Orders each party to bear its own costs.

Pilotti Rueff Riese

Serrarens Delvaux Hammes van Kleffens

Delivered in open court in Luxembourg on 17 December 1956.

M. Pilotti
President

A. Van Houtte
Registrar

Ch. L. Hammes
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL ROEMER[1]

Summary

Mr President,
Members of the Court,

Allow me, at the outset of my opinion in Case 1/56, *Bourgaux* v *Common Assembly*, briefly to rehearse the facts once again.

I — Facts

The applicant entered the employment of the Common Assembly on 1 January 1953. His contract was concluded for two years and on its expiry was extended for a further year until 31 December 1955 under a general extension of similar contracts. The applicant was head of the Reports of Proceedings and Parliamentary Services Department. On 25 November 1955 the Bureau of the Common Assembly after obtaining an opinion from outside

1 — Translated from the German.

experts for the purpose of reorganizing its Secretariat resolved *inter alia* that two departments should be dissolved and that the corresponding posts of heads of department including the applicant's post should disappear; it also resolved that the applicant's contract should not be further extended. On 13 December 1955 notification was sent to the applicant of an order, in so far as it affected him, of the President. He was at the same time informed that apart from the compensation due to him under his contract of employment and the provisional Staff Regualtions he would receive further compensation equivalent to two years' salary. This compensation was paid to the applicant, who accepted it.

On 12 January 1956 the applicant brought the present action against these decisions and he claims that the Court should:

1. Find that the decision of the Bureau of 25 November 1955 was improperly adopted;

2. Consequently annul that decision and the order of the President of 13 December 1955.

In the course of the proceedings the applicant withdrew a further application in which he claimed one franc as symbolic compensation for non-material damage.

The defendant contends that the claim should be dismissed.

II — Jurisdiction of the Court, nature of the action and admissibility of the application for annulment

The Court has to settle an action by a servant of the Community who objects to the termination of his services.

Jurisdiction of the Court

The jurisdiction of the Court to decide such kinds of action has not been contested in the written procedure. Even in the oral procedure the defendant's representative did not in fact contest jurisdiction but only the admissibility of the application for annulment. It has not been alleged that another court has jurisdiction. The defendant's representative merely indicated that *without* the provisions with regard to arbitration in Article 42 of the Treaty national courts might possibly be called upon to decide this case. It was however alleged that individuals could not bring actions for the annulment of orders of the Bureau of the Common Assembly or orders of its President but that the Court could order only damages in such cases. This is however a question which must be separated from the question of admissibility; I shall deal with it immediately afterwards.

I can therefore be very brief on the question of admissibility and refer to the judgment of the Court and my opinion in Case 1/55 *Kergall* v *Common Assembly*. In the present case too the jurisdiction of the Court rests on Article 42 of the Treaty in conjunction with Article 17 of the contract of employment concluded with the applicant and the relevant articles of the applicable Staff Regulations. All the Staff Regulations which have been in force in the Community, just like the definitive Staff Regulations, contain an article on the jurisdiction of the Court. Therefore for the question of jurisdiction it does not need to be considered which regulations apply to the present case.

The jurisdiction however does not rest solely on Article 42 of the Treaty. In his application the applicant relies on the definitive Staff Regulations and maintains that they must apply to him; the defendant contests this. The question of admissibility is also dealt with by Article 58 of the Staff Regulations of the Community. This provision is not an arbitration clause contained in a private contract concerned with public law. Therefore Article 42 of the Treaty is no longer sufficient to give jurisdiction to the Court. With regard to the legal position of employees, in so far as regulations similar to laws unilaterally established by the authority, namely the provisional regulations on the legal position of staff and ultimately the definitive Staff Reglations of the Community, have taken their place alongside the purely contractual provisions, the first paragraph of Article 43 of the Treaty applies in addition to Article 42. This gives the Court jurisdiction

in any other case provided for by provisions supplementing the Treaty. In my view the Staff Regulations, which the institutions of the Community are empowered under the Treaty to adopt, must be regarded as such a supplementary provision; I would refer to Article 16 of the Statute of the Court of Justice and the last paragraph of Article 7 of the Convention on the Transitional Provisions. The application of the arbitration clause was as much a safeguard for the initial period as the engagement of servants on the basis of contracts of employment. The power to adopt Staff Regulations necessarily embraces the power to decide disputes arising therefrom; and the final decision, by a court, could only be entrusted to the Court of Justice of the Community.

