OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 11 JUNE 1968[1]

Mr President,
Members of the Court,

A road accident, commonplace and yet serious in its consequences, is to give us the opportunity, on reference from the Belgian Cour de Cassation, to define the scope of the immunity from legal proceedings granted by the Protocols to officials of the European Communities 'in respect of acts performed by them in their official capacity, including their words spoken or written'.

The facts are simple. Mr Claude Sayag, an engineer in Grade A6 in the European Atomic Energy Community, was instructed by means of a travel order to escort two representatives of private undertakings, Mr Leduc and Mr van Hassen, on visits to installations at Mol; he was on his way to Brussels, the place of his mission, driving his own car in which the two persons whom I have just mentioned were also seated. At Herselt, he failed to observe the right of way at a crossroads, so causing a collision in the course of which both he and his passengers were injured, one of them very seriously. After consultations between the Belgian Ministry for Foreign Affairs and the departments of Euratom on the question whether, at the time of the accident, he was acting in his official capacity, a prosecution was undertaken. The Tribunal Correctionnel, Brussels, rejected the objection of inadmissibility—which Mr Sayag had put forward on the ground of his immunity from legal proceedings—in view of the fact that that immunity had been waived by the Commission. This reasoning was set aside by the Cour d'Appel, which took the view that in this case the immunity did not require to be waived, as it covered only acts carried out by officials in the actual performance of their duties and not those committed on the occasion of the performance of those duties, and the action of Mr Sayag in driving to the place of his mission came within the latter category as he was not employed by Euratom as a vehicle driver but as an engineer. In consequence the Cour d'Appel imposed a number of penalties on the defendant and as regards the civil actions ordered him and his insurers, the S.A. Zurich, to pay various sums of compensation to the victim, Mr Leduc, and to the latter's insurance, S.A. La Concorde. Mr Sayag and the Zurich insurance company appealed against this judgment to the Cour de Cassation, their first ground of appeal being the infringement of Articles 11 and 17 of the Protocol on the Privileges and Immunities of the EAEC of 17 April 1957. In these circumstances the Cour de Cassation, by judgment of 12 February 1968, without considering at this stage of the procedure the two other submissions put forward, has asked you to interpret Article 11(a) of that Protocol—which has now become Article 12(a) of the Protocol annexed to the Treaty of Brussels dated 8 April 1965—and more precisely to rule 'whether the immunity from legal proceedings provided for by this article is applicable to officials and servants of the Community when the acts giving rise to legal proceedings were carried out by them during the performance of their duties and have some relationship with their vocational activities or whether the immunity only covers acts constituting the actual performance of their normal duties or those prescribed under the Staff Regulations'.

I

1. As the judgment making the reference points out, the provision which is to be interpreted is found in identical terms in the two Protocols of 1957 and 1965, the latter of which entered into force in 1 July 1967, that is to say, when the Cour de Cassation was already seised of the matter. Whichever of the provisions applies in this case—a point on which it is not necessary to make a pronouncement—your jurisdiction to give the interpretation which is asked for is not in doubt. As far as the first Protocol is con-

1 — Translated from the French.

cerned it follows from the combination of Articles 150 and 207 of the EAEC Treaty, and for the second from Article 30 of the Treaty of 8 April 1965, which makes applicable to the provisions of the latter Treaty and of the Protocol annexed to it the provisions of the EAEC Treaty relative to your jurisdiction and its exercise.

2. Limited and precise though the provision on which you are consulted may be, its scope can still only be measured by placing it in the framework of the Protocol as a whole and by looking for its justification there. The first source is Article 191 of the EAEC Treaty: '*The Community* shall enjoy in the territories of the Member States such privileges and immunities as are *necessary for the performance of its tasks* under the conditions laid down in a separate Protocol.' As regards this document, which is an integral part of the Treaty, it contains very different rules according to the categories to which it is applied. For example it guarantees the inviolability of the premises and archives of the Community itself. It grants to members of the Assembly a position which is in practice copied from traditional parliamentary immunities. It accords to missions of third countries accredited to the Community 'the customary diplomatic immunities' and, by a slightly different formula, to the representatives of Member States taking part in the work of the institutions of the Community as well as to their advisers and technical experts, the customary privileges, immunities and facilities in the performance of their duties and during their travel to and from the place of meeting. However, for officials and servants of the Community, the Protocol cannot merely make a reference to custom, whether diplomatic or not; in Articles 11 to 14 it enumerates the various advantages which they enjoy (immunity from legal proceedings, freedom from rules relating to immigration, importation of their furniture and motor car free of duty, exemption from national taxes on salaries paid by the Community) or at least which they are capable of enjoying, since it is for the Council to determine the categories of officials to which these provisions apply in whole or in part. Finally, the Protocol states in Article 17 that privileges, immunities and facilities are to be accorded to officials solely in the interests of the Community.

