3. The time-limit of one month from the transmission of the opinion of the Disciplinary Board which the Staff Regulations give the appointing authority for taking its final decision cannot be regarded as a mandatory time-limit, in the sense that any measures adopted after its expiry are void, but constitutes a rule of sound administration, with the result that a failure to observe it may render the institution liable for any damage caused to those concerned. The same remarks apply to the three-month period allowed by the Staff Regulations for the transmission of the Disciplinary Board's opinion.
4. Once the truth of the allegations made against the official has been established, it is for the appointing authority to choose the appropriate penalty. The Court cannot substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers.

In order to enable the Court to carry out that limited review, it is indispensable that the preamble to the decision should specify the acts which the official is found to have committed and the considerations which have led the appointing authority to impose the particular penalty. If the penalty imposed by the appointing authority is severer than that suggested by the Disciplinary Board in its opinion, the reasons for this must be clearly stated.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 13 December 1984 *

Mr President,
Members of the Court,

1. I think there has never been a case before the Court which has combined more fully the two meanings of the Italian word 'lite' than the case today, namely: the legal meaning as a lawsuit and the ordinary meaning as a brawl or scuffle. The Court is asked to assess the lawfulness of an administrative decision taken on 7 April 1983 by Richard Burke, the Member of the Commission responsible for staff matters, whereby Mr F., a principal administrator at the Commission and the present applicant, was dismissed for having — and I cite the words of the decision — 'committed . . . a violent act of aggression against the Director General for Personnel and Administration, causing him injuries'.

There is no doubt that, from a disciplinary point of view, the scuffle involved misconduct of an extremely serious nature. As for the lawsuit, it has led to the production of an immense amount of material, the parties having put forward all kinds of documents and considerations to support their own version of the events and to corroborate their legal arguments. I must

* Translated from the Italian.

nevertheless observe that this abundance of material has not made the waters of the proceedings any clearer. On the contrary, it has made them all the murkier and that is particularly regrettable since the matter is one of discipline, that is to say, one which more than any other is characterized by the importance of the facts and circumstances.

For reasons of clarity and at the same time pertinence, I shall therefore restrict myself to the facts and arguments which are indispensable for a correct appraisal of the lawfulness of the measure submitted to the Court for consideration.

2. Mr F., who entered the service of the Commission in 1975, was engaged initially as a member of the temporary staff and later became an established official; on 1 July 1982 he was seconded for two years to the French Ministry of Cooperation and Development. That decision was part of a policy of exchange of officials between the Commission and the administrations of the Member States which the Commission had pursued since 1976.

Before the secondment was arranged, President Thorn informed the French Minister of the Commission's wish to ensure that the exchange programme, which had basically been conceived for purposes of training, career formation and instruction, did not become tainted by 'political considerations'. The Minister gave a full guarantee of the use to which Mr F. would be put and thus there was nothing more to prevent his secondment.

However, some days after taking up his duties in France the applicant applied for and obtained leave (from 1 to 10 August) from the Ministry to stand as a candidate in the elections for the Corsican assembly. He did not inform the Commission that he was standing as a candidate. Nor did he inform the Commission of his subsequent election. However, one month after his election, that is to say on 8 September 1982, he sent a letter to the Director General for Personnel and Administration, Mr Morel, requesting permission pursuant to the second paragraph of Article 12 of the Staff Regulations to exercise the mandate which the Corsican electorate had given him.

Weeks passed without an answer from the Director. However, the Commission administration had not forgotten Mr F. and even before 8 September the Director, who evidently was aware of Mr. F's election, had instructed his staff to study the measures to be taken with regard to him. In view of the silence on the part of the administration and perhaps having been warned that the measures contemplated did not accord with his wishes the applicant decided to present himself personally in Brussels. On 6 October he requested an interview with the Director General for Personnel, which took place the same afternoon in the Director's office.

From that moment the parties' versions disagree and in their account of what happened during the meeting the animosity and allegations cloud or distort the facts. We may perhaps never know the truth about their actions or intentions. I prefer therefore to confine myself to the findings made by the Disciplinary Board in the reasoned opinion that it delivered in the disciplinary proceedings which Mr Burke initiated against Mr F. The following is the key passage:

'Although the discussion [obviously relating to the administrative measures consequent upon Mr F.'s election] was at times lively the meeting was largely conducted in a calm

and quite objective atmosphere. The meeting became acrimonious only towards the end when it became apparent that no reconciliation of views was possible and following Mr Morel's reply to [Mr F.'s] statement that he intended to bring his case before the Court of Justice.

