OPINION OF MR ADVOCATE GENERAL LAGRANGE[1]

Summary

I — The facts 69

II — The application for annulment (Case 7/56) 77

Admissibility 77
Jurisdiction of the Court 78
Examination of the substance 79
Scope of the decisions in issue 79
Withdrawal of individual decisions 79
Interpretation of Article 78 of the Treaty 82
Application thereof to the present case 83
Final conclusion 89

III — The applications for damages (Cases 3 to 7/57) 90

Admissibility 90
Liability 90
Reparation for the damage 91
Amount of the injury 92
Final conclusion 93

Mr President,
Members of the Court,

The applications before the Court involve particularly difficult points of interpretation of the provisions of Article 78 of the Treaty as regards the nature and the scope of the powers concerning staff matters conferred by that article on the committee referred to as 'the Committee of the Four Presidents', in relation to those of the other institutions of the Community. Thus the action goes far beyond the usual scope of disputes between an administrative authority and its servants: in fact, it concerns *the very balance of powers set up by the Treaty*. This is sufficient indication of the importance of the judgment which is to be delivered in these cases. By putting an end to the controversies of which the said Article 78 has been the subject since the entry into force of the Treaty, that judgment will give the various authorities responsible for staff matters a clearer idea of the limits of their respective powers, and thereby will enable them better to conduct the administrative life of the Community. This is also the justification for the exhaustiveness which I felt was required of my explanations, in an action in which the defendant administrative authority is to a large extent 'morally' in agreement with the applicants, and confines itself in its conclusions to relying upon the wisdom of the Court. Finally, I think that it is particularly necessary that the ECSC system should be clearly formulated and should be capable of application forthwith from day to day and without disputes, in view of the prospect of the entry into force in the not too distant future of the new European Treaties, which involve solutions to these questions which are very different from those contained in the present Treaty and which will require careful adjustments.

I — The facts

It is not my intention to give a complete chronological account of the elaboration of the Staff Regulations of the Community, since it was experienced by the Court itself as an institution, and since it has doubtless not been forgotten by the Members of the Court; I wish to mention only those aspects which seem essential to the understanding of this action. The problem of the Staff Regulations arose from the beginning out of Article 78 of the Treaty and Article 7 of the Convention on the Transitional Provisions. The third paragraph of the latter article, to

1 — Translated from the French.

which I shall return later, is worded as follows: 'Until the Committee provided for in Article 78 of the Treaty has decided upon the size of the staff of the Community and has laid down staff regulations, *the personnel required shall be engaged on a contractual basis*'. Thus from the beginning, the nature of the links between the Community and the servants of the four institutions was of a contractual nature. But also from the beginning the idea was accepted that this was only a transitional period and that a system of *staff regulations governed by public law* should be substituted as soon as possible for the contractual system —'as soon as possible' meaning as soon as general Staff Regulations of Officials had been drawn up. The Assembly in particular had voted resolutions to that effect, and the Committee of Presidents had started to examine the drawing up of those general Staff Regulations. In the meantime, although they remained fixed term contracts, the nature of the contracts became less and less precarious; they were supplemented by regulations involving firm guarantees (discipline, leave, insurance scheme, etc.) applicable to all the staff of each institution; finally, the period of their validity was fixed in anticipation of the date envisaged for the entry into force of the Staff Regulations. Thus in its judgment in the *Kergall* case, the Court found that those contracts were by nature 'contracts governed by public law which are the precursors of the Staff Regulations', and drew from that theory certain legal consequences as to the 'eligibility' of staff in service to be brought within the ambit of the future Staff Regulations.

