 — For convenience, I shall henceforth ignore the Euratom Treaty, the provisions of which are, as you know, identical with those of the EEC Treaty.

could constitute a means of infringing the constitutional rules relating to the duration of the sessions and, for example, the prerogatives which the executive enjoys in this respect, this cannot apply in the European Treaties. As I have said, we have here neither opening nor closure of sessions involving the intervention of another power. The European Assembly meets automatically on certain dates; it ends the session itself and may meet for an extraordinary session *at the request of a majority of its members*. It thus appears that the provision of the Rules by virtue of which the Assembly 'shall itself determine the duration of adjournments of the session', this being 'the annual session', is quite simply a practical procedure by which the Assembly profits from the fact that it meets to decide the resumption of its work at a later date without its being necessary to obtain during the adjournment the required number of signatures to obtain a meeting for an extraordinary session. Such a meeting is decided there and then and its date fixed. I should merely note that, to be fully in conformity with the provisions of the Treaties, the decision should be taken by a *majority of the members* of the Assembly.

Furthermore, I find both in practice followed by the European Assembly and in the wording itself of the Rules a very strong confirmation of the distinction between the adjournments of the session and the mere adjournments of the sittings. As regards the wording of the Rules, the distinction appears clearly in Article 20. As regards the practice, if I take at random one of the issues of the reports of the debates, for example Facsimile No 61 (sitting of 4 to 8 February 1963) we read on page 5 the following:

'*The President*: The sitting is open.

1. Resumption of the session.

The President: I declare resumed the session of the European Assembly which was adjourned on 23 November 1962.'

On page 24 the President fixes the next sitting for the following day together with its agenda and closes the meeting. The following day at 3.30 p.m. he merely opens the sitting and the same applies for the following days to the end of the 'cycle' of sittings (to use a neutral word). Then we read (page 230):

'7. Approval of the minutes.

The President: In conformity with Article 20 (2) of the Rules, I must submit to the Assembly the minutes of *the present session* which were drawn up during the debates.

Are there any comments?

The minutes of proceedings are approved.

8. Adjournment of the session.

The President: The Assembly has now completed its agenda. The enlarged Bureau proposes to fix the next sitting for Monday 25 March 1963 at 5.00 p.m.

Are there any objections?

Then it is decided.

Members of the Assembly will receive proposals concerning the agenda as soon as they have been drawn up.

In thanking my colleagues for having carried out their work well and swiftly in sometimes difficult conditions *I declare the session adjourned until 25 March 1963.* (Applause)

The sitting is adjourned.

(The sitting was adjourned at 11.30 a.m.)'

Thus everything happens as if the Assembly held *several* sessions each year. We even find in certain minutes a final declaration of the President declaring *in so many words*: '*The next session* is to take place' on such and such a date (for example, Reports of debates No 63, p. 44; No 66, p. 172).

I would point out, finally, that in conformity with its Rules, the European Assembly approves the minutes of the last sitting before the session is declared adjourned. Sometimes even, the minutes approved are those '*of the present session*' (Report No 61, which I read a moment ago, and No 66, p. 172, already cited).

Such a practice conforms with those systems involving several sessions (Laferrière, Droit constitutionnel, 2nd ed., p. 744). When there is merely an adjournment of the sitting, the minutes are normally approved at the beginning of the following sitting.

The truth is that the very expression '*adjournment of the session*' has a different meaning according to whether we are in a system of permanent session or, as in the Communities, in a system of sessions, ordinary and extraordinary, of limited duration. In the former case the 'adjournment' is a mere fact, for example, an adjournment of sittings of a certain length. In the second case, on the other hand, the expression bears a legal significance: it is the interval between the sessions. (Laferrière, ibid., p. 992, note 1.)

The argument put forward during the oral procedure that the parliamentary committees cannot meet between sessions is irrelevant. All depends in this respect on the constitutions. Under the Luxembourg constitution such meetings of committees during the interval between sessions would in fact be prohibited. Under the system of the French constitution of 1875, on the other hand, the committees could meet between sessions. The Rules of Procedure of the European Assembly regulate the question in Article 39, according to which 'A committee shall meet when convened by its chairman or at the request of the President, *whether the Assembly is in session or not*'.

In these circumstances, and without bringing into question the legality of the Rules of Procedure of the European Assembly, which do not appear to me to be contrary to the Treaties, I think that, during the 'adjournment' of a session, the Assembly *is not in session*, within the meaning of Article 9 of each of the three Protocols on the Privileges and Immunities.

I am of the opinion:

— that Article 9 of each of the three Protocols on the Privileges and Immunities should be interpreted as meaning that the 'duration of the sessions of the Assembly' does not include the period of adjournment of the session, fixed by the European Assembly under the conditions set out in its Rules of Procedure; and

— that the Tribunal d'Arrondissement of Luxembourg should decide on the costs of the present action.

Appendix IV:

European Parliament: The Statute for MEPs (2003)

Brussels, 18 December 2003

The Statute for MEPs

(update: 18 December 2003)

MEPs have never been closer to having a single set of rules governing their status, pay and conditions (known as a "Statute"), whichever country they are from. After Parliament voted for a draft Statute in June 2003 (for details see below under *Recent developments*), the Council of Ministers, which has to approve the Statute, announced that it was opposed to three points: the retirement age for MEPs, the tax arrangements for their salaries and certain matters of primary law that were included in the draft Statute (i.e. privileges and immunities) which it said should be updated and harmonised on the basis of negotiations among EU governments.

This week, on 17 December 2003, Parliament voted in plenary by a very large majority (345 for, 94 against and 88 abstentions) in favour of a resolution which should bring the whole issue to a swift conclusion. Following this key vote, European Parliament President Pat Cox thanked Willi Rothley (PES, D) for his long-running efforts to find a solution to this matter and commented *"The House has voted wisely."*

Accepting the wishes of the Council, MEPs agreed to a separate examination of the parts of the Statute relating to primary legislation, namely the 1965 Protocol on Privileges and Immunities, which they ask the Member States to revise. Several governments wanted to able to levy national income tax on MEPs' salaries. Parliament has accepted that its Members' salaries, which will in future be paid from the Community budget, should be subject not only to Community tax but also to national tax, provided there is no double taxation (a point accepted by the Council). Lastly, this week's resolution proposes a compromise on the retirement age, which the Italian Presidency indicated would be acceptable to the Council: MEPs will be entitled to a pension from the age of 63 (instead of age 65 as the Council wanted, and age 60 as proposed by Parliament in June).