Nature of the application

From this there are important consequences for the nature of a staff case. Only after the nature of such an action is clarified can an opinion on the question of admissibility of an application for annulment in such an action be given.

The Treaty recognizes applications for annulment, 'recours en annulation', under Article 33 and 'recours de pleine jurisdiction' (cases in which the Court has unlimited jurisdiction). The latter term is expressly used in Articles 36 and 88. As is known this distinction is taken from French law. Without going into details I should like to remind the Court briefly of the principles of this distinction, which moreover in the course of time has become a little less clear-cut in French law:

The 'recours en annulation' is directed against an administrative measure, the lawfulness of which is examined, and if necessary the measure is annulled.

The 'recours de pleine jurisdiction' is directed against the authority as a party and invokes subjective rights; the Court considers the matter comprehensively both from the point of view of facts and law and can not only annul the decision of the authority but also amend it or order the authority to make reparation.

The Treaty says just as little about the category into which the action based on an arbitration clause comes as do the relevant articles of the Staff Regulations with regard to particulars about the nature of the staff action. The Treaty however is also silent on the typical case of 'recours de pleine jurisdiction' under French law, liability of the adminstration for a wrongful act or omission ('faute de service') (first paragraph of Article 40 of the Treaty); this is obviously because it necessarily follows from the nature of the action that it can only be a 'recours de pleine jurisdiction'. An action for wrongful act or omission may relate to a preliminary decision of the administration although Article 40 of the Statute does not necessarily require it. The Court can not only annul this preliminary decision of the administration but also replace it by awarding compensation or varying the amount of compensation. In this connexion it is interesting to observe that Much in his work 'Die Amtshaftung' (p. 91, Note 235) expressly mentions that the annulment of a preliminary decision of the administration must be decided in the context of a 'recours de pleine jurisdiction' and not in an action for annulment under Article 33 of the Treaty. In our case too which is concerned with the legal relationship of the servant to the administrative authority it would be inappropriate to apply the provisions which are intended to ensure an objective review of the legality of the economic adminstration of the High Authority. Contracts of employment concluded with employees give rise to rights and duties on both sides for they give the employees claims governed by public law to the performance of obligations on the part of the administration. Actions concerned with this legal position must therefore be classified in the second category, 'recours de pleine jurisdiction', and the Court must be recognized as having unlimited jurisdiction.

In contrast to Articles 33 and 38 of the Treaty where a limitation of the Court's powers of review or a limitation to specific grounds of nullity is specified, Articles 42 and 43 of the Treaty, like the Staff Regulations, say simply that the Court shall have jurisdiction 'to give judgment' in the cases referred to there. The Court's jurisdiction is therefore basically unlimited and

the judgment can order any measures which are required to resolve the case before the Court.

At this point I should however immediately observe that this does not mean unlimited jurisdiction in respect of *all* factors and preliminary questions in relation to the measures taken against officials. The administration has a discretion in certain cases which it must exercise in accordance with its obligations in the interests of the service. The jurisdiction of the Court extends as far as these limits. Beyond this the administration is entitled to determine the internal affairs of the service. These service directives do not interfere with a sphere of law special to the official but concern him only as a member of a hierarchic authority which would in certain circumstances be disturbed by intervention by the Court in this sphere.

Admissibility of the application for annulment

From these considerations it follows that Article 38 of the Treaty which has been frequently referred to in the written and oral procedure does not apply to the present case. Article 38 of the Treaty, as a special provision for decisions of the Common Assembly and not of its Bureau, cannot be relied on in a question of the legal protection of the official because the legal protection of officials must be the same for *all* four institutions of the Community. This legal protection within the special power relationship between the authority and its officials which is subject in *all* institutions to the same rules, cannot be affected by the fact that the decisions of the institutions which are of external significance, on account of their varying nature and scope are subject to different conditions for review by the Court; in the case of the Court of Justice itself, owing to the final nature of its judgments, there is no provision for any such review. For similar reasons my colleague, Mr Advocate General Lagrange, in a staff action recently dealt with claimed that the High Authority could not rely on Article 33 of the Treaty.