However, although the drawing up of the Staff Regulations was obviously a condition precedent to their entry into force, it was not the only one. For, in addition to the provisions making up the Staff Regulations properly so-called (general rights and duties of the servants, recruitment, promotion, discipline, leave, pensions, dismissal, positions, etc.), the substitution of a system of staff regulations for a contractual system presupposes the creation of the posts and the administrative services corresponding to the tasks which the administration must perform, and the fixing of the salary scales pertaining thereto. Moreover, it is necessary to lay down the conditions under which servants currently in service can be, according to the accepted form of words, 'established' in the new services, that is, brought within the ambit of the Staff Regulations and appointed to a definite grade and step, without necessarily fulfilling the conditions stipulated in this connexion by the Staff Regulations for the Future. Only after all this work has been carried out can individual measures of implementation be adopted.

However, in addition there was a double problem parallel to all the others: (1) Were those various operations to be *common* to the four institutions, and if so to what extent? (2) In that connexion, what was to be the role of the Committee of Presidents?

On the first point, it seems that the need not for absolute standardization but for what was described as 'harmonization' was accepted very quickly, on the basis of the following idea: the settlement of similar situations in the same way in the four institutions. Agreement was easily reached to place in this category everything which concerned what I have called the Staff Regulations properly so-called (general rules, recruitment, promotion, discipline, etc.); in relation to those questions, it was even decided in the end to put into force only one set of provisions, the general Staff Regulations of Officials of the Community, common to the four institutions, with only certain implementing rules particular to the institutions being set apart in annexes pertaining to each of them. The same was true of the drawing up of a common scale of grades, each one corresponding to a salary comprised within a maximum and a minimum limit. The various problems raised by the creation of posts, the correspondence between posts and the determination of the grades in which they were to be classified, that is to say the problems of harmonization properly so-called, gave rise to great difficulties of implementation which are at the root of this dispute.

On the second point, namely the role of the Committee of Presidents and the nature and extent of its powers in relation to those of the institutions, in particular those of the Assembly, it was not possible to define any common formula on which all four institutions were in agreement. Proceedings fol-

lowed a rather empirical course, and it has only become possible since the Staff Regulations have been definitively approved and implemented to form an opinion, on the basis of their provisions, as to the legal system which emerges from them: that was not yet the case on 12 December 1955, the date of the adoption of the decisions the lawfulness of which is in issue.

On that date, the position was as follows:

(1) A 'scale' comprising 13 grades, divided into steps, had been adopted by the Committee of Presidents at its meeting on 9 May 1955, at the same time as the corresponding scale of salaries was fixed;

(2) On 25 November 1955, the Bureau of the Assembly had taken a whole series of decisions as a consequence of the re-organization of the departments of the Secretariat of the Common Assembly, which for the purposes of this opinion may be summarized as follows:

The adoption of a 'job-description list', that is of a complete table comprising the classification of the various posts into the grades and categories established by the Committee of Presidents together with a description in relation to each of the posts of the tasks to which it corresponded;

A decision to implement as from 1 January 1956 the scale of salaries fixed by the Committee of Presidents on 9 May 1955;

Finally, the following decision which I quote word for word:

'On a proposal by Mr Fohrmann and after hearing a statement by Mr de Nerée in which he associates himself with the proposal made by the Bureau in restricted session, and after discussing the question, the Bureau *decides:*

Within the framework of the re-organization of the Secretariat of the Common Assembly, and taking into account in particular the decisions of the Bureau of 27 October 1954 on the subject of annual and biennial steps, the appointments and promotions set out below will take effect on the date indicated in the individual decisions or orders, which shall be communicated in good time by the President to each person concerned.'

There follows a list of all the officials of the Assembly, classified by grades and steps. The five applicants are to be found classified therein as follows:

Mr Genuardi, Grade 2, Step 1,
Mr Cicconardi, Grade 3, Step 5,
Mrs Steichen, Grade 8, Step 5
Mrs Couturaud, Grade 9A, Step 5,
Miss Algera, Grade 9A, Step 3.

Such was the situation in brief immediately before 12 December 1955. What happened on that day?