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The resolution adopted on 17 December asks the Council to say if it can officially accept these compromises, preferably before the end of the Italian presidency but certainly no later than 15 January 2004, so that the matter can be resolved once and for all before the European elections in June. This was what the majority of MEPs want, even though the resolution adopted does not propose a date for the entry into force of the new Statute. Thus, twenty-five years after the first direct elections to the European Parliament, all its Members may at last be governed by the same rules.

The legal bases

The length and complexity of the whole process can be traced back to the 1976 Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, which did not contain any provisions on a Statute for Members. MEPs therefore remained subject to extremely varied national rules, particularly as regards pay and allowances. It was only with the **Amsterdam Treaty,** which entered into force on 1 May 1999, that the first legal basis was created. Article 190(5) of the Treaty stated: *"The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting unanimously, lay down the regulations and general conditions governing the performance of the duties of its Members."*

The **Nice Treaty**, which entered into forced on 1 February 2003, relaxed this legal basis by amending Article 190(5) to read: "*The European Parliament, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council."* There is thus a shift from unanimity to qualified majority voting, except for the tax arrangements. In addition, Article 192(2) of the Treaty states: *"Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community Act is required for the purpose of implementing this Treaty."*

For its part, the **European Council** has, in a number of declarations since 1999, indicated a willingness to secure agreement on a Members' Statute.

Procedural complications

The process of agreeing on a Statute for MEPs has also been complicated by the range of actors involved: *Parliament*, which takes decisions on the Statute by a simple majority; the *Bureau of Parliament*, which rules on financial and administrative matters concerning Members; the *Commission*, which must be consulted and deliver an opinion; and the *Council*, whose approval is required for any Statute adopted by Parliament.

The order in which the different actors play their parts also helps explain the difficulties of completing the procedure. As stipulated by the EC Treaty, the Statute is laid down, not after *the approval of the Council*, but with its *approval*. It may thus be decided at an initial stage to secure approval by a majority in the plenary Assembly for a draft opinion by the Legal Affairs Committee before forwarding the proposal to the Council. But it would also be possible for the Council to approve a draft in advance, and for Parliament to draw up the Statute after having taken note of that approval.

Since 1998 the European Parliament has been calling for the adoption of a common Members' Statute in accordance with the fundamental principles of equality and non-discrimination laid down in the Treaties. And since 3 December 1998, when Parliament adopted a report tabled by Mr Rothley, negotiations have continued at the highest level between Parliament and the Council.

Recent developments

May 1999 and October 1999 - The European Parliament, meeting in plenary sitting during the old (May 1999) and new (October 1999) term of office, voted to confirm its December 1998 resolution.

12 July 2000 - The Committee on Legal Affairs adopted the draft report tabled by Willi Rothley (PES, D) following the recommendations issued by a working party of independent experts (accredited by the Conference of Presidents in February 2000). The study assigned to the working party of experts concerned Members' activities, and included a comparison of the pay and allowances drawn by members of national parliaments and the remuneration of persons discharging comparable duties.

25 June 2001 - The Committee on Legal Affairs adopted the report by Willi Rothley on taxation aspects of the Statute.

29 October 2001 - The General Affairs Council, meeting in Luxembourg, reached a political agreement on the taxation and remuneration of Members and submitted it to Parliament, which supported it. The compromise thereby adopted, on the fiscal aspects of the Statute, stipulates that the salary will be payable from the European Union budget and will be subject to Community taxation. Member States may, however, impose an additional national tax, subject to the exclusion of double taxation, if they have declared their intention so to do to the European Parliament before the Statute's adoption. Member States retain the right to take MEPs' salaries into consideration for the purpose of fixing the rates of tax applicable to their other income.

15 November 2001 - The Conference of Presidents decided, on the initiative of the President, Nicole Fontaine, to submit a draft letter to the President of the Council for approval by the Conference of Presidents, on the fiscal aspects of a future Statute.

9 April 2002 - The Legal Affairs Committee adopted an opinion for the Conference of Presidents setting out the principal components of the Members' Statute. Article 1 of the annex to this opinion states that the Members' salary shall be 50% of the basic salary of a judge of the EU Court of Justice (currently 17,341.27 euros). Under Article 3 :

(1) The allowance [salary] shall be paid from the budget of the European Union.
(2) It shall be subject to Community tax.
(3) Member States may - subject to the exclusion of double taxation in any form - levy an additional national tax provided that they have declared that intention to the European Parliament before adoption of this Statute. The declaration shall be lodged with the Secretary-General of the European Parliament.
(4) The right of Member States to take the allowance into account in determining the tax to be levied on other income shall remain unchanged.

16 May 2002 - The President of the European Parliament noted the above opinion, and asked the Conference of Presidents to rule on the procedure to be followed. Various opinions were expressed on that procedure :
-The rapporteur wanted Parliament's plenary to state its opinion in advance of any approach to the Council, and believed the matter should be dealt with at the level of the Heads of State/Government;
- The President proposed establishing contact with the Council (Spanish Presidency) as soon as the Conference of Presidents had given him a mandate to do so.

14 November 2002 - The Conference of Presidents considered the procedural aspects and :
- it decided to authorise the Legal Affairs Committee to draw up a report proposing a draft Members' Statute;

- it was also agreed that the President would maintain the exploratory contacts with the Heads of Government and report to all the political group chairmen.

20 November 2002 - The President reported to the Conference of Presidents on the exploratory contacts with Member State governments on the basis of the Rothley opinion for the Committee on Legal Affairs. The President had also informed all the political group chairmen accordingly.

3 December 2002 - The following groups and Members:
- EPP-ED and PES,
- ELDR, Greens/EFA, EUL/NGL, Michiel van Hulten and Bill Miller,
- Greens/EFA,
each tabled a joint motion for a resolution calling for the procedure for the adoption of the Statute to be wound up.

- The EPP-ED and PES groups referred to the opinion setting out the key points in the Members' Statute which the Committee on Legal Affairs had submitted to the President of the European Parliament.

- The ELDR, Greens/EFA, EUL/NGL, Michiel van Hulten and Bill Miller called on the committees responsible to submit a final draft of the Statute on the basis of work already done by the Committee on Legal Affairs and the exploratory contacts made by the President with the Member States.