[Mr F.] suddenly launched a violent assault on Mr Morel. He punched him in the face and grabbed hold of the front of his shirt, causing it to tear. The violence of the assault caused Mr Morel to fall from the armchair in which he was sitting. He hurt his hand while trying to catch hold of the edge of the low glass table around which the three participants at the meeting were seated.'

The scuffle did not end there, but even an inspection of the Director's office did not allow the Disciplinary Board to establish with certainty the events which followed. In spite of that, it concluded that: 'It is in any event established that [Mr F.] committed a violent act of aggression against Mr Morel ...'That is the only charge which the Commission makes against the applicant. It is also the only fact on which the parties agree without reservation.

In their pleadings the applicant and defendant dwell on a whole series of events and the consequences — especially of a psychological nature — flowing from them. However, those events in no way contribute to an understanding of the problem raised by the present action and have no bearing on its solution. There is in particular mention of a reply, or rather a draft reply, which was to have been sent to Mr F. That reply, which was submitted for examination by the internal departments of the Commission (which subsequently sent it to the Director General for Personnel), basically concerned Mr F's position under the Staff Regulations following his election to the Corsican Assembly. It is common ground that it was never sent and therefore it could have no influence on the applicant's conduct.

The events which followed the episode of 6 October were essentially of an administrative nature. Mr F. was suspended on 20 October and the competent authority began disciplinary proceedings against him pursuant to the rules in Annex IX to the Staff Regulations. After a careful and scrupulous inquiry the Disciplinary Board gave a reasoned opinion on 8 March 1983 in which it recommended the appointing authority to impose on Mr F. the penalty referred to in Article 86(2)(e) of the Staff Regulations, that is to say downgrading from Grade A 5, Step 5, to Grade A 6, Step 8. On 7 April 1983 Mr Burke rejected that recommendation and removed Mr F from his post without reducing or withdrawing his entitlement to retirement pension. There followed an administrative complaint and, after its express rejection by the Commission, the action upon which the Court must now rule.

3. Summarized in that way the matter seems straightforward and its solution not difficult. Unfortunately it is not so. The first paragraph of Article 1 of Annex IX to the Staff Regulations provides that. 'A report shall be submitted to the Disciplinary Board by the appointing authority, stating clearly the facts complained of and, where appropriate, the circumstances in which they arose.' We must therefore look at the facts and circumstances. Although I have already mentioned the former, I have not yet spoken of the latter, and it is there that lies

the kernel of the question of the legality of the contested measure.

We know little about the relevance of circumstances as an ancillary element of a disciplinary offence in Community staff law, in particular as regards their purpose and effect, partly because the Court has rarely had occasion to deal with them. This does not seem to me the most appropriate place to repair that lacuna. I shall therefore confine myself to two observations of a general nature which are of immediate concern to us and should not raise too many doubts:

(a) the legislature has not specified the nature or scope of the circumstances and that is obviously intended to ensure that the administration has the widest possible room for manoeuvre;

(b) if pursuant to Article 1 the appointing authority intends to attach importance *also* to the 'circumstances in which [the facts] arose', they must for that reason be clearly specified.

(a) In the *report sent to the Disciplinary Board* Mr Burke, departing from the wording of Annex IV — which speaks of circumstances in which the facts complained of *arose* [1] — prefers to specify the circumstances in which the facts complained of 'occurred'. [2] It is obvious that the difference between the two wordings is not merely one of style. Indeed, certain of the circumstances taken into account on page 6 of the report are completely unrelated to the circumstances in which the act of violence took place. Thus there is mention of the election of Mr F. as a new factor in relation to his administrative position; there is a long discussion about the freedom of officials to hold a political opinion; there is reference to certain rules of good conduct. I don't deny that all those factors are important and were certainly involved when the facts *occurred;* however, they are irrelevant if it is sought to understand how and why the act of aggression was *committed.*