It remains to be considered whether, in the context of an action which is not more precisely specified but which according to my researches should not be classified as an application for a declaration that a decision is void within the meaning of Article 33 of the Treaty, application can nevertheless be made for annulment of an official decision.

If it is clear that the *application* for annulment does not mean that it is an application for a declaration that a decision is void within the meaning of Article 33 of the Treaty then there need be no difficulties. The two types of action, 'annulation' and 'pleine jurisdiction' are not clearly opposed to one another but rather stand in the relationship of 'the lesser' to 'the greater'. The well-known principle can therefore be applied: 'Qui peut le plus, peut le moins'. There are numerous examples where, in an action involving unlimited jurisdiction, the annulment of an administrative measure can be applied for and ordered. I have already mentioned one such case arising from the Treaty: in an action based on liability for a wrongful act or omission a preliminary decision of the administration can be annulled. On French law let me quote from Laubadère, Traité Théorique et Pratique des Contrats Administratifs 1956, T. II, p., 196:

'Le juge du contrat peut en principe annuler les mesures prises par l'administration et contraires à ses engagements contractuels';

examples are cited from the case-law of the Conseil d'État. Finally I would refer to the Statutes of the international administrative courts and quote as example Article 9 of the Statute of the Administrative Court of the United Nations relating to staff cases:

'S'il reconnaît le bien-fondé de la requête, le Tribunal ordonne l'annulation de la décision contestée ou l'exécution de l'obligation invoquée'.

In brief it may be said that the Court has jurisdiction in the present case and that also the application for annulment is admissible.

III – Claims of the applicant

There is still an observation called for with regard to the applicant's claims. The application contests not only the order of the President of the Common Assembly of 13 December 1955 individually notified to the applicant but also the decision of the Bureau of 25 November 1955 on which that order was based. This 'decision' is contained in voluminous minutes of 15 pages and represents in truth a whole series of decisions which relate to the agenda of this session of the Bureau. The applicant has not particularized the decision he wished to contest. During the oral procedure and ultimately at the hearing today the applicant restricted his written claims and expressly declared that he was not contesting the new organization as such or the abolition of the post which he occupied but only the termination of his employment with the Common Assembly. This decision is numbered 15 on page 14 of the minutes of the meeting of the Bureau of 25 November 1955. The applicant had to contest this decision since it is simply repeated in the notification of the President of 13 December 1955 and the grounds for terminating the employment appear only from the minutes of the meeting.

IV – Consideration of the substance

I thus come to the individual complaints in the application.

Abolition of the post occupied by the applicant

In the written procedure the applicant had objected that the abolition of the post which he occupied was improper. I have already stated that this objection was not maintained in the oral procedure. It is therefore not necessary to say anything more about this issue. I would like only to mention that in the case of measures relating to administrative organization we enter the sphere of the above-mentioned internal conduct of the service. The Court has already decided in the judgment in Case 1/55, *Kergall,* that the Bureau of the Common Assembly has power to develop its Secretariat in its discretion and in the interests of the service and to order the abolition of posts which appear superfluous to it.

At most a misuse of powers could have been alleged here. For this it would have been necessary to contest the opinion and perhaps the objectivity of the experts whose recommendations the defendant followed. The applicant does not seek to make such complaints. Accordingly the applicant's application by notice dated 20 November 1956 which it put forward in the alternative and which seeks to have certain documents produced and the experts heard has lost its purpose and need not be considered.

In judging the present case there are thus the following basic facts which are not contested:

The administration of the Common Assembly embracing 90 posts which are at the disposal of the Bureau and the members of the Assembly has been restructured in such a way that 21 of the existing posts have disappeared whilst 19 different types of posts have been created. This meant that the continued employment after 1 January 1956 of two persons who had until then been employed became impossible.