4 December 2002 - Mr Bertel Haarder repeated, on behalf of the Council, under the Danish Presidency, that the Council was prepared to enter into a dialogue with the European Parliament about the circumstances for the adoption of the Statute of Members. But he would not go into details concerning the proposals by the Committee on Legal Affairs, as these had not been sent to the Council nor had they been adopted by a majority in Parliament.

He said it was of course crucial for a Statute to be adopted that would increase the dignity accorded to the individual MEP; there had to be clarity regarding the reimbursement of expenses, and an appropriate salary level.

5 December 2002 - The plenary adopted, by 296 votes to 136, with 45 abstentions, a joint EPP-ED and PES resolution citing the opinion adopted by the Legal Affairs Committee for the Conference of Presidents (Rothley report), in which Parliament stated that it:

1. Regards it as appropriate to wind up the procedure for adoption of the Statute;
2. Cites the opinion adopted by the Committee on Legal Affairs and the Internal Market for the President of the European Parliament presenting the key elements of the Statute for Members;
3. Calls on the Commission to take a position on that document;
4. Calls on the Council to bring to a conclusion the dialogue with the European Parliament, at the level of Heads of State or Government, on the practical arrangements which will lead to the adoption of the Statute;
5. Calls on the Bureau, in the light of this draft, to prepare rules on the reimbursement of expenses which should enter into force simultaneously with the Statute;
6. Instructs its President to forward this resolution to the Council and the Commission.

14 January 2003 - The Bureau, the Conference of Presidents and the Quaestors decided to convene a working party on Members' pay and expenses in the context of the negotiations on the adoption of an MEPs' Statute. The Greek Presidency of the Council, in a debate in plenary outlining its priorities, stated that it wished to concentrate on drawing up the Statute of Members of the European Parliament together with the Statute of the European political parties.

The Committee on Budgets, in a working document on Parliament's 2004 Budget, pointed out that the budgetary procedure for the financial year 2004 was going to be marked by a series of important developments [including] the adoption of a Members' Statute. It was assumed that the Rothley report

would provide the basis for negotiations with Council. In accordance with Parliament's wish, a Statute should be applicable at the beginning of the new legislature, for which appropriations would have to be entered to cover the cost in the second half of 2004. Preliminary calculations of expenditure amounted to EUR 85 m per year (according to a report by the Secretary General).

22 January 2003 - The Committee on Legal Affairs considered for the first time the draft report on the adoption of the Statute of Members of the European Parliament tabled by Mr Rothley.

25 March 2003 - The Committee on Legal Affairs put the draft report to the vote without adopting the resolution. The draft report would be submitted to plenary after a Bureau decision on the arrangements for the reimbursement of expenses had been taken and the Council had issued the list of Member States that had decided to subject their MEPs to national taxation.

21 May 2003 - The Committee on Legal Affairs adopted the consolidated draft resolution on the MEPs' Statute as part of a report by Willi Rothley.

28 May 2003 - In the meantime the European Parliament continued to work on the reform of its own allowances system in order to achieve greater transparency. On 28 May 2003, the Bureau unanimously adopted a new system of repayment of travel expenses. These expenses would now be reimbursed on the basis of actual costs (involving presentation of documentary evidence) and could not exceed a certain amount depending on the method of transportation chosen. This new system is due to enter into force at the same time as the new Statute.

3 June 2003 - The European Parliament adopted in plenary the consolidated draft report by Mr Rothley by 294 votes to 171, with 59 abstentions. According to this report, all MEPs would receive the same salary of 8,500 euros (gross) per month, which is half of the salary of a Judge of the European Court of Justice. This salary should be funded from the EU budget. Currently, MEPs' gross monthly salaries vary considerably depending on their nationality, from 2,618 to 10,974 euros.

Taxation: The draft Statute aims to apply Community tax to the salary of all MEPs, on a common basis, following the same rules of taxation as those applicable to European civil servants and other EC staff. Parliament decided to distance itself from an earlier agreement with the Council to allow some Member States to levy a national tax in addition to EC tax .

Refunding of expenses: The resolution adopted states that the draft Statute must lay down as a principle that MEPs are entitled to the reimbursement of costs incurred in the exercise of their mandate and that the Parliament should determine those cases in which reimbursement may consist of a flat-rate sum. The precise rules on this issue, however, are not laid down in the Statute itself, but are subject to a decision by the Parliament's Bureau.

Parliamentary immunity: The draft Statute also ensures that Members can work without fear of prosecution for any action taken as part of their duties: *"A Member may at no time be the subject of legal proceedings or otherwise be held to account extrajudicially for any action taken, vote cast or statement made in the exercise of his/her mandate." ..."Any restriction of a Member's personal freedom shall be permitted only with the consent of Parliament, except where he/she is caught in the act." ... "Members shall enjoy freedom of movement throughout the European Union." "This right may not be restricted by law or by order of a public authority or court."* (Articles 4, 5 and 7 of draft Statute.)

Pensions and invalidity: The draft Statute sets the pensionable age at 60. The retirement pension would be equivalent to 3.5% of salary for each full year of service, with a ceiling of 70%. At the end of their mandate, MEPs would be entitled to a transitional allowance, for a maximum of 24 months after leaving office. MEPs would also receive an invalidity pension if they became incapacitated during their term of office. A fund is to be set up for the retirement pensions and the pensions for

MEPs' surviving dependants. This fund would be financed by MEPs themselves (one third) and the European Parliament (two thirds).

New Member States: The draft Statute also provides for transition periods for the new Member States from the entry into force of the accession treaties and for two parliamentary terms thereafter. During these periods new Member States will be entitled to adopt rules which differ from the Statute as regards pay, transitional allowances and pensions.

Current Member States: owing to the complexities of the procedure for changing the Statute, existing MEPs who are re-elected will be able to opt to stick to the old rules for one parliamentary term.

4 June 2003 - After hearing that the European Commission had given its assent to the draft Statute, Parliament's plenary adopted a motion for a resolution by 233 votes to 167 with 36 abstentions calling on the Council to approve the Statute.

25 June 2003 - The Council notified Parliament of those points on which it disagreed with the text that Parliament had just adopted. The differences centred around three points:
- the inclusion, in the text adopted, of matters relating to the privileges and immunities of Members which are governed by primary law, while such issues are governed by a 1965 Protocol annexed to the Treaties and have not been addressed by the Convention, which has therefore not proposed any changes to the Protocol;
- the tax arrangements for Members proposed in the future Statute;
- the age of retirement (60).