(b) In the *reasoned opinion given by the Disciplinary Board,* on the other hand, there is no mention of the 'circumstances' referred to by Mr Burke, whereas attention is paid, and I think rightly, to the subjective and objective circumstances relating to the misconduct. Thus 'the circumstances in which the meeting was organized' (page 4(2)(a)) and 'the circumstances surrounding the act of violence' (page 5(c)) are clearly set out. Some of those circumstances are subsequently described as mitigating (page 7, third paragraph); and account thereof is taken in reducing the penalty which should be imposed on Mr F., whose conduct — and it is the Board itself which say so — deserves the severest of penalties (see below at 7).

(c) In the *disciplinary decision* Mr Burke makes no further reference to the circumstances to which his report had referred. He mentions on the other hand those referred to by the Board in its opinion, but does not regard them as mitigating.

1 — (Translator's Note) The Italian text is as follows: circostanze in cui i fatti addebitati *sono stati commessi.*

2 — (Translator's Note) Italian text: si sono prodotti.

The parties take opposite views, but at least — and it is not an unimportant merit — they refer to the same matter, namely whether or not there are 'mitigating circumstances' as found by the Disciplinary Board.

It is probably impossible and in any event unnecessary to establish which of the many versions put forward in the case sets out clearly and above all truthfully the circumstances in which the act of violence was committed. In that regard I think it is sufficient to make one observation: in all the documents which are of importance for the purposes of this action, that is to say, apart from the opinion of the Disciplinary Board, the decision of Mr Burke and the conclusions of the parties, the authors all agree on the circumstances regarded by the Board as mitigating, albeit assessing them in different ways from the legal point of view. Let us therefore see what the Board says. At page 7 of the reasoned opinion the above-mentioned circumstances are said to be:

'First, [Mr F.'s] neurotic character, characterized by an inability to contain frustration;

Secondly, the feeling of insecurity and anxiety associated with the high level of frustration to which [Mr F.] was subject owing to the serious consequences which any decisions taken would have for him, to the circumstances in which the meeting was arranged and to the course which it took;

Finally, the obvious absence of premeditation.'

As is apparent, the Board stresses both the psychological and physical characteristics of Mr F. and his relation with the victim at the time of the act of violence. The Board was led in that direction to a large extent by a medical report given on 27 October 1982 by Dr J. De Geyter and Professor E. Dumont, who visited Mr F. on 13 October 1982 at the Fond Roy Institute, where the applicant had been taken by some colleagues immediately after the incident. It is worth noting that, although from the procedural point of view it is the defendant's document, this report has never been challenged either during the disciplinary proceedings or before the Court. Furthermore, it is one of the essential factors on which the decision of 7 April is based. It may therefore be regarded as akin to evidence of experts *pro veritate*. It basically states the following:

'[Mr F.] must be regarded as having been legally responsible at the time of the facts and as being such now. However, account should be taken of his neurotic personality characterized, in particular, by an inability to contain frustration'.

4. In the present action Mr F. claims primarily that the Commission's decision of 11 July 1983 rejecting his complaint for annulment of the decision of 7 April 1983 (removal from his post) should be annulled, together with, if necessary, the Disciplinary Board's opinion. In the alternative, he claims the payment of damages equivalent to three years' remuneration and such further compensation as will repair the damage suffered by him as an official.

The Commission contends that the action should be declared inadmissible in so far as it is directed against the opinion of the Disciplinary Board and that for the rest it should be declared unfounded.

5. In support of its objection of inadmissibility the Commission states that,

although the Court by implication has held to the contrary (judgment of 11 July 1968 in Case 35/67, *Van Eick* v *Commission* [1968] ECR 239), the opinion of the Disciplinary Board is solely a preparatory measure and in no way binding. It cannot therefore be the subject of an application for annulment. That does not mean that if the Board has given it in breach of the Staff Regulations the official concerned has no protection. On the contrary, there is nothing to prevent him from challenging the decision itself and citing in support of his action any irregularities affecting the opinion and the disciplinary proceedings.

The applicant takes the opposite view. He observes that the opinion constitutes the conclusion of a 'special and distinct procedure' and that its function is to allow the appointing authority to take a disciplinary decision; consequently, it may be challenged independently. In his opinion, the judgment of 11 November 1981 in Case 60/81 (*IBM* v *Commission* [1981] ECR 2639) is authority for that view.