On this basis, which he now recognizes, the applicant contests only the consequences affecting him personally namely the final termination of his employment with the Common Assembly. He claims in the *first* place that *he* ought to have been given one of the new posts. Alternatively he takes the view that the Common Assembly ought not definitively to have terminated his employment but have assigned him non-active status. These are the only two claims which were still made in the oral procedure and which I can now consider.

Assignment to a new post

If we consider the general picture of the new organization of the Secretariat as appears from the pleadings we observe that we are not dealing simply with the disappearance of two posts but that in fact a completely new structure and new distribution of posts has been put in hand. It suf-

fices in the present case to consider the groups consisting of the earlier 'Chefs de Service' and 'Chefs de Division'. As appears from a comparison of Decision No 6 and No 7 of 25 November 1955, five managerial posts have disappeared and three new ones have been created. The total result of the new structure for the number of posts (the disappearance of two posts) affects these two groups. The authority was faced with the question which three of the five holders of the posts which have disappeared should be given the three new posts. Since there are no express provisions appertaining thereto this decision lay in the discretion of the authority.

When the applicant maintains that he ought to have been considered for a new post this means in law that he alleges that the authority has not exercised its discretion properly in relation to him. On this the applicant says that two officials who were below him in rank were given new posts.

The applicant's representative made this claim clear at the hearing—let me quote from the pleading of Mr Chareyre (minutes of the Court, I b, p. 1):

'C'était nécessairement le rang qu'occupaient les intéressés .... qui devait déterminer ceux à conserver ...'

Mr Rolin argued in a similar manner, cf. minutes of the Court, IV a, p. 16 to IV b, p. 2.

The applicant refers to various incidents with his superiors simply to explain *why* the authority has acted as it did with him. In my view these allegations do not suffice to show a wrongful use of discretion. The view that preference should be given to the highest officials in relation to re-employment must be rejected. On the contrary the criterion is on the one hand the range of duties of the new posts and in the particular case the tasks of the particular office and on the other hand the ability and experience of the official as proved by his previous duties. In the present case it is significant that the duties for which the applicant was previously responsible have been redistributed among several posts. The case of the second head of department specially mentioned by the applicant, Mr Limpach, is different because his duties were retained under one office subject to being made a subdepartment. Mr Limpach was the head of the Finance Branch; he became head of the Finance Office as Mr Rolin stated at the hearing (minutes of the Court, B IV a, p. 16). In these circumstances very special facts would have to be shown to justify preference being given to the applicant with regard to one of the new posts (thereby disregarding the claims of another official whose interests could likewise not be overlooked); such facts do not appear to me to be present in this case.

The applicant's personal file does not justify a different judgment nor do the two documents produced towards the end of the hearing. On the contrary the personal documents reveal negative factors which in considering and deciding which three officials should be assigned to the new posts were quite capable of influencing the defendant against the applicant. In particular it appears from documents Nos. 13, 27 and 28 that the defendant on several occasions warned the applicant and threatened him with disciplinary measures and to suggest that his contract would not be renewed and that he would not be integrated under the Staff Regulations. When Mr Chareyre asks the question today: 'Should not Mr Bourgaux have been preferred to the others (... être préféré à d'autres)?' the reply might be given that these incidents which I have just mentioned do not speak in favour of preferring the applicant in the appointment to the three new posts. To show misuse of powers (and this is what it amounts to) explicit reasons ought to have been given why the defendant in the view of the applicant should have assigned *him* to one of the three new posts and not one of the three officials who were kept on. Only if these resaons were shown and moreover if the result of the comparison must necessarily have been unequivocally in favour of the applicant could the contrary decision of the defendant be regarded as defective.

The applicant has produced photocopies of typed copies of written communications of the Secretary General to the President of

the defendant dated 2 February 1955 and 29 November 1955.