3 December 2003 - Following fresh talks between Mr Cox, Mr Rothley and the Council Presidency, Mr Rothley asked the Legal Affairs Committee on 3 December to vote on new provisions on the three sticking points. The proposed compromises were: a retirement age of 63; salaries to be taxed nationally provided there is no double taxation; and separation of secondary and primary law provisions. The draft text called on the Member States to revise the primary law provisions (laid down in the 1965 Protocol on Privileges and Immunities) on the lines suggested by Parliament in June 2003.

Following a debate, the members of the Committee on Legal Affairs had to decide whether to vote on this compromise package. They decided, by 16 votes to 13, not to vote on it.

11 December 2003 - Parliament's Conference of Presidents decided nevertheless to include the question of the Statute on the agenda for the upcoming plenary session in Strasbourg. A debate, with draft resolutions, was scheduled for Wednesday 17 December 2003, to follow statements by the Council and Commission.

17 December 2003 - Mr Antonione, for the Council Presidency-in-Office, and Ms de Palacio, for the Commission, opened the debate by saying that an agreement was closer than it had ever been. Many MEPs voiced the same hope but warned the Council that the time for prevarication was over and that the opportunity to wind up the issue must be grasped. Mr Rothley particularly stressed that with the European elections just around the corner *"things must be clear and transparent in the eyes of the European voters who elect us and pay us"*. President Cox wound up a debate that had taken place in a spirit of consensus by expressing the hope that a clear majority would emerge, so that the matter could be settled now.

A joint resolution was tabled by the five main political groups (EPP-ED, PES, ELDR, Greens/EFA and EUL/NGL) which contained the key points of the Rothley resolution of 3 December. This resolution was adopted by a large majority: 345 in favour, 94 against and 88 abstentions.

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Venice Commission: Report on the Regime of Parliamentary Immunity (1996)

CDL-INF(1996)007e
Strasbourg, 4 June 1996

Preliminary remarks:

1. This report, adopted by the Sub-Commission on Democratic Institutions on the basis of a draft report drawn up by Mr G. W. Maas Geesteranus with the assistance of the Secretariat of the European Commission for Democracy through Law, was approved by the Commission during its 27th meeting which took place on 17 and 18 May 1996.

2. The proposal to devote a study to parliamentary immunity originates from the representative of the Parliamentary Assembly of the Council of Europe, Mr Stoffelen, who submitted the topic to the Venice Commission during its 18th meeting.

3. In the opinion of the Commission, the request of the Assembly was indeed very much to the point. On the one hand, the topic of parliamentary immunity lies in the heart of the debate over the guarantees of parliamentary democracy in Europe given that the independence and satisfactory operation of parliament are essential to the separation of powers. On the other hand, the topic is of current interest in view of the tendencies in certain states to encourage elements of a "continuous democracy"[4][1], ie increased citizen control or participation.

4. As a first step in the course of preparing this report, a questionnaire was drawn up for submission to the members, associate members and observers of the Commission.

5. The Commission received replies from the following countries: *Albania, Austria, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, together with Canada, Japan and Kyrgyzstan, non-European states represented in the Venice Commission.*

6. The received replies were used to compile the summary tables presented in Appendix I.

7. In the preparation of this report, constant reference was also made to the study produced by the General Directorate for Research of the European Parliament in 1993, entitled "Parliamentary immunity in the member states of the European Community and in the European Parliament" (Legal Affairs Series, W-4).

8. Working from the tabulated information, it was possible to produce this report in a comparative overall perspective. It does not constitute an exhaustive analysis of the topic, nor does it purport to infer uniform and generally applicable principles, given the diversity and complexity of the national situations. However, it provides an analytical and speculative instrument containing, in a systematic way, information which is not always accessible, particularly for linguistic reasons.

9. The report accordingly gives an overview of the varying legal rules adopted and provides an initial basis for comparison as regards the subject-matter at Europe-wide.

I. Introduction

4[1] *"Democratie continue" is a term coined by Dominique Rousseau, "Le Monde", 1 February 1996, p. 16.*

10. The need to afford parliamentarians special protection is recognised in all the states under consideration. However, this does not imply that the institution of parliamentary immunity has failed to attract numerous criticisms, or that any form of impunity should be secured to parliamentarians.

11. Notwithstanding the variety of terms and descriptions employed by national legislation and the scope of protection in the various countries, most European states recognise two categories of immunity for parliamentarians:

- firstly, the "non-liability" or "freedom of speech" of parliamentarians in respect of judicial proceedings over the opinions expressed and votes cast in the discharge of their parliamentary duties;

- secondly, their "inviolability" or "immunity in the strict sense" shielding them from all arrest, detention or prosecution without the consent of the chamber to which they belong.

12. The law of certain countries provides for a special jurisdiction with regard to offences committed by members of parliament. This is often the Supreme Court as in Spain or the Netherlands, the Federal Tribunal in Switzerland or the Court of Appeal in Greece. In other countries such as the United Kingdom and Malta, the House itself may perform functions of a judicial nature.

13. In some countries (France, Belgium), the provisions on immunity have public policy status, so that immunity cannot be voluntarily waived by any member and acts performed in breach thereof are void. Elsewhere it is for members to avail themselves of their immunity (Slovenia). They may in some cases even be able to refuse to testify, thus evading any attempt at preliminary investigation when in reality they are personally under suspicion (Belarus, Greece).

14. Immunity, with a different theoretical conception according to country, is designed to safeguard the "people's representatives" against arbitrary power. Consequently, it protects the legislature against interference from the executive or sometimes even from the judiciary. Parliamentary immunity ensures thus collective protection for parliament as a body, its operation and its acts, as well as individual protection for its constituent members.

15. It has been gradually extended to other persons:

- all persons participating in "proceedings in Parliament" in the countries with British-style institutions (United Kingdom, Netherlands, Ireland);

- members of the regional assemblies (Landtag) in Austria;

- members of the Community and Regional Councils and ministers in Belgium.

16. Nevertheless, in Germany parliamentary immunity applies solely to members of the Bundestag, not those of the Bundesrat.

17. As a rule, the legal foundation of immunity is enshrined in the fundamental statutes of states. The principle is embodied in the United Kingdom's "Bill of Rights" of 1689 and in the Constitution of most other countries, more seldom in the law unless some aspect of this protection is completely omitted from the legislation in force.

