

OPINION OF MR ADVOCATE-GENERAL GAND  
DELIVERED ON 22 APRIL 1970<sup>1</sup>

*Mr President,  
Members of the Court,*

The Court is called upon today to decide finally after the expert's report on the application made by X against the decision of 26 March 1968 by which the Audit Board of the European Communities removed him from his post.

Your interlocutory judgment of 7 May 1969 has already decided several of the points in dispute: you have set aside the submissions directed against the regularity of the disciplinary procedure as well as that which threw doubt upon the reality of certain acts on which the disciplinary measure was based. These acts, you will remember, were the following: first, the theft from a large store on 14 November 1964 of six bottles of whisky and, secondly, the theft during the following Summer from various offices of the Audit Board of administrative documents which the applicant used in writing a note under a false name on 22 November 1965 to a senior official of Euratom.

Doubt may exist however on the question whether the person committing those acts must be regarded as being responsible from the disciplinary point of view. According to Article 86 of the Staff Regulations, any failure by an official to comply with his obligations may make him liable to disciplinary action only if committed 'intentionally or through negligence'. Taking into account certain documents in the file, particularly the allegations of X and the medical certificates produced by him during the final phase of the disciplinary procedure, it appeared to the Court that neither the terms of the decision nor the information provided by the defendant enabled it to be decided whether or not the decision made in respect of responsibility for the conduct in question was justified.

The Court's judgment therefore provided for an expert's report in order to establish whether at the time of the conduct in question the applicant was affected by

mental disorder 'to such an extent as to exclude responsibility for his conduct' or—to repeat the words of the operative part of the judgment—'such that the acts which have been attributed to him could not have been intentional'.

I

1. The expert appointed by the Court, Professor Volcher, has submitted a report going into great detail, upon which he has commented verbally; he had the opportunity in replying to the questions which were put to him of developing and specifying his conclusions. It is from this report that it is necessary to start in order to decide the outcome of X's application; but before summarizing the contents of it I should like to make two preliminary remarks.

The first deals with the delicate nature, as he himself emphasized, of the task entrusted to the expert. He had to decide in 1969 upon a mental state several years earlier without having many points of reference. In addition to the memorandum provided by the departments of the Audit Board, he mainly used the statements of the applicant whom he examined several times, and reports from his own colleagues, the private doctors who had treated X.

The other remark is that he intentionally refrained from replying to the question put by the Court's judgment of 7 May 1969, or more precisely, from repeating the wording in which it was formulated, namely the 'voluntary' nature or otherwise of the actions attributed to the applicant. He has explained the reason for it and why it appeared to him that the reply must be replaced by a description of the development of the mental state of the person concerned and of the links between that state and the acts of which he is accused. However that may be, on that point which tends to show that the thinking of the Court has remained closer to St. Thomas than to Freud, you will find in the body of the report and in its con-

1 — Translated from the French.

clusions factors upon which you will be able to base your decision.

Without repeating the whole of the document which you have before you I will keep merely to two series of indications, one concerned with the development of the physical and mental health of X, the other with the evaluation made by the expert of his state at the time of the acts.

2. After noting that the applicant had always been in good health until the time when he entered the service of the Board, the report shows that as from July 1963 he had gastric trouble for which he went into a clinic for observation from 24 to 28 July 1963; he was again taken into hospital from 12 to 19 December 1963 after an accident at work which gave him a serious emotional shock. His digestive trouble was cured by a medicament including in particular psychoplegic medicine which might cause quite severe neuropsychic excitement phenomenon. These medicaments were administered in relatively small doses which were increased later in October 1964, but when they were increased to three doses of 25 mg per day, X stated that he had taken a dose of 50 mg on 14 November in the morning, that is to say, before the theft from the show-case.

Already at the time when he began that treatment, says the expert, X found himself uncomfortable in the Audit Board and began to complain of the atmosphere; then the situation continued to deteriorate and he became more and more irritable, sensitive and depressed. The critical point was reached when in November 1967—some weeks after the opinion of the Disciplinary Board—he entered the Institute of Psychiatry of the Brugmann Hospital, in an open ward, and remained there until 31 May 1968. The expert states that he is in agreement with the diagnosis which was made at that time: X was suffering from delusions of persecution and was asserting imaginary rights (report p. 19).