We must therefore be careful not to allow ourselves to be influenced by the classical justifications given for diplomatic immunities: the representative nature of the diplomatic agent—extra-territoriality—reciprocity between the States, and by the solutions which they bring with them. No doubt the reason for the advantages granted to officials may vary according to the advantage concerned. Thus as regards the tax question it is so as to ensure equality between servants; for freedom of immigration or freedom of importation it is the desire to avoid any obstacle to recruitment on a wide geographical basis; but these advantages are always measured against the interests of the Community which is their exclusive justification, even though, according to the judgment in the *Humblet* Case (6/60, Rec. 1960, p. 1156), an official may claim the benefit of them directly and in his own name before the court having jurisdiction.

II

It is in the light of these observations that we must now examine the provision in question.

Article 11 of the Protocol lays down that in the territory of each Member State, officials shall be immune from legal proceedings in respect of acts performed by them *in their official capacity*, including their words spoken or written. This, the Article says, is subject to the provisions of Articles 152 and 188 of the Treaty (which confer jurisdiction on the Court of Justice in any dispute between the Community and its servants and which state that the personal liability of its servants towards the Community shall be governed by the provisions laid down in the Staff Regulations.) Immunity as thus defined is to continue after the official concerned has ceased to hold office. Moreover the second paragraph of Article 18 lays down that each institution of the Community shall be required to waive the immunity accorded to an official wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Community.

1. Certainly European officials are, like ev-

ery other individual, required to respect the law of the country in which they may be, but immunity from legal proceedings requires that he should not be summoned to court, whether criminal or civil, by reason of acts which that immunity covers as long as it has not been waived. There may therefore be two successive bars to legal proceedings which it is appropriate to distinguish.

First of all we must determine whether the act complained of comes *of its very nature* within the provisions of Article 11 of the Protocol. This is a question of definition which makes an objective evaluation necessary but who is empowered to carry it out? The logic of the system prevents reference being made to the national authorities; in the first analysis it is the institution to which the official is responsible which is the best placed to know in what capacity he has been acting and whether there exists a sufficient link—which I shall later have to define in greater detail—between his act and the task of the Community. It is also envisaged that in the application of the Protocol the institutions of the Community shall act in concert with the responsible authorities of the Member States concerned and we know that in fact the Commission is invited by the Belgian authorities to give its view whenever inquiries are opened or legal proceedings commenced against one of its officials. This system is certainly preferable to that in the United States where the courts appear to rely entirely on the assessment of the State Department.

However, the Community institution's view is not final. A dispute on this point between an official and an institution may give rise to the procedure under Article 90 of the Staff Regulations and subsequently to an appeal to you. Or else the national court before which the case has been brought, having some doubt on the opinion put forward by the institution, may refer the matter to you as in the present case, in the circumstances referred to in Article 150 of the EAEC Treaty since the interpretation of the Protocol may also affect its jurisdiction.

Still more decisive is the role of the institution when it is a question of waiving the immunity since it is difficult to see how any effective judicial review of its decision can be provided for. A refusal on its part to waive the immunity may give rise to a conflict with the authorities of the state concerned, just as a positive decision may be contested by the official, but the virtually discretionary powers which it possesses to assess the interests of the Community give a purely moral character to the duty with which it is faced and leave no room—at least as far as the reasons are concerned—for any censure on the part of the Community court.

2. This still leaves us to decide how to answer the question which is put to you.

As far as the Belgian Cour de Cassation is concerned, the formula 'acts performed by them [officials] in their official capacity' is capable of the following two interpretations: according to the wider interpretation it refers to acts performed by officials in the exercise of their duties and having some relationship with their vocational activities. According to a narrower interpretation, it would only cover acts constituting the actual performance of their normal duties or those prescribed by the Staff Regulations. You are not required to give a judgment on the substance of the matter before the Belgian court; it is however impossible to overlook the fact that the circumstances of the case have guided the way in which the question is put to you and that the observations submitted either in writing or orally have frequently referred to it. According to a the wider interpretation, it will suffice to bring immunity into play if the offence in question occurred when the official was making his way to the place of his mission driving his private car, for the facts are clearly not unrelated to his work and this is so whatever may be the terms of his travel order and whatever too may be the conclusions to be drawn in pursuance of the Staff Regulations from the use by an official of his own vehicle. According to the stricter interpretation on the contrary, stress will be laid on the fact that the person responsible for the accident was an engineer whose qualifications are not precisely known but were certainly in any case not those of a chauffeur and the conclusion will therefore be drawn that his act is not covered by the immunity.

The arguments in favour of one or other of these conceptions have been laid before us

in excellent terms during the oral proceedings by Mr Sayag's and Mr Leduc's eminent advocates; so I shall not return to them. On the other hand I should like to consider the view put forward from the beginning by the Commission and sustained with even greater vigour during the oral procedure because this concept shows up the narrow relationship which exists between Article 11 and Article 17 and because there in my view the nub of the problem is to be found.