18. The forerunner of parliamentary immunity in the true sense was a certain sacrosanctity of representative office; in Rome, the Tribune of the Plebs enjoyed the same inviolability.

19. The origin of parliamentary immunity as such can be traced back to the 14th century[5][2]. As "freedom of speech" (irresponsibility) for parliamentarians, it was confirmed by the House of Commons at the early 16th century. At that time, the second aspect of immunity, namely "freedom from arrest" (inviolability), was prescribed only in the event of measures restricting personal freedom pursuant to civil actions.

20. With the French Revolution, protection was extended so as to be effective against court action in criminal cases and against any charge of a parliamentarian even for acts unrelated to parliamentary service.

21. These two aspects of immunity, as gradually defined in the French system, appear to recur today in most national legal systems.

22. The guarantees afforded by the two types of immunity (irresponsibility/ inviolability, "freedom of speech/ "freedom from arrest") are complementary. They should therefore be examined from the successive angles of their scope, the acts to which they relate and their implications in the event of wrongful use.

II. Non-liability

23. "Non-liability" implies immunity against any judicial proceedings relating to opinions expressed or votes cast and is encountered in most national legal regimes for protecting parliamentarians.

24. It is termed, for instance, "berüfliche Immunität" in Austria, "Indemnität" in Germany, "freedom of speech" in Ireland, Malta, Canada, the Netherlands and the United Kingdom, "insindacabilità" in Italy, "inviolabilidad" in Spain and "Immunität/Irresponsabilité" in Switzerland.

25. Ukraine is the one country whose legislation contains no provision concerning this aspect of immunity and deals with protection strictly in terms of inviolability. In Russia, while the inviolability of Duma members has constitutional value as a principle, non-liability is prescribed only by law.

A. The principle: absolute character of protection

1. Purposes

26. In the first place, the principle of members' non-liability constitutes a special form of the protection which is arranged in order to guarantee independence and freedom of expression for parliament and its members, especially vis-à-vis the executive and the principle of separation of powers. The expediency of guarding against any arbitrary arrest of a people's representative by the government does not seem an immaterial concern still at now-days[6][3].

27. In the second place, the principle of non-liability progressively acquires the further quality of an additional surety for parliamentarians vis-à-vis the majority opinion expressed in parliament itself. As representatives of the people which placed them in office, by holding even minority opinions they still express a portion of popular and/or national sovereignty, respect for which is central to the principles of pluralist democracy. This would imply that the real function of the institution of parliamentary immunity is to protect the expression of the common will and the composition of parliament as elected by the citizens[7][4].

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[5][2] *The member Thomas Haxey, during the session of the English Parliament from 12 January to 12 February 1397, submitted a bill denouncing the conduct of the Court of Richard II. He was tried and condemned to death for treason but the sentence was not carried out thanks to a royal pardon granted because of the pressure brought to bear by the House of Commons.*

[6][3] *Hermann Butzer, Immunität im demokratischen Rechtstaat, Berlin 1991, p. 75.*

[7][4] *Richard Wurbs, Regelungsprobleme der Immunität und der Indemnität in der parlamentarischen Praxis, Berlin 1987, p. 21.*

2. Scope of the principle of non-liability

28. As a rule, this type of immunity essentially relates to "opinions expressed and votes cast in the discharge of parliamentary duties". It is perpetual in the sense that the protection enjoyed by the parliamentarian regarding the opinions stated in the performance of an electoral mandate is not extinguished when the mandate ends.

29. It protects parliamentarians against any sanction ordered by the State or by state bodies, as well as against private individuals and attempted unlawful influence. This affords them exemption from all court proceedings. The law of certain countries contains more specific provisions extending freedom from liability to all civil, criminal or administrative action or stipulating that a member of parliament may not be subsequently pursued, arrested, detained or tried.

30. By contrast, in Bulgaria for instance members are free from criminal liability only. In Slovenia, civil liability is also incurred for damage or injury of which they stand accused. In France or Norway, parliamentarians are not liable and are not compelled to make redress even where "the acts charged constitute an offence or cause damage".

3. Acts covered by immunity

31. Parliamentarians have absolute privilege of non-liability as regards the ballots in which they participate, whether in the chamber or in the parliamentary committees or sub-committees.

32. Nor are they held accountable for the opinions expressed, whether orally or in writing, in parliament or in a parliamentary committee, or for acts performed on business assigned by the parliament in connection with their mandate.

33. The exact breadth of immunity and the acts which it covers have been specified by parliamentary practice and by jurisprudence. In particular, a more or less restrictive interpretation depending on the country has been used in defining the acts or circumstances which would come within the ambit of "performance of the mandate" or "parliamentary functions".

34. For many states, these are purely functions performed in parliament, ie in the session chamber or in the committees or bodies set up for session purposes. In the United Kingdom the acts covered by immunity are "proceedings in Parliament" as defined over the years by parliamentary jurisprudence. The same opinions expressed outside parliament (Luxembourg), or sometimes the same written statements in breach of the rules applying to the publicity of proceedings (Belgium), do not come within the scope of immunity. In Turkey, the same statements repeated outside parliament also enjoy immunity, unless the Bureau of the Grand National Assembly decides otherwise.

35. In Moldova, on the other hand, this immunity concerns the "acts which a parliamentarian and nobody else may perform in parliament". In Norway or the Netherlands, however, it concerns political opinions expressed even outside parliament.

36. In Portugal, Turkey and Norway, there is immunity even for "offences of defamation". In other countries, though, the constitutional text excludes any defamatory statements or insults.

37. Non-liability sometimes extends to the activity and/or behaviour of members of parliament which, while not constituting acts specific to parliamentary office, are in some way related to it. Consequently, parliamentarians' enhanced freedom of expression extends to their public non-parliamentary activities, in particular on the media, in election declarations and in public debates. In other cases, "political and partisan activity" as in Luxembourg and also in Italy or, as in Spain, "statements made in the context of meetings of parties or with constituents, private encounters or journalistic activities", are excluded from the coverage of immunity.

B. Qualification of the principle of non-liability

38. It is widely observed that although the protection instituted is absolute with regard to the ballots in which members of parliament vote, they do not have quite the same guarantees for their opinions expressed in or out of parliament.