Both documents are opinions of the Secretary General in preparation for an answer to letters addressed to the President of the General Assembly. The document of 29 November 1955 is *subsequent* to the decision of the Bureau of 25 November 1955; it simply puts right an error as to the post which the applicant filled. The opinion of 2 February 1955 relates to a letter from the applicant to the President of the Common Assembly; this letter is numbered 21 in the applicant's personal file; the applicant sent it himself with a covering note (No 22 in the personal file) to the Secretary General with the request that it be forwarded to President Pella and the Bureau rejected the application made therein at its meeting on 27 May 1955 (Document No 25 in the personal file).

These documents do not appear to me important because they are not capable of showing that the applicant's employment should have continued and that he should have been assigned to one of the new posts. I therefore do not need to consider the observations of the applicant's representative, Mr Rolin, to the effect that the defendant ought to have produced these documents and that its neglect to do so represented an objectionable failure to fulfil its duty on the part of a party to an action in respect of adducing all the evidence. Nor do I need to give an opinion on the submission of the defendant's representative, Mr Ansiaux, that both documents and especially the document of 29 November 1955, by reason of their nature ought not to be in the personal file and were confidential. The defendant's observation that the applicant had not revealed how he had come into possession of the documents to which he did not have access in the course of his employment or in the course of the action, has not been disputed by the applicant. I do not have to give an opinion on the submission of counsel for the defendant, Mr Ansiaux, that by irregularly obtaining a photostat copy of these documents the applicant had committed a breach of confidence vis-à-vis the authority and for this reason had made his employment in the service impossible. I will simply observe that the fidelity of officials to the administration and the confidence of the administration in its officials must be a major factor in their relationship if the constitutional tasks of the administration, which can act only through its officials, are to be performed.

At the hearing the applicant alleged in conclusion that the High Authority at the time in question proceeded to engage more than 80 new recruits and that the Common Assembly did not endeavour to fit the applicant into one of these new posts. It suffices to observe that this fact could in no way justify annulling the defendant's measure respecting the applicant as claimed. The Common Assembly as *one* of the institutions of the Community could not assign the applicant to a post which was vacant in another institution of the Community. This would not be compatible with the independence of the institutions of our Community which is laid down in the Treaty. The Common Assembly could at most suggest that the High Authority should take over the applicant in an appropriate position and in doing so recommend him in accordance with its responsibility if it felt able to do so. If the Common Assembly did not do so, that might constitute a disregard of its obligation to assist the applicant, giving rise at most to a claim for damages; damages are however not claimed and the amount of the compensation actually granted is not contested. Moreover the applicant was never prevented himself from applying for free posts and requesting the recommendation of the Common Assembly for this purpose. We have no information regarding any such applications by the applicant.

Accordingly it must be observed with regard to the first ground of claim:

The fact that the contested decisions did not provide for further employment of the applicant is not sufficient to justify their annulment. The first claim is therefore not valid.

Transfer to non-active status

The second claim is that the contested decisions should be annulled because they

ought not to have definitively terminated the applicant's employment but to have transferred him to 'non-active status'. On this issue too the applicant somewhat altered his position at the hearing and in part broadened his claim; new evidence was adduced at the hearing.

'Transfer to non-active status' involves the maintenance of the employment relationship so that the employee continues to receive monthly payments during the waiting period and has a prior right to be assigned to a vacant post in his category, service and career bracket in so far as he possesses the requisite qualifications; after the expiry of the waiting period without a new post being assigned the employee has a claim to proportionate retirement pension. In this case there could be no talk of any allowance for termination of employment either under his contract or the Staff Regulations and likewise no compensation by way of a single capital payment. The applicant cannot seize upon a single factor of non-active status and claim a prior right to a vacant post while retaining the compensation for termination of employment or repaying only according to the terms of the contested decision.

The applicant bases his claim to be assigned non-active status on two arguments the second of which is expressed in the alternative. In the first place the applicant considers that the definitive Staff Regulations of the Community should already have been applied to him. In the second place he alleges that according to the judgment of the Court in the case of *Kergall* the current draft of the definitive Staff Regulations should have taken into account so that he should in any case have enjoyed the advantages of non-active status.