1. The Committee of Presidents held its fourteenth meeting, at the end of which it declared that the Staff Regulations were definitively adopted with regard to the three institutions other than the Council of Ministers; in regard to the latter the Committee took note of the reservation expressed by its President in his statement to the effect that he was obliged to consult his colleagues before giving his definitive agreement. The minutes add:

'As regards the procedure to be followed in drawing up the *annexes,* the Committee *decides* that the administrations of the institutions shall consult each other. At the same time, it specifies that such consultation shall be directed towards harmonizing the provisions, but that it shall not prejudice the discretionary nature of the annexes.'

Among those annexes (which according to the Staff Regulations are considered as falling within the jurisdiction of the institutions), there must appear that same table of posts, drawn up in correlation with the 'job-description' list and the classification of those posts in the scale drawn up by the Committee of Presidents.

2. 'Late in the evening' of the same day, to use the words of the Assembly, the President of that institution sent to each servant concerned an individual order signed by

himself and the Secretary-General approving the application to that servant of the Staff Regulations. In view of the importance of those orders, from which the applicants purport to derive the vested rights upon which they seek to base their arguments, I consider it necessary to set the precise terms of them before the court. For example, this is the one which concerns Miss Algera:

'The President of the Common Assembly of the European Coal and Steel Community.

Having regard to Article 43 of the Rules of Procedure of the Common Assembly, adopted by the Assembly at its session on 10 January 1953, amended at its sessions on 16 January 1953 and 12 May 1954;

Having regard to the provisions of the rules of Internal Administration of the Assembly, adopted by the Bureau at its meeting on 25 November 1955;

Having regard to the proceedings of the Bureau on 25 November 1955;

Having regard to the written declaration of Miss Algera dated 12 December 1955 to the effect that she wishes to benefit from the application of the Staff Regulations,

ORDERS:

1. The contract of employment concluded between the Common Assembly of the European Coal and Steel Community, on the one hand, and Miss Algera, on the other hand, which expires on 31 December 1955, shall lapse on 31 December 1955.

2. The Provisional Rules and the annexes thereto, which entered into force on 1 July 1953 pursuant to a decision of the Bureau of the Common Assembly of 15 June 1953, shall lapse on 31 December 1955.

3. From 1 January 1956, Miss Dini Algera

   SHALL BENEFIT FROM THE APPLICATION OF THE STAFF REGULATIONS,

   shall be appointed to the grade of assistant I,

   shall take seniority equivalent to the third step.

4. Pending the total or partial implementation of the provisions of the Staff Regulations and the annexes thereto, and within the framework of the alterations consequent upon the entry into force of the Rules of Internal Administration, the articles of the contract and of the Provisional Rules, which both lapse on 31 December 1955 and which are set out in an annex hereto, shall apply on a transitional basis.

The annex attached hereto forms an integral part of this order.

Luxembourg, 12 December 1955.

Signed: G. Pella
President of the Common Assembly
Signed: de Nerée
Secretary General of the Common Assembly'

Let us stop for a moment at this point—late in the evening of 12 December 1955—and attempt to see how the situation appears both from the point of view of the Committee of Presidents and from that of the Assembly.