1. Relativity of the protection instituted: areas excluded from protection

39. In general, defamatory or insulting remarks are excluded from the scope of immunity, in which case members can be sued and subjected to compensation in the same way as other citizens. In the United Kingdom, it rests with the court to suspend proceedings when it considers that parliamentary privilege is involved. Nonetheless, it is often the disciplinary authority of the chambers which censures a member for conduct or statements which are unreasonable "having regard to his office and status".

40. In Austria, for instance, a member is accountable only to the Chamber to which he belongs, and incurs only disciplinary measures at the discretion of the Speaker.

41. In the Slovak Republic, members remain subject to the disciplinary authority of the National Council of the Slovak Republic in the case of "declarations unbefitting their position and reputation". In Latvia, disciplinary measures can be taken for "deliberate spreading of slanderous information; defamation relating to private or family life".

42. In Spain, acts of violence against persons or property are excluded even if committed inside the parliament. So are statements made in the context of meetings of parties or with constituents, private encounters or journalistic activities.

43. In Ireland, certain offences such as treason, serious crimes and public order offences are excluded from the coverage of immunity.

44. While they are not amenable to criminal justice (or to civil justice in general), parliamentarians are subject at least to the disciplinary authority of the chambers, exercised by the Speaker, in accordance with the Rules of Procedure. The provisions governing the applicable measures are more or less precise in this regard. Penalties vary from one country to another: they range from call to order or curtailment of speaking time (Austria) to expulsion, and in theory may even entail imprisonment (United Kingdom).

45. In some countries parliament has added powers in this respect and even performs judicial functions. In the United Kingdom for instance, the Houses are entitled to hold inquiries and to examine witnesses, to penalise persons (Members and others) guilty of abuse of privilege or contempt, and to publish documents without fear of libel action. The House alone may impose penalties or take decisions in this matter.

46. The same used to apply in Malta until the legislation was brought into line with the requirements of Article 6 para. 1 of the European Convention on Human Rights as interpreted in the Demicoli case by the European Court of Human Rights in Strasbourg[8[5]].

47. In Malta, members are subject to the disciplinary authority of the House of Representatives for infringing its Rules or vexatiously interrupting the conduct of its business.

2. Lifting of the parliamentary immunity relating to non-liability

48. The lifting of "non-liability" immunity would normally be precluded by its nature if it were to restrict the freedom of speech of parliamentarians. Yet some countries prescribe a procedure for this purpose. The countries where immunity can be lifted are Denmark, Finland, Czech Republic, Germany, Greece, Hungary, Malta, Netherlands, Switzerland and United Kingdom.

49. In Denmark, the proposal to lift immunity is made by the private individual who considers himself wronged by what the parliamentarian concerned has said outside parliament,

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8[5] *Case of Demicoli v. Malta, judgment of 27 August 1991.*

in the private sphere, although in practice the Folketing invariably withholds its consent.

50. In Finland the proposal to lift immunity is made by the person competent to do so depending on the circumstances, ie the police officer, the prosecutor or the plaintiff, and the decision to lift immunity is taken by a majority of 5/6 of votes cast in parliament.

51. In Greece the decision to lift immunity is taken by the Chamber, which must decide within 45 days.

52. In Hungary, the proposal to lift immunity is submitted to the President of the National Assembly by the Procurator General, or by the competent court. The request is considered within 30 days by the Committee on Parliamentary Immunities and Incompatibilities. The decision is taken by the National Assembly without debate and requires a two-thirds majority of the votes of members present.

53. In Malta, where, according to the common-law system, there is no lifting of immunity strictly speaking, the Speaker of the House refers to the Committee of Privileges any cases of "breach of privilege" or contempt committed "prima facie" against the Parliament. The Committee of Privileges was set up in order to investigate in each case whether a member has committed contempt or acts in excess or breach of his privileges. The Committee then refers the matter to the House, which has competence to either bring the person concerned to justice or impose its own disciplinary measures.

54. In Romania, immunity may be lifted only by the Chamber to which the parliamentarian belongs. The decision is taken by the Senate by a majority of a two-thirds of the votes of members present and by the Chamber of deputies by a majority of a two-thirds of the votes of the members. The proposal to lift immunity is submitted to the President of the Chamber of deputies or Senate by the Minister of Justice.

55. In Switzerland, only "relative exemption from criminal liability" may be lifted, subject to the consent of both houses, which may bring the member before the Federal Tribunal. This exemption concerns offences committed in connection with the member's official activity or position, so as to exclude acts such as defamation, abuse of authority, dishonest management of public interests, acceptance of bribes, breach of the duty to fulfil the parliamentary mandate, and disclosure of military secrets. Lifting of a parliamentarian's privilege of secrecy regarding correspondence and telephone and telegraph messages also requires the consent of the chambers. In this case, the act or the opinion expressed is held to be unconnected with the member's official activity or position.

56. In Germany, where "anti-constitutional defamation" or "contempt of the Bundestag" are committed the requests of the prosecution are made in accordance with the rules of criminal procedure and administrative fines to the Federal Minister of Justice and submitted by the latter to the Bundestag for a ruling whether to authorise prosecution. By prior decision, the Committee on Electoral Scrutiny, Immunities and the Rules of Procedure may authorise prosecution for "anti-constitutional defamation" or "contempt of the Bundestag".

57. Moreover, a debate has been opened in this country on the question of the influence, whether or not politically admissible, wielded by political leaders and a new law has come into force for the prevention of corruption, buying and selling votes and trading in influence.

58. It must be acknowledged in concluding this section that, on balance, the system of protection instituted to safeguard parliamentarians' freedom of speech is fairly uniform in the countries considered. Except in cases of racist utterances by members, this particular aspect of immunity is not substantially debated or challenged. The same does not apply to the immunity established by way of inviolability.

III. Inviolability

59. This side of immunity certainly appears more complex in essence and occasions a far wider variety of legal arrangements for its application. Its justification seems more disputed than non-liability, so much so that in several states inviolability has long since vanished or is not contemplated in the system of protection established for parliamentarians.

60. Thus in Canada, Ireland, Malta and the United Kingdom there is question of inviolability only in civil cases, whereas in criminal cases parliamentarians enjoy no special protection and are treated on equal terms with other citizens. Indeed, members in the Netherlands enjoy no inviolability whatsoever.

61. In most other states, inviolability does protect parliamentarians in criminal cases. However, it is not very easy to ascertain any common features or to adopt uniform terminology owing to the dissimilarity of the procedures laid down and the relevant terms.