(a) Application of the Staff Regulations of the Community in their final form

The applicant bases his claim for the direct application of the Staff Regulations in their final form on the fact that the Committee of Four Presidents at its meeting on 12 December 1955 decided that the Staff Regulations for three institutions of the Community with the exception of the Council of Ministers which had made a reservation should be finally accepted. This meant in the applicant's view that the 'provisional Staff Regulations' of 1 July 1953 in accordance with Article 51 thereof were 'automatically' replaced by these regulations. Moreover on the same day all servants of the Common Assembly received a new contract bringing them within the regulations so that on their signature the provisions of the regulations which had just been adopted would apply to them.

The defendant has replied that the Common Assembly up to the day of the first hearing in this case had not yet brought the regulations into force and the wording approved at the meeting on 12 December 1955 had not been published and had once more been amended by the Committee of Four Presidents at the meeting on 28 January 1956.

There are three different arguments in the applicant's submissions in support of the view that the Common Assembly ought to have applied the provisions on the assignment of non-active status to the applicant's case:

1. The 'adoption' by the Committee of Four Presidents at the meeting on 12 December 1955 means that the regulations were directly applicable to all servants of the three institutions.

2. The 'adoption' replaced the 'provisional regulations' of 1 July 1953 by the new regulations.

3. The 'contracts of employment for the application of the Staff Regulations' meant that the Staff Regulations would immediately apply to employees who signed these contracts; and such an offer of contract ought to have been made to the applicant.

The documents necessary to assess these three submissions are before the Court; I will deal with them in the following examination.

On the *first* issue it appears from the minutes of 12 December 1955 that the Committee of Four Presidents discussed the draft article by article and, subject to numerous amendments, agreed upon one text. Since a reservation was made by the

President of the Council of Ministers the Commission decided,

'que le statut est définitivement adopté en ce qui concerne les trois institutions'—page 30 of the minutes.

It hardly need be said that this decision can only mean that the *text* was now finally established and that no further amendments were to be made. Even this intention of concluding discussion of the text of the Staff Regulations did not prevent amendments from being discussed at the meeting of the Committee of Four Presidents on 28 January 1956 or amendments of the text which was adopted on 12 December 1955 from being made; it follows from this that the 'definitive adoption' on 12 December 1955 was a purely internal matter of the Committee of Four Presidents and did not exclude discussion being reopened. The final text of the Staff Regulations as published contains a note that they were adopted on 28 January 1956 whereas it is significant that the date of their entry into force in respect of the individual institutions remained open. The impossibility of any other interpretation is apparent from the fact that these were only part of the complete provisions on the Staff Regulations: there was provision for the drawing-up of annexes by the individual institutions and of staff rules by a joint committee, both of which steps were essential for the application of the actual Staff Regulations. To summarize it may be said that after the meeting on 12 December 1955 it was finally established that the future Staff Regulations, like all the earlier drafts, would contain provisions on transfer to non-active status. There is nothing in the decision of the Committee of Four Presidents however implying that these provisions were now to be immediately applied. My impression is that the applicant's counsel admitted this at the hearing. Let me quote from the observations of Mr Chareyre, minutes of the Court IV a 1:

'... à la séance du 12 décembre 1955 le statut a été déclaré adopté en ce qui concerne trois des institutions, et cela implique non pas peut-être que la *mise en vigueur* ait été réalisée pour ceux des agents qui étaient appelés à souscrire au statut mais d'après les termes mêmes de l'arrêt Kergall cela impliquait que les règles ainsi adoptées se substituaient sur le champ à celles qui résultaient du règlement intérieur'.

What Mr Rolin says today about the 'adoption' of the Staff Regulations carries no conviction that there was an obligation on the Common Assembly to apply the Staff Regulations after the decision at the meeting of the four Presidents of 12 December 1955 directly and generally to their administration.

I thus come to the applicant's *second* argument which relies on Article 51 of the 'provisional Staff Regulations' of 1 July 1953 and the judgment in *Kergall*. As far as that judgment is concerned the applicant can have in mind only one part, namely at 2 A 4. The Court is there quoting the provisions of Article 15 of the contract of employment and Article 51 of the 'provisional regulations' of 1 July 1953 to draw conclusions on the legal nature of the contract of employment from the fact that in both provisions there is mention of definitive Staff Regulations. The Court however did not interpret Article 51 of the 'provisional regulations'. As is known, the first sentence of Article 51 is as follows:

'Le présent règlement sera remplacé de plein droit par le Statut du personnel de la Communauté dès son adoption'.