For the latter, it seemed fairly clear: the Assembly confined itself to implementing the decisions of its Bureau by adopting individual orders bringing its servants within the ambit of the Staff Regulations and establishing them in a specific grade and step, and communicating those orders to the persons concerned at the same moment. That action can be explained only if, in the opinion of the Assembly, the Committee of Presidents had already adopted the decisions necessary to render the individual classification of the servants possible, which means that, according to that opinion, the Committee of Presidents had exhausted its power of decision by establishing the scale of grades and steps on 9 May 1955, and that all other operations came within the jurisdiction of the institution. Only one obstacle remained, but it concerned only the *implementation* of the validly adopted classification decisions: that obstacle was, in the absence of the validly drawn up and published Staff Regulations themselves, an assurance regarding the entry into force of those Staff Regulations in the near future: in that connexion, the decision of the Committee of Presidents declaring that the Staff Regulations were definitively adopted as regards three of the institutions, including the Assembly, appeared sufficient to the Assembly to remove that last obstacle. (In fact, definitive adoption for all four institutions was not to take place until 28 January 1956.) As to the passage concerning the drawing up of the annexes, the Assembly doubtless saw in it only a confirmation of its position of independence, since the minutes merely provided for consultation between the institutions over harmonizing *'the provisions',* without prejudice to the 'discretionary nature' of the said annexes: such forms of words doubtless meant that the classification *tables,* as drawn up by the institutions, and at all events by the Assembly for its part, were to be incorporated in Annex I, the drawing up of which was to be preceded, like that of the other annexes, by joint preparatory studies, with each institution moreover entirely reserving its power of final decision.

As regards the *Committee of Presidents,* one thing is certain, and that is that on 12 December 1955 it had not yet officially taken up any position on the legal problem with which the Court is concerned today. Moreover, none of the three institutions apart from the Assembly thought that it was obliged—or able—to draw up for its own part a classification table of posts and, still less, to proceed to the establishment and individual classification of its servants. It may therefore be inferred that, in the opinion of the Committee of Presidents as such, the preliminary 'harmonization' work which it had asked the institutions to carry out for the purpose of drawing up the annexes concerned not only the very formulation of the provisions, but also the elaboration of the classification tables designed to be incorporated into Annex I.

It must however be acknowledged that uncertainty, not to say ambiguity, remained. But that ambiguity in its turn was removed as from March 1956; because:

First, as appears from the minutes of the session of 15 March 1956, the *Bureau of the Assembly* decided at the end of a meeting in private,

'to agree to the request of the President of the High Authority with a view to drawing up, with the other institutions, as harmonious a table of

posts as possible. This affirmative answer to the request of the President of the High Authority [the minutes add] *shall in no way constitute an interpretation of Article 78 of the Treaty and must not entail any prejudice to the autonomy of the decisions of the Bureau of the Assembly, if the effort necessary to reach harmonization proves impossible.'*

Secondly, the *Committee of Presidents* had on 5 March 1956 already 'taken note of the unanimous intention of the heads of the four institutions to achieve harmonization of the grades and remuneration of the staff in all the institutions of the Community', and on 29 March 1956 it decided 'to constitute' a working party 'having as its terms of reference'

'to seek and achieve harmonization between the tables of duties and grades of the different institutions, so as to permit common Staff Regulations for Community staff, the annexes thereto and the General Rules to enter into force.'

Thus the positions at this point were as follows:

(1) The Committee of Presidents and the Assembly were in agreement to undertake the harmonization work and not to implement the Staff Regulations immediately;

(2) The Assembly formally maintained its position of principle as to its 'sovereignty' in this field and reserved all its rights in the event of failure;

(3) The Committee of Presidents continued to withhold its commitment on this question of principle;

(4) Even in practice, there remained 'differences of emphasis' which were important: the Assembly agreed to take part only in drawing up 'as harmonious a table of posts as possible', thus appearing to accept in advance the possibility of certain discrepancies between similar posts in different institutions, which were not however to prevent the implementation of the common Staff Regulations. The Committee of Presidents, on the other hand, expressly made the implementation of the Staff Regulations, including the annexes and the General Rules, subject to the *conclusion*, that is to say doubtless the *complete success* of the harmonization work: thus the consequence of failure—which all concerned were determined to avoid at all costs —would have been the implementation of four different sets of Staff Regulations, one for each of the four institutions.