The existence of the Communities does not in itself affect the principle of sovereignty of the state, which continues to apply in its proper sphere, on its territory, as against all persons: the normal course of justice, just like police regulations, must be respected. Nor can the recognition of immunity affect such sovereignty unless it is necessary to permit the institutions, acting through the agency of its servants, to accomplish its task without obstacles created by the rules or intervention of the national authorities: in other words, the purpose of the immunity is to settle the conflict which may arise between the accomplishment of that Community task and national law.

The Commission has quoted to you examples of this possible conflict, referring to cases which have already risen: that of the consultant physician who must be in a position to practise in a state of which he is not a national without exposing himself to prosecution for illegal practice of medicine. There is the case—of which echoes have recently been heard in the press—of officials who must be able to maintain contacts on behalf of the Community with officials of the eastern world or to travel to those countries without being subsequently the object of indiscreet curiosity on the part of the police. Other cases may be imagined: when, for example, at the time of the Suez crisis and in order to save petrol the country in which you have your seat forbade car driving on Sundays, this prohibition could not in any event apply to cars being used for the purposes of the ECSC.

The stress must therefore be placed upon the Community. So that there may be grounds for immunity, one must be faced with an act, an oral or written statement which must in reality be the act of an institution itself, one which involves it officially. It is the Community which is being protected and the immunity does not benefit its servants except as it were indirectly to the extent to which the Community expresses itself through them and to which they perform Community acts and set in motion the powers of the institution.

In these circumstances it will be understood that immunity may be limited to cases in which the official is carrying out specific duties on behalf of the Community. This clearly links up with the idea expressed by Professor Mario Miele in his work on the privileges and immunities of international civil servants (p. 40) when he says that, in order to be covered by the immunity, the act must 'arise out of the sphere' of the duties with which the official is charged. Above all, he adds, it is necessary to inquire whether there is a connexion or an essential link of causality between the act and the duty with which the official is charged.

The role of Euratom and its officials is to adopt regulations or take decisions, to conclude contracts, to carry out work in research centres. From this point of view one might even wonder whether driving a Community vehicle by one of the institution's drivers has a link with the progress of the Community sufficient to give rise to immunity. In any event, as far as the use of a private car by an official is concerned, the answer appears to me to be necessarily in the negative, because the driving of a vehicle does not come within the official tasks and duties of the servant and is the result of a free choice on his part. I shall not dwell on this point: a comparison between Annex VII of the Staff Regulations and the travel order shows that thd use of a vehicle is authorized but not compulsory and takes place on the responsibility of the official. Hence an offence arising out of such use does not require any waiver of immunity on the part of the institution before it can be penalized; it is not covered by the immunity.

3. Here it may be noted that the appellant before the Cour de Cassation, Mr Sayag, has formally acquainted you with the fact that, although he was claiming the benefit of Article 11 of the Protocol, nevertheless he took the view that his immunity must be waived by the application of Article 17, thus admitting that it was for him to undergo the

legal consequences of the offence which he had committed. This desire to defend the Treaty for its own sake, this respect for the requirements of form appear all the more remarkable because they are shown not by a jurist but by a technician. But they lead one to believe that the question before you is not the only one which may be put in an action of this kind nor in practice is it the most important. Factually speaking the problem is that of the relationship between the provisions of the Protocol on immunity from legal proceedings and the rules of Article 188 of the EAEC Treaty regarding noncontractual liability of the Community: once it is established that an act is entitled to immunity because it has been carried out by a servant in his official capacity, how is it possible to avoid admitting that the act was committed in the performance of the servant's duties and that the damage which results involves the direct liability of the Community before you? And even if the institution thinks that it is called upon to waive the immunity, does not the Community remain liable?

I shall be careful not to attempt to solve here this question of the relationship between the two provisions which was briefly touched upon during the oral procedure; I should simply like to say that there is not a necessary parallel between the two concepts and that it is by no means excluded that an act of which one refuses to admit that it was performed by a servant in his official capacity within the meaning of Article 11 of the Protocol may nevertheless be considered as carried out by him in the performance of his duties within the meaning of Article 188 of the EAEC Treaty. Perhaps one day you will have to consider this problem and you will then have to resolve it on the basis of the general principles common to the legal systems of the Member States.

4. Having said this, and limiting myself to the question which has been referred to you, I am not sure that it is possible to reply to it exactly by adopting one of the two alternatives put to you by the Cour de Cassation. I think that it would be both more precise and more illuminating for the illustrious Belgian court if you were to rule, as the Commission suggests, that immunity only exists when an official who comes within one of the categories determined in conformity with Article 15 of the Protocol, performs, in a sphere directly related to the application of the Treaty or to the functioning of the institution, an act coming within the scope of his official duties.

Finally, I think that it is for the Belgian Cour de Cassation to decide as to the costs in this action.