I should like for the moment to assume that the applicant's argument is correct and that the regulations adopted by the Committee of the Four Presidents on 12 December 1955 did in fact immediately replace the provisional regulations. What would this have meant in the applicant's case? Article 2 of the Staff Regulations specifies the four classes of staff to which the regulations apply. The applicant belongs to none of these four classes. Before the Staff Regulations entered into force all those persons already employed had to be dealt with according to the transitional provisions which such positive regulations must necessarily have. Article 59 provides:

'Staff *may* be established as officials'.

Article 3 of the Staff Regulations provides:

'Recruitment save for the regular filling of vacant posts shall not be allowed'.

According to the decision of the Bureau of 25 November 1955, however, no post was provided for the applicant so that the Staff Regulations could not be applied to him. Had they been applied to him solely for the purpose of transferring him immediately to non-active status this might on the contrary have represented a misuse of powers on the part of the administration.
It is thus seen that even accepting the applicant's argument the legal consequence which he asserts does not follow. It suffices moreover to say that the word 'adoption' (which is unfortunately not a legal term of art) in Article 51 can be understood only in the sense of 'applicability' for otherwise there would have been a legal vacuum and conflicts. Finally the words 'Staff Regulations' in the same article must be understood in the sense of comprehensive Staff Regulations whereas the text accepted on 12 December 1955, as stated, provided only principles requiring to be supplemented by the annexes which had not yet been adopted and by the staff rules.
For the reasons the second argument of the applicant in my view does not lead to the conclusion that he ought to or could have been transferred to non-active status.
I come to the *third* and last argument which relies on the so-called 'contracts for the application of the Staff Regulations'. Consideration of the documents filed shows that we are concerned with the following steps:

1. An application by each member of staff for the Staff Regulations to be applied to him.

2. An order by the President of the Common Assembly in relation to each member of staff containing transitional provisions: in principle the provisions of the contract of employment and the 'provisional regulations' of 1 July 1953 cease to apply on 31 December 1955; until however the Staff Regulations apply the individual articles listed in an annex continue to apply.

3. A letter from the Secretary General of the Common Assembly to each member of staff concerned appointing him to his post with effect from 1 January 1956 and referring to the decision of the Bureau of 25 November 1955 and Article 12 of the 'provisional regulations'.

Only two conclusions can be drawn from the aforesaid steps:

1. Even if the applicant had made an application as mentioned under 1. above, no order could have been made in his favour since he was not to be appointed to a vacant post.

2. Even for staff who had requested that the Staff Regulations be applied to them and in respect of whom there had been an order the text approved on 12 December 1955 did not immediately apply. On the contrary the Common Assembly, as we were informed on the second day of the hearing, brought the Staff Regulations with the annexes and staff rules into effect only by the decision of its Bureau of 1 October 1956 and with effect from 1 July 1956.

Since the contracts of employment of all staff expired on 31 December 1955 the Common Assembly was presented with the question of how its legal relationship to its staff was to be governed after that time. The entry into force of the Staff Regulations with its annexes and the staff rules was to be expected during the course of 1956; a restructuring of the Secretariat with a new detailed list of posts had just been drawn up at the meeting of the Bureau on 25 November 1955. In these circumstances the 'contracts for the application of the Staff Regulations' were to be regarded as a special form of the necessary extension of the contracts of employment then in force which were due to expire at the end of the year. No such extension could be granted to the applicant, however, because the new detailed list of posts, according to which no post was provided

for him, entered into force on 1 January 1956.
This demonstrates that the applicant's first claim that he should have been transferred to non-active status on the ground that the Staff Regulations in their final from were immediately applicable is unfounded.