I shall pass very quickly over the following stages which did not bring about any alterations in the positions which had been taken up. Let me point out only that the special committee entrusted by the Committee of Presidents with the harmonization work (known as the 'Delvaux Committee', from the name of its chairman, a Judge of the Court) did not confine itself to carrying out its task in an abstract way, but proposed practical solutions to settle the case of servants of the Assembly who, under the new tables, were classified in a grade or step lower than that which had been assigned to them on 12 December 1955: that solution consisted in the award of a 'differential allowance' designed to ensure that servants thus affected would continue to receive for a certain period of time a level of remuneration corresponding to their first classification. Let me also point out that the President of the Assembly continued to maintain his reservations of principle, in particular concerning the transitional measures envisaged. In fact, the minutes of the meeting of the Committee of Presidents on 12 May 1956 state: 'he wishes to point out that this resolution [concerning the transitional measures proposed by the Delvaux Committee and accepted in principle by the four Presidents] must not take for granted a position which the Common Assembly cannot yet definitively accept. Indeed, such definitive acceptance is conditional upon its being possible to overcome the difficulties which are raised by the transitional measures, *which is a condition which must be fulfilled if the adoption by the Assembly of its own Staff Regulations is to be avoided.*' Thus, the Assembly's power freely to adopt the Staff Regulations of its servants, including their classification in the scale of grades drawn up by the Committee of Presidents, was

once again expressly asserted by its President, who associated himself only out of courtesy with the various attempts at harmonization which had been undertaken.

I come now to the decisions or measures which immediately preceded or accompanied the contested decisions:

(1) *Meeting of the Committee of Presidents on 15 June 1956.* The following appears in the minutes: 'As regards the Common Assembly, it [the Committee of Presidents] takes note of the statement of the President of that institution to the effect that he will put before the Bureau of the Assembly the proposals or suggestions submitted by the Harmonization Committee [the Delvaux Committee] and will communicate by letter either his agreement or his proposals for amendments, after having contacted the officials of the Assembly for the purpose of seeking a possible settlement by mutual agreement as suggested by the Committee'. Let me add however that 'finding that the Special Committee has not received all the elements necessary to enable it to accomplish its task, Mr Delvaux, with the agreement of this colleagues, Mr Rasquin, Mr Vanrullen and Mr Finet, asks that their mission be terminated and that they be relieved of their functions'.

(2) *Meeting of the Bureau of the Common Assembly on 19 June 1956.* I quote paragraphs (2) and (3) from page 4 of the minutes, as they seem to me the most important:

'2. The Bureau has instructed Mr Vanrullen, the Vice-President, to continue his task with a view to resolving the problem of reclassification and the measures relating thereto, *on the basis of the proposals made by the Delvaux Committee and adopted by the Committee of the Four Presidents at its meeting on 15 June 1956;*

3. The Bureau has delegated all its administrative powers to Mr Vanrullen for the purpose of carrying out the task which is mentioned under (2).'

(3) *Meeting of the Bureau on 22 June 1956.* Of the minutes of this meeting I would only note the fact that the Bureau intended to content itself with the agreement of the majority of the staff, not of all its servants.

(4) *On 27 June 1956,* a letter was sent by Mr Vanrullen, in the name of the President, to each of the employees affected by the harmonization measures. It appears necessary to me to place before the Court the essential passages of that letter:

'Dear Madam [I quote throughout from the letter sent to Miss Algera],

By an order of 12 December 1955, you were brought within the ambit of the Staff Regulations and appointed to the grade of assistant I.

The Bureau of the Common Assembly proposes to implement, in the near future, the Staff Regulations common to the four institutions, which were adopted by the Committee of the Four Presidents on 28 January 1956.
According to the provisions of those Staff Regulations and the annexes thereto, and in particular the salary scale and the table of correspondence between grades and posts, the duties which you perform correspond to grade II and to category C (assistant II).
Consequently, taking your seniority into account, your establishment, in accordance with Article 2 (2) and the transitional provisions of the Staff Regulations, will be effected on the following terms:

1. You will be appointed as an established official in category C, grade 11, step 8, with seniority in your step from 1 January 1956.