3. But how was he just at the moment when the acts complained of occurred, that is to say, in 1964 and 1965?

We know—the expert specified this in reply

to questions put at the hearing—that from the middle of 1963 the process was beginning which continued to deteriorate until his admission to a psychiatric institute. The state in which X then was may ‘perhaps be compared to a pre-psychotic state’, which has some connexion with the actions complained of. This was the position in respect of the theft from the show-case, having regard to the excitation phenomena which the employment of psychoplegic drugs might cause, and I recall on this subject that the doctor advising the Audit Board had for this reason accepted that there were considerable mitigating circumstances. In respect of the theft of documents and the drafting of the note which the applicant denies, and on which for this reason the expert cannot express any further view, they might, according to Professor Volcher, be a part of the general picture of morbid reactions; the documents and the note were used to establish rights, to obtain satisfaction for various imaginary claims and to obtain revenge on ‘persecutors’ (report, p. 20).

The conclusion is the following: that the facts which gave rise to the disciplinary decision may be understood as manifestations of the aforementioned pathological state (report, p. 21). It was specified at the hearing in the following terms: ‘These are acts which may really be understood and explained by the state in which X was at that time, and which followed somehow logically from the state he was in and the beliefs he then had’. Having arrived at this point, one comes upon the very wording of the question which the Court put. Since the expert does not believe that he has the right or the ability to evaluate the ‘voluntary’ nature of these acts, is it possible to know at least whether and to what extent the applicant could be regarded as being responsible for them? Supposing that it were a question not of infringements of discipline but of infringements of criminal law and if the question of the mental state of the accused had been raised before a criminal court, would he expert have decided that the person was or was not concerned? The reply is quite clear: the expert would have stated that he had an average diminution of responsibility.

## II

It is now necessary to draw the conclusions which follow as regards the legal position from the psychological and medical information provided by the expert, which I hope I have summarized faithfully.

In my view, this information cannot lead to the annulment of the decision taken by the Audit Board.

In re-reading your interlocutory judgment one finds that you did not believe that you could immediately decide without exact information upon the mental state of the applicant which had been presented to you in the written procedure in the most unfavourable light. The statement in reply, for example, insists that 'insanity, as in criminal matters, excludes from the acts complained of any guilt from a disciplinary point of view'. The responsibility of the applicant for his actions did not appear to you to follow as things stood from the wording of the decision or the information provided by the defendant; but it does not follow that the slightest alteration of the mental state of the person concerned, the slightest disequilibrium must, in your view, remove from the acts complained of the character of acts punishable in a disciplinary manner. Quite to the contrary, the expert's report was to establish whether the applicant was 'mentally disturbed to such an extent as to exclude responsibility for his conduct'. Those are the words used in the grounds of the Court's judgment, to which I shall keep because of the reservations expressed by the expert on those which appear in the operative part.

All one can say is that from a criminal point of view the applicant's responsibility must be regarded as having undergone an average diminution. It is not entirely without doubt, but it cannot be excluded. Before such a finding a criminal court might have to adjust the sentence imposed, to vary it to take into account the degree of responsibility of the person committing an act which would itself remain of a punishable nature.

But disciplinary law is not to be confused with criminal law. A disciplinary authority certainly cannot impose any punishment whatever when there is no responsibility

upon the official and the court whose function it is to review the existence of the act and its punishable nature must annul a decision taken in infringement of that principle. Only that is not the case in the present instance. On the contrary, as soon as the imposition of a sanction becomes legally possible the determination of its seriousness and the question whether it should be altered to take into account any 'extenuating circumstances' comes within the discretion of the disciplinary authority and in the last resort is connected with its expediency. A court with an appeal before it can decide only upon the legality of the decision.

In other words, if the expert's report had shown that because of the mental state of the applicant at the time of the actions he was not responsible you would have had to annul the decision of the Board. Once more, those are not the conclusions which appear from the report and the oral proceedings; the doubt which led you to give an interlocutory judgment in order that this point should be cleared up has been clarified. It is necessary in my opinion to set aside the only submission which remains in dispute and consequently to dismiss the application for annulment.

## III

It remains for me to mention two points.

1. Your interlocutory judgment did not decide upon the conclusions directed towards damages, which the applicant justified by the material and non-material damage caused by the act or omission of which the Audit Board was alleged to be guilty.

The dismissal of the application for annulment leads logically to setting aside these conclusions as a necessary consequence: the defendant is not guilty of any wrongful act or omission.

2. The Court also reserved to costs. As the applicant has failed in his claims each of the parties should normally bear its own costs, in accordance with Article 70 of the Rules of Procedure. However, as the expert's report was required because of the necessity

to clarify a point insufficiently elucidated in the contested decision, it appears reasonable to me to have the costs subsequent to the interlocutory judgment paid by the Audit Board.

In my opinion:

- X's application for annulment and his conclusions in respect of damages should be dismissed;
- Each of the parties should pay its own costs, with the exception of the costs subsequent to the judgment of 7 May 1969 which should be paid by the Audit Board.