I do not think that argument is well founded. According to Article 91(1) and (2) of the Staff Regulations the Court has jurisdiction in any dispute between the Community and a member of its staff regarding the legality of any measure 'adversely affecting' that person. Furthermore, an action is admissible only if a complaint pursuant to Article 90(2) has been made to the the appointing authority within the period provided. It is common ground that in the present case the applicant made such a complaint *solely* against the decision of Mr Burke. Furthermore, he maintains that the decision was unlawful since, *contrary to the opinion of the Disciplinary Board*, it denied that there were mitigating circumstances. Therefore, far from criticizing the opinion as he does today, the applicant relied on it; he in fact used it as a weapon to attack Mr Burke's decision.

Is that observation sufficient to conclude that the claim is inadmissible? In my opinion it is. Let us assume, however, that the Court does not think so, that is to say, that it considers that the complaint against the opinion is contained by implication in that made against the disciplinary decision. The applicant must nevertheless show that the opinion is a *decision*, that is to say, a measure which can affect the legal position of the person challenging it.

In that connection the applicant has cited the judgment in the *IBM* case, which concerns the nature of certain preparatory measures in anti-trust proceedings. The relevant passages are contained in paragraphs 10 and 11. The Court stated as follows:

'In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings . . . were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.'

Clearly, the applicant's argument is based on the *obiter dictum* in paragraph 11. Even assuming however — and it is an assumption which I hesitate to make — that

anti-trust proceedings and disciplinary proceedings are comparable and that the rules of one apply equally to the other, I think it can certainly be ruled out that the opinion of the Disciplinary Board is:

(a) the culmination of a 'special and distinct procedure' and

(b) a definitive or even provisional measure. In order to explain the reasons for that view I shall refer to the principles of administrative law.

(a) The second paragraph of Article 87 of the Staff Regulations provides that downgrading and removal from post 'shall be ordered by the appointing authority after the disciplinary procedure provided for in Annex IX has been completed.' It should be noted that the provision makes the imposition of the most severe penalties conditional not upon the issue of an opinion by the Disciplinary Board, that is to say on the adoption of a *measure*, but on the completion of a complex *procedure*, which is governed by a set of rules contained in the Staff Regulations and in a special annex. Let us therefore look at the aspects of those rules which appear to be the most important for the solution of our problem. In particular, which is the body which initiates and concludes the proceedings? And by what measures?

Article 87 states that the procedure is to be 'initiated by the appointing authority', thus implying that the power to do so belongs solely to the appointing authority (a power, nevertheless, subject to an obligation: the official concerned must be heard). Article 1 of Annex IX explains that the procedure commences with the transmission of a report by the appointing authority to the Chairman of the Disciplinary Board. That provision thus functions as a link between the rules of the Staff Regulations and those of the annex and accordingly allows us to consider them in conjunction with one another. Finally, the last paragraph of Article 7 of Annex IX states how and by whom the procedure is concluded. It states that the appointing authority 'shall take its decision within one month [from the delivery of the opinion]'. Once again, however, the appointing authority must hear the official.

That completes the picture, which seems to me quite clear. The disciplinary proceedings are opened and closed by the same body by means of the same measure and subject to the same condition: the appointing authority, by a decision and after hearing the person concerned. It is therefore not true that the proceedings are split up into 'special' stages which are concluded separately. The proceedings are a composite but unified whole and the appointing authority is the sole authority responsible from the beginning to the end.

(b) Obvious reasons of a substantial nature prevent the opinion from being regarded as a decision, at least in the technical sense of a measure having binding legal effects. It is true that it is an administrative measure but it has, nevertheless, very special characteristics. Far from expressing the will of the administration, it is the expression of a judgment (in so far as it makes a reasoned recommendation concerning 'the disciplinary measure appropriate to the facts complained of': the first paragraph of Article 7 of Annex IX) and possibly a *statement of the known facts* (in so far as it gives an account of any inquiry made: Article 6 of Annex IX).