62. This form of immunity is called, for instance, "ausserberüfliche Immunität" in Austria, "Immunität" in Germany, "freedom from arrest" in Ireland, Malta, Canada and the United Kingdom, "immunidad" in Spain, "Sessionsteilnahmegarantie" in Switzerland.

63. In Italy this form of immunity was called "improcedibilità" until Article 68 of the Constitution was amended by Article 1 of the Constitutional Law 29 October 1993 n° 3. Following this amendment, the requirement of an authorisation to start criminal procedure against a member of the Parliament was repealed. On the other hand, the personal search of a member of the Parliament or the search of his domicile as well as his arrest, his detention in prison or the restriction of his freedom of speech is not allowed without the authorisation of the Chamber to which the member belongs.

A. The principle of inviolability

1. Scope of immunity

64. Inviolability constitutes another aspect of the effective protection of the parliament's members in order to guarantee its independence and shield them from any risk of arbitrary arrest. In general, it protects members of parliament from all "arrest" or prosecution unless parliament consents.

65. Under the common-law system of protection, as we have seen, inviolability operates only in civil cases.

66. In Austria, Germany, Kyrgyzstan, Latvia, Russia and the Slovak Republic, immunity also extends to "administrative action". In Moldova and Ukraine, it applies to all proceedings except such as are expressly provided for by law. In Romania, immunity extends to administrative proceedings concerning petty offences.

67. The effective scope of this immunity varies with the country. In some cases, parliamentarians are also immune from personal searches, house or office searches, preliminary enquiries and other investigations in general. This is the position, for instance, in Albania, Austria, Belarus, Georgia, Russia, Turkey.

68. By contrast, in other countries inviolability does not apply to measures of preliminary investigation or to the bringing of proceedings (France, Portugal, Japan). Often inviolability may take effect only from the time when the member is examined.

69. The duration of immunity likewise varies according to the country; in some it is confined to the parliament's session periods, while in others it applies for the complete term of the legislature. In Greece, the Constitution prescribes measures such as maintenance of immunity between the chamber's dissolution and reconstitution, or where martial law is proclaimed.

70. Be that as it may, inviolability merely serves to suspend legal proceedings during a member's term of office or the parliamentary sessions, not to obstruct the course of justice permanently.

2. Acts covered by immunity

71. In some countries, where the offence charged is of a certain gravity it is excluded from the scope of immunity and thus no longer calls for the prior consent of the chamber (as in Portugal and Sweden).

72. Likewise, such consent is not required where the member is apprehended in flagrante delicto (for most states) or detected while committing a serious offence (Albania, Bulgaria, Croatia, Cyprus, Finland, Norway, Portugal, Slovenia, Turkey) or the day after that of the crime (Germany).

73. In Hungary, Austria or Bulgaria, even if a member is arrested in flagrante delicto, the subsequent proceedings nonetheless may require the consent of the chamber concerned.

74. The classification of the act charged as "flagrante delicto" usually rests with the court, as in France and Spain. The Assembly may nevertheless suspend proceedings if it considers that wrongful recourse has been had to the exception of "flagrante delicto".

75. Furthermore, derogations from the rules of inviolability are prescribed for lesser offences (administrative fine offences in France).

76. Thus in Luxembourg inviolability does not prevent action from being taken against a parliamentarian for petty offences in respect of which the law does not prescribe pre-trial detention and which do not constitute dishonourable offences.

77. On the other hand, in such countries as Portugal petty offences are also covered by immunity although they are do not come under criminal procedure.

B. Lifting of parliamentary immunity

1. Procedure for lifting immunity

78. The lifting of parliamentary immunity with regard to inviolability is constituted by the chamber's permission to institute criminal proceedings or to keep the member under arrest or in detention.

79. The procedure is the same overall except in Germany where there is a procedure of prior consent to prosecution through the passing of a general law when parliament first takes office.

80. Indeed, at the start of its term the Bundestag adopts a general decision authorising investigation of unlawful acts, excepting insults of a political nature. However, criminal proceedings subsequently require the consent of the Bundestag for each set of proceedings and each specific charge.

81. Elsewhere, procedure related to the lifting of immunity is usually contained in the parliamentary Rules of Procedure.

82. The proposal to lift immunity comes from the competent public authority (in most cases the public prosecutor), the injured party or the parliamentarian personally. Often the proposal is passed to the President of the Assembly through the Minister of Justice or even the Prime Minister.

83. It is then considered by an ad hoc or specialised parliamentary committee whose membership may vary in size and composition and whose function is to give an opinion after examining the member concerned.

84. The plenary chamber, after (or without) debate in closed (or public) session followed by a secret (or other) ballot, decides by simple (or qualified) majority whether or not to authorise the lifting of immunity (or to suspend any proceedings already instituted for the reasons discussed above).

85. Sometimes the chambers are required to deliberate within a prescribed time on the request to lift immunity. Parliament's abstention or silence on this score is variously interpreted; it often signifies suspension of proceedings and is therefore akin to a refusal.

2. Conditions attached to the lifting of immunity

86. These conditions are of an extremely varied nature. Most states concur in treating the decision to lift a member's parliamentary immunity as a purely political one.

87. This frequently implies that parliament holds discretionary power in the matter, as the only body capable of ruling on acts contrary to its sovereignty or independence.

88. In practice, a number of criteria have nonetheless been established, to guard against making the decision of the majority appear entirely arbitrary in turn.

89. Immunity must not sanction the impunity of members of parliament for offences committed by them, nor should it intentionally obstruct the course of justice and the proper functioning of democracy.

90. Parliament firstly carries out a strict scrutiny of the request as to its seriousness, sincerity and fairness, as well as timeliness (particularly when the parliament's term of office is drawing to a close) and procedural correctness.

91. Care is also taken to safeguard parliament's reputation, and public opinion is consulted in order to uphold the public order.

92. Requests for immunity to be lifted are nevertheless generally refused where there is cause to suspect the existence of fumus persecutionis, ie an intention to prosecute the parliamentarian unjustly and endanger his/her freedom and independence.

93. Likewise, when the reprehensible acts are of only minor gravity, parliament usually prefers not to grant lifting of immunity, deemed burdensome and unduly opprobrious.

94. In Albania and Belgium immunity is in any case not lifted without sufficient evidence that the member is the real culprit of the alleged crime.