(b) Application of the principles of the judgment in Case 1/55, *Kergall*

The second argument of the applicant remains to be considered, namely that in any case an application of the principles of the judgment in the case of *Kergall* should have led to his transfer to non-active status. The Court stated in that judgment that the administration in adopting its decisions and *quantifying the grant provided for by ... the contract of employment ... ought to have had regard* to the provisions of the draft (p. 25 of French version) and ought to have *granted an analogous payment* ('indemnité analogue', second paragraph p. 28).
I think the correct interpretation of the judgment is that the Court was never thinking of a *direct application of drafts*. It simply stated that *in the application of the contract of employment and the provisional regulations* the legal principles of the drafts should be respected. In the particular case of *Kergall* that meant that the Bureau *in applying Article 15* of the contract of employment which provided for a minimum compensation and thus gave it a discretion, ought to have regard to the fact that the dismissal of the applicant *Kergall* was the result of the disappearance of his post and that on the disappearance of a post the draft of the Staff Regulations provided a non-active status of three years for the official affected and that for the first year the *full* salary and for the following two years *half* the salary should be paid. This was *one* of the points of view to be had regard to in applying Article 15 of the contract of employment, albeit the main one; there could be other considerations and there were in fact in the case of *Kergall*; they meant that the financial result of this consideration was not completely equivalent to that provided for in the draft.
The principles applying to non-active status are set out at paragraph 2 A 7 in the Judgment in Case 1/55, *Kergall*. As appears from the context the Court set these principles out to clarify the concept of 'non-active status' which basically has been retained in all the drafts of the Staff Regulations in their final form and corresponds to the provisions of the national Civil Service law of several Member States. As appears from the conclusions drawn by the Court, however, it did not thereby mean to say that these provisions should already be applied. It was thus erroneous to state at the hearing (as did Mr Rolin in his arguments—Minutes of the Court IV a 14 and IV b 4) that according to the judgment in Case 1/55, *Kergall*, the provisions on non-active status and in particular the prior claim to new posts were already directly applicable to an official whose position was governed by a contract. Nor did the defendant attempt to apply these provisions directly; this appears from the fact that the applicant was paid and accepted compensation for loss of office and a single capital sum for which there is no place on transfer to non-active status. In the absence of legal and budgetary provision the defendant could not continue to make monthly payments to the applicant of the amount of his previous salary.
The question was discussed at the hearing whether the applicant ought not to have received more compensation since according to a later draft of the Staff Regulations of 1955 the non-active status was extended from three to four years. This question appears to me irrelevant since the application has not contested the amount of compensation awarded and the Court is bound by the claim contained therein. Likewise the personal position of the applicant and his type of post in his home country can be relevant only to the amount of compensation and need not therefore be discussed.
It thus appears that as regards the second part of the claim the contested measures of the defendant do not infringe the principles which the Court laid down in its judgment in the case of *Kergall*. Only the provisions of the provisional Staff Regulations can be directly applied to an official under a contract, who according to the judgment is in the legal position of a *provisionally* esta-

blished official; they do not provide for non-active status and simply make possible the grant of *appropriate* compensation. It seems to me that the applicant's counsel himself recognized this. At the hearing he said (I quote Mr Chareyre, Minutes of the Court I b 4):

'Le succès de ce deuxième moyen est conditionné par l'opinion que vous aurez du point de savoir quel était le statut auquel était soumis Monsieur Bourgaux au moment où a été prise à son égard la mesure de non-renouvellement de son contrat'.

In view of what I have said I think there is no discernible authority requiring the applicant to be transferred to non-active status. The contested decisions could not therefore have transferred the applicant to non-active status and are therefore not defective.

V — Conclusion, costs and submission

The general result in my opinion is that the action is unfounded. The costs are thus governed by Article 60(1) of the Rules of Procedure of the Court. With regard to the question of the costs which are recoverable may I refer to my opinion in the case of *Kergall* according to which in principle in staff actions costs of representation of the institutions are not to be borne by the staff. In the present case the defendant has asked that the applicant should bear the whole costs; it based this application on the view that the action was an abusive procedure. It would be going too far to agree with the defendant in this; it would require renewed consideration of the facts and procedure. I therefore ask to be allowed to leave this decision, which can be given *ex aequo et bono*, completely in the discretion of the Court.

In these circumstances my opinion is that the action should be dismissed.