In that light I should define it as a typical consultative measure, that is to say a measure by which the body concerned assesses at a technical level a matter submitted for its scrutiny by the body having the power of decision. The administrative assessment is a matter for the

latter body alone. Although an opinion is required before the most serious penalties are imposed, it is not binding and the appointing authority may take a different view provided that it states its reasons for doing so. In short, the opinion is an internal measure of a preparatory nature. It is not possible to challenge it and an application directly seeking its annulment is inadmissible.

Having come to that conclusion I think it useful to emphasize what I have already said in summarizing the argument of the defendant institution: the defects or irregularities to which the reasoned opinion may be subject are not immune from review by the Court. The opinion, as we have just seen, is an internal measure, but that does not prevent it from having external importance if and when the proceedings in which it is given lead to a decision. In that event, the defects in the opinion (just like any defects in the proceedings) may affect the lawfulness and validity of the final measure and may thus be censured in an action against that measure. There are of course limits to that rule. The defects must have a *definite* influence; they must *actually* affect the form or substance of the decision.

I can clarify the above by an example taken from the present case. One of the submissions with which the applicant challenges the decision concerns an infringement of essential procedural requirements; among the many complaints made in that regard, the last is that the three-month period which the first paragraph of Article 7 of Annex IX imposes on the Disciplinary Board for the drafting of its opinion was not observed. That period relates to an internal procedure which, whilst having to provide certain guarantees, is not a matter for the courts or a matter of public policy. It may be inferred that its aim is solely to determine the period for the completion of the disciplinary proceedings and hence that failure to observe it may at most make the administration liable (see the judgment of 4 February 1970 in Case 16/69, *Van Eick* v *Commission* [1970] ECR 3), but certainly cannot make the final measure void. The present case provides obvious evidence of all that. The fact that the opinion was given after expiry of the three-month period in no way affected the decision taken by the Member of Commission, which from the formal viewpoint was duly adopted within the required period.

Thus, my conclusions on this point are as follows:

(a) The reasoned opinion of the Disciplinary Board and the measures relating to the disciplinary proceedings which are not true decisions are measures which in themselves are not open to challenge in proceedings brought under Articles 90 and 91 of the Staff Regulations.

(b) Any defects or irregularities in the disciplinary proceedings or the opinion may be relied upon in an action directed against the final decision in so far as they actually affect the lawfulness or validity thereof, concerning either the observance of procedural requirements or the legal assessment of the facts.

It is in the light of those principles that I shall consider the complaints made by the applicant against the disciplinary proceedings and the reasoned opinion.

6. In his application the applicant makes five submissions, namely:

(1) infringement of essential procedural requirements;

(2) infringement of the rights of the defence;

(3) manifest errors in the assessment of the facts;

(4) mistake of law; and

(5) incorrect, incomplete and inadequate statement of grounds.

Let me say straightaway that in my opinion the first two submissions are without foundation, the third and fourth contain nothing to allow the Court to assess the way in which the administration exercised its discretion and the last is in part well founded. The reasons for my conclusions are as follows.

In his first submission (infringement of essential procedural requirements) the applicant complains of five defects in the contested decision:

(a) the *audi alteram partem* principle, upon which disciplinary proceedings are based, was not respected;

(b) the minutes recording the depositions of witnesses were drawn up late, that is to say after the reasoned opinion had already been delivered;

(c) the minutes were not signed by the witnesses;

(d) the minutes of the meetings of the Disciplinary Board were not communicated to him; and

(e) the Board did not observe the period (three months) within which it was required to give its opinion.

I have already shown that the last complaint is unfounded (Section 5, *in fine*). The applicant abandoned the third complaint, recognizing it to be unfounded after the Commission submitted its defence. There remains the first, second and fourth complaints; however, only the first is of any importance since the other merely concern two minor aspects of the first.

Let us turn therefore to the *audi alteram partem* principle. Even before the present Staff Regulations entered into force the Court recognized that, although the function of the Disciplinary Board is to advise the appointing authority, it must observe the aforesaid principle (cf. the judgment of 11 July 1968 in Case 35/67 *Van Eick* v *Commission* [1968] ECR 329). However, in my view the Disciplinary Board did not infringe that principle in this case. It must be said that it was above all the applicant who cast doubts upon his own claims. Although he complains of the delay before he received the minutes of certain hearings, he does not deny that he himself refused to be present at those hearings (of which in any event he heard the recordings); but what is more important, his praise for the scrupulous and irreproachable way in which the Board conducted the inquiry is almost lyrical (at page 23 of his reply he states that the opinion is 'very complete and carefully reasoned . . . and given after proceedings in which numerous witnesses were heard, numerous statements were received and several lawyers appeared'!)