95. In Bulgaria immunity is lifted when sufficient evidence of a serious crime has been obtained by the state prosecutor and then by the parliamentary ethics committee.

96. In Austria, immunity is lifted when the offence charged is manifestly unrelated to activities as a representative.

97. In Turkey, parliamentary decisions regarding the lifting of the immunity can be appealed to the Constitutional Court within one week by the member concerned or any other member, in which case the Constitutional Court makes a ruling within 15 days.

98. In all circumstances, at the stage when parliamentary immunity is lifted the presumption of innocence must be consistently respected, in order to avoid that the public believes the parliamentarian guilty, since according to the established case-law of the European Court of Human Rights this principle is binding not only on criminal courts but on all state authorities.

IV. Conclusion

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99. On balance, the system established to protect parliamentarians' freedom of expression is fairly uniform in the various countries considered. Except in cases of racist utterances by members, this particular aspect of immunity is not substantially debated or challenged.

100. Immunity in the form of inviolability, however, appears more complex and generates a wider variety of legal provisions.

101. The institution of immunity as such is not in fact a subject of passionate debate in most countries surveyed. It reappears as a topical issue on the occasion of proceedings against members, particularly for corruption.

102. Parliamentary immunity continues to be an institution which assures members of their independence from other powers and their freedom of action and expression, although the relationship between the characteristics of the various powers has evolved considerably in the parliamentary democracies. It also protects parliamentarians from possible abuses by the majority.

103. But while the necessary compliance with the principle of separation of powers and the expression of the common will render it expedient to lay down specific rules for the protection of parliamentarians, it would be inconsistent with the principles of parliamentary democracy to make members immune from punishment for offences committed. The immunity thus instituted must, of course, not be such as to obstruct the course of justice.

104. In actual fact, the extent of the protection provided largely depends on parliamentary practice but also on the role of public opinion and the development of attitudes. The role of the press, together with a certain ethical sense, accordingly have a decisive effect on the application of the parliamentary immunity system.

105. Finally, in certain countries a tendency to regulate in law the conditions for lifting parliamentary immunity can be observed, or else an effort to define fixed, objective criteria as far as possible. This trend is prompted by concern for stricter application of the principles of rule of law and by the demands of safeguarding fundamental freedoms.

A P P E N D I X

Duration of immunity[9]

	Non-liability	*Inviolability*
Albania	-	*The parliamentary session.*
Austria	-	-
Belarus	*During the period in which the deputy carries out his parliamentary duties and after its expiry.*	*For the duration of the parliament.*
Belgium	*From the announcement of election results, with no time-limit for acts carried out during his mandate.*	*During the session of either Chamber; in practice, throughout the life of the Parliament.*

[9] This is an extract of the table on replies to the questionnaire on parliamentary immunity, which include also “Legal basis”, “Scope of immunity”, “Acts covered by immunity”, “Persons covered”, “Can immunity be lifted?” “By whom?”, “Procedure for lifting immunity”, “Conditions attached to lifting immunity” and “Possibility of appeal”.

Bulgaria	*-*	*-*
Canada	*Perpetual.*	*From 40 days before, to 40 days after, the parliamentary session.*
Croatia	*-*	*From the day of constitution of the Chamber to the day of expiry of the MP's mandate; between two sessions, the Parliamentary Committee on Mandates and Immunities decides on approval of detention or opening of criminal proceedings, later confirmed or overturned by the Chamber.*
Cyprus	*For the duration of the mandate.*	*For the duration of the mandate.*
Czech Republic	*- Life-time period.*	*- Life-time period.*
Denmark	*Unlimited.*	*For the duration of mandate.*
Finland	*-*	*Duration of the Parliament, in practice for the period between elections.*
France	*Permanent and perpetual.*	*Duration of mandate, except for prosecutions instituted before the beginning of the mandate;* *Between sessions, only arrest is prohibited, unless authorised by the Bureau of the Chamber,* *Such authorization is not necessary:* *- in the case of* flagrante delicto*;* *- where arrest is the result of investigations authorised during a session;* *- where arrest is the result of final sentencing to a custodial sentence.*
Georgia	*For the duration of the mandate.*	*For the duration of the mandate.*
Germany	*Perpetual.*	*For the duration of the mandate, starting from acceptance of the election.*
Greece	*After taking the oath, then with no time-limit; this also applies to the right to refuse to testify.* *No Member of the dissolved Chamber may be prosecuted for a political offence before the election of the new Chamber.*	*From the day of investiture and throughout the life of the Parliament, even for crimes committed before the beginning of the mandate.* *Inviolability is suspended when the Chamber is dissolved for any reason whatsoever, unless the deputy stands for election to the new Chamber. A deputy who has committed a "political offence" is covered.* *In the event of a state of emergency being declared, the deputy is covered throughout the application of the decree, even if the Chamber is dissolved or after the expiry of the legislature.*
Hungary	*-*	*-*

Ireland	*Unlimited.*	*For the duration of the mandate.*
Italy	*Unlimited.*	*For the life of the Parliament, from the proclamation of results.*
Japan	*Unlimited.*	*For the duration of sessions.*
Kyrgyzstan	*Unlimited.*	*For the duration of his mandate.*
Latvia	*Unlimited.*	*For the duration of sessions.*
Liechtenstein	*Unlimited.*	*For the duration of sessions.*
Lithuania	*Unlimited.*	*For the length of sessions.*
Luxembourg	*Unlimited.*	*For the duration of sessions.*
Malta	*Unlimited.*	*Duration of sessions.*
Moldova	*Permanent.*	*For the duration of sessions.*
Netherlands	*Unlimited.*	*-*
Norway	*-*	*During sessions.*
Portugal	*Unlimited.*	*For the duration of the legislature, from the first meeting of the Assembly and during the period it is dissolved.*
Romania	*-*	*-*
Russia	*Unlimited.*	*For the duration of the mandate.*
Slovakia	*Unlimited.*	*For the duration of the mandate.*
Slovenia	*Unlimited.*	*For the duration of the mandate.*
Spain	*Unlimited.*	*For the duration of the mandate.*
Sweden	*Unlimited.*	*For the duration of sessions.*
Switzerland	*Unlimited.*	*For the duration of sessions.*
Turkey	*Permanent.*	*For the duration of the mandate.*
Ukraine	*-*	*For the duration of the mandate.*
United Kingdom	*Unlimited.*	*For 40 days after every prorogation or dissolution.*