That is not however my main argument. We must consider what the *audi alteram partem* entails in Community disciplinary proceedings. In the absence of decisions by the Court, it is clear that the answer must be dictated by logic and experience: both show that, in seeking to establish the facts concerning alleged punishable conduct, the most effective and clearest means of separating fact from fiction, the relevant from the irrelevant and the intentional from the unintentional is *direct confrontation* between the parties. I need not go into the most well known example of that method, namely the technique of cross-examination employed in the British criminal system, since examining magistrates in the

continental tradition also know full well that evidence given in the absence of the accused has less weight than statements made in his presence.

I conclude from the foregoing that the *audi alteram partem* principle is observed when the facts and circumstances alleged against or in defence of the official are put to the disciplinary body in the *presence of the official.* Mr F. is asking much more than that. In demanding that the Board should let his lawyers have the minutes of the hearings *at which he was present,* he is not asking for observance of the *audi alteram partem* principle but is seeking to convert what is essentially an oral procedure, and moreover one which is supplementary to the report of the appointing authority, into a procedure based on documents. Thus, in continually referring to Article 9 of Annex IX, which provides that minutes are to be kept of the meetings of the Disciplinary Board and the hearing of witnesses, he is elevating a simple requirement that records should be kept into a rule of procedure which has no justification in this case.

Clearly the foregoing remarks apply equally to the right of defence, which moreover forms the basis of the *audi alteram partem* principle. Mr F. complains that he was not able to defend himself adequately at the last meeting he had with the appointing authority because he was not *in possession* of the minutes relating to certain depositions or those of the meetings of the Board. However, it has been shown — and even admitted by the applicant — that he and his lawyers were in a position:

(a) to present their defence both by means of written and oral observations and by calling various witnesses (as provided for in the second paragraph of Article 4 of Annex IX);

(b) to be present at the hearing of all the witnesses and to be informed in good time of their written and oral statements (as is required by the first paragraph of Article 6 of Annex IX); consequently, it is clear that the applicant's second submission must also be regarded as unfounded.

7. In his third and fourth submissions Mr F. challenges the decision taken in relation to him on the ground that it disclosed a manifest error in the appraisal of various facts and an error of law. In his view, the appointing authority failed to take into account many of the circumstances which the Disciplinary Board described in its opinion and, by not following the Board's view that those circumstances were of a mitigating nature, it imposed a penalty on him disproportionate to the seriousness of the facts with which he was charged.

There is little to say about the first point. As I have already said in the third section of this Opinion, Mr Burke in his report of 20 October did indeed take into consideration circumstances which had nothing to do with Mr F.'s act of violence; however, there is no doubt that, at least for the purpose of denying their mitigating nature, his decision refers solely to the circumstances dealt with by the Board. I would add that in drafting its final decision the appointing authority is in no way bound to list again all the aspects of the case submitted for its consideration. In other words, it may set them out and examine them with reference to the reasoned opinion. That being so, the applicant has produced no evidence to show that the appointing authority did not fully and properly consider each fact and

circumstance relating to the events of 6 October. The complaint of manifest error must therefore be dismissed.

The second problem is more complex since it concerns the assessment of the facts with reference to the applicable rules for the purpose of determining the penalty to be imposed. We enter here the field of the 'administrative discretion' attributed to the disciplinary authority, that is to say, a field where the review of legality by the Court is very restricted, and quite rightly so. See in that regard the judgments of 4 February 1970 and in Case 13/69 *(Van Eick* v *Commission* [1970] ECR 3) and 30 May 1973 in Case 46/72 *(De Greef* v *Commission* [1973] ECR 543). The Court held that once the facts were proved 'the evaluation of the seriousness of the shortcomings of which the Disciplinary Board has found the applicant to be guilty and the choice of the disciplinary measure which appears . . . the most appropriate lie within the discretionary power of the appointing authority.' It was further held that 'it is not a matter for the Court to substitute its own judgment for that of the disciplinary authority, except in cases of obvious disproportion or abuse of power.'

It seems to me that there is neither of those defects in the contested decision. Let us begin with the act of violence itself, that is to say without taking into account the surrounding circumstances. In that respect the fact that the Disciplinary Board and the appointing authority, that is to say the body making a technical assessment and the body making an administrative assessment, reached the same conclusion is decisive. That of the appointing authority is already known; the terms used by the Board are no less explicit. In its reasoned opinion it states that the medical evidence shows that the act committed by Mr F. was wholly intentional; it follows that it deserves 'very severe judgment, particularly since it was that of an official of the rank of principal administrator . . . An official guilty of such conduct . . . should suffer in consequence the severest penalty'.

Faced with that consensus of opinion, it is clearly impossible to claim that the penalty imposed was disproportionate to the conduct complained of. We must therefore ask ourselves whether, in refusing to accept that the circumstances in which the act of violence was committed were of a mitigating nature, Mr Burke made an error so manifest as to render the measure unlawful. That view must be rejected.

According to Article 86 of the Staff Regulations, the power to impose a penalty is based on a finding of two matters: one *objective*, namely the commission of an unlawful act and the consequences thereof, and the other *subjective*, namely the *mens rea* of the official. After verifying that the official concerned can be held responsible for his conduct and after considering its seriousness, the appointing authority merely has to impose the penalty; in determining that penalty it is not obliged to take account of factors such as the degree of blame attaching to the official or the existence of mitigating or aggravating circumstances (such as for example recidivism). If the appointing authority wishes to attach importance to those factors, its discretion is subject only — and I might add naturally — to the requirement of reasonableness. In other words, its assessment of such factors may not be arbitrary.

Seen in that light, the decision of 7 April appears to be free of any manifest error. After stating that the applicant is to be held responsible for his conduct and that the

circumstances which he pleads do not mitigate the seriousness of his offence, the appointing authority concludes that 'in those circumstances the penalty recommended by the Disciplinary Board is inappropriate in relation to the misconduct in question.' There is nothing unreasonable or arbitrary in that conclusion. On the contrary, it is logical and in accordance with the criteria of sound disciplinary administration. The fourth submission must therefore be rejected.

8. Of the three defects to which the applicant refers in his last submission, namely incorrect, incomplete and inadequate statement of grounds, I shall deal only with the last.

On this point the submission is well founded. I do not intend to examine in detail the arguments put forward by the parties on that issue. Mr F. maintains that, if it departs from the recommendation of the Board and imposes a more severe penalty, the appointing authority must give a more 'precise' and more 'exhaustive' statement of reasons; the Commission recognizes that requirement, but denies that the statement must also be 'copious'. Both observations are self-evident and yet have no legal basis. The grounds that I have for considering the statement of reasons contained in Mr Burke's decision to be inadequate lie elsewhere and relate solely to the appointing authority's refusal to accept that there were mitigating circumstances for the act of violence.

I have already mentioned the circumstances in question in the third section of this Opinion: the applicant's nervous nature, his state of insecurity and anxiety during the meeting with the Director and the obvious absence of premeditation. The mitigating nature of those factors or other similar factors is an established principle of our legal systems, in the sense that the criminal laws and the internal disciplinary codes in the administrative systems of our countries all recognize it without reservation. I therefore think that, when he stated that 'in the light of the foregoing, the circumstances referred to by the Disciplinary Board do not have the mitigating character which the Board attributes to them and do not diminish the seriousness of [Mr F.'s] conduct or lessen his responsibility' (see the last recital in the decision) Mr Burke did not intend to deny that they had that character in principle, but only to say that in the particular case the circumstances found by the Board were not *sufficient* to affect the penalty.

Can it be said that, reworded in that way, the decision of 7 April explains *why* they were not sufficient? That in fact is the issue; in my opinion, it is always — and especially when reasons are being given for not following the opinion of a consultative body — absolutely necessary to set out carefully *all* the options. In a recent judgment of 21 June 1984 in Case 69/83 (*Lux* v *Court of Auditors*) the Court stated that the obligation to state reasons was to be considered in the light of the 'discretionary power enjoyed by the appointing authority in this area' and the 'nature of the disadvantages which such a measure may entail for the official concerned'. It is difficult not to recognize that for Mr F. the appointing authority's acceptance or rejection of the view that there were mitigating circumstances was of the greatest importance. It cannot be said that a brief statement of reasons is sufficient for every decision, even the most unfavourable for the person concerned. Such a statement may well be sufficient, but only, as the Court has stated in its judgment of 30 May 1984 in Case 111/83 (*Picciolo* v *Parliament*), if 'the details

given by the [administration] . . . have enabled the Court to exercise its powers of judicial review and to check the correctness of the reasons stated'.

'Details', that is the key word. Does the measure imposing the penalty contain them? The Commission itself must have some doubts in that respect. It emphasizes that the phrase 'in the light of the foregoing' must be taken to refer to *all* the foregoing recitals rather than that which immediately precedes the phrase. Let us assume that that is the right interpretation and let us look at the whole text of the decision for a sentence which makes clear why Mr Burke disagreed with the Board's opinion. The only one which may be regarded as directed to that end is to be found on page 2 and is as follows: 'Whatever [Mr F.'s] impressions may have been at the meeting with the Director General for Personnel and Administration and however great the frustration which he may have felt, it is none the less true that an official must expect to encounter changes in his administrative position during his career and that, in any event, the Staff Regulations and the administrative rules provide an extensive range of remedies at various levels'.

They are, I think, correct observations, if somewhat trite. However, I doubt whether they serve the Commission's purpose. They are to be found word for word in the opinion of the Disciplinary Board, together with even severer statements, such as the following: 'European officials, who by virtue of their employment enjoy certain advantages and privileges, must be expected to observe a high degree of discipline, even in circumstances in which they feel frustrated. Otherwise, an administration made up of officials of numerous nationalities and different temperaments would be unable to function properly.' However, after making that severe judgment on the case, the Board considered that the mitigating circumstances justified a reduction in the penalty.

Naturally, there was nothing to prevent Mr Burke from regarding that conclusion as erroneous. In that respect, for example, it may be observed that it is at least unbalanced, because it takes into account the mitigating circumstances, but ignores the aggravating circumstances; and yet there are aggravating circumstances if it is true — to give only one example — that Mr F. acted in the knowledge that both before and after the Corsican election he had not observed the obligations imposed on him by Article 15 of the Staff Regulations. However, it is a fact:

(a) that the decision of 7 April makes no reference to such matters (just as, on the other hand, it does not mention the absence of premeditation, a question which is entirely different from that of intent); and

(b) that the lacunae have certainly not been supplied by the Commission during the oral procedure.

The Court must therefore consider the decision as it stands. That being so, there can be no doubt that the decision is unlawful because it contains an inadequate statement of reasons, even if it is deficient in only one respect, namely its failure to explain why no importance was attached to the mitigating circumstances.

If that were not so, if it were held that the measure adopted by Mr Burke was unassailable even on that issue, a lawyer might wonder what purpose the draftsmen of the Staff Regulations had in mind *in requiring* the appointing authority to obtain an opinion from a special body whose task is to submit to the authority responsible for the

decision its *opinion* concerning 'the disciplinary measure appropriate to the facts complained of'. That, I fear, would be an unanswerable question.

9. Finally, I think the applicant's alternative claim for damages is obviously unfounded. His misconduct is fully proven and admitted by him and the defect which I have found in the contested decision does not make it less appropriate or indeed less just. It therefore seems clear that such a defect involves no liability on the part of the administration. As Mr Advocate General Trabucchi said in Case 46/72, 'the law must not be a purely formal remedy destroying the substance of retributive justice'.

The claim must therefore be dismissed.

10. For all the reasons which I have set out, I propose that the Court should grant in part the application brought on 6 October 1983 by Mr F. against the Commission and annul the decision of 7 April 1983 on the ground that in determining the penalty it did not state the reasons why the appointing authority rejected the Disciplinary Board's view that the circumstances specified in its reasoned opinion were of a mitigating nature. The applicant's other claims must be dismissed.

I propose that the parties should bear their own costs pursuant to Article 70 of the Rules of Procedure.