2. The starting point for your general seniority in the service will be fixed at 1 February 1956.

3. If under the above classification you would receive remuneration lower than that which you are currently receiving, until 30 June 1958 you will receive a compensatory allowance calculated in accordance with the provisions of Article 60 of the Staff Regulations.

4. You will be granted the maximum additional seniority provided for in Article 108 of the General Rules of the Community (pensions scheme).

In order to enable the Bureau of the Assembly to take a decision as soon as possible, I shall take it that you accept the above proposals, if I have not received a negative reply from you before 10 July 1956.

Yours faithfully,
pp. the President of the Common Assembly,

Signed: Emile Vanrullen,
Vice-President.'

(5) *On 7 July,* a certain number of employees refused to accept the terms in the letter of 27 June and insisted quite simply that the decision of 12 December 1955 should be kept in force.

(6) *On 12 July,* in a letter again signed in the name of the President of the Common Assembly, Mr Vanrullen wrote the following:

'Dear Madam,

By a letter of 7 July 1956 you informed me of your disagreement with the terms on which your establishment could be effected under the provisions of Article 2 (2) and the transitional provisions of the Staff Regulations.
Under these circumstances, and in so far as you persist in the point of view expressed in your aforementioned letter, when the Staff Regulations are implemented by the Bureau of the Common Assembly, it will be possible to apply them to you only as a temporary member of staff, subject to a one-year contract, renewable twice within the limits laid down by Article 2 (3) of the Staff Regulations.
I ask you to inform me before 21 July whether these proposals meet with your agreement. You will find enclosed a specimen contract.
If I have not received your reply by 20 July I shall have to take it that you renounce the benefit of the provisions of the order notified to you on 12 December 1955 and shall accordingly presume the nullity of your renunciation to the benefit of the provisions of your contract, of the Provisional Staff Rules of the Common Assembly of 1 July 1953 and of the application of the table of rank and salary drawn up by the Bureau at its meeting on 27 October 1954, which will once more apply to you.
Your contract, which in the normal course of events would have expired on 31 December 1955, will be prolonged a final time from 1 January 1956 to 31 December 1956 at the salary of 2 754 EPU (European Payments Union) units of account, fixed by the Bureau at its meeting on 25 November 1955.

Yours faithfully,
pp.the President of the Common Assembly,

Signed: Emile Vanrullen,
Vice-President.'

(7) *On 19 July,* each of the applicants sent a letter persisting in his position.

(8) *On 10 October* 1956, a 'communication' bearing the number 56/12 was addressed to the staff, informing it of the decisions adopted by the Bureau on *1 October* 1956 the essential parts of which are the following:

(a) The implementation of the common Staff Regulations and of the General Rules, with retroactive effect from 1 July 1956, with regard to those servants who accepted Mr Vanrullen's proposals, with or without reservations;

(b) The implementation, with regard to the same servants and with effect from the same date, of the annexes to the common Staff Regulations

'taking into account the provisions of the third paragraph of Article 62 of those Staff Regulations',

according to which the annexes shall be drawn up by each institution and may be amended after consultation with the staff and ascertainment of the opinion of the Committee of Presidents;

(c) Finally (and I quote)

'the *decision* regarding the officials who have not accepted the Bureau's proposals communicated to them by Mr Vanrullen *will be ... taken by the new Bureau* [which was to take up its duties one month later]. The system laid down by the provisional regulations shall remain applicable to those servants. The Bureau has instructed Vice-President Vanrullen and myself to collect forthwith the necessary details to enable the new Bureau to *take its decisions* with full knowledge of the facts.'

The communication bears the signature of the Secretary-General.

The following passage, which obviously is not reproduced in the communication, appears in the *minutes* of the meeting of the Bureau on 1 October 1956:

'Mr Pella stresses the political *but also the legal* importance of the decision adopted by the Bureau, and in his opinion, with which his colleagues concur, the Bureau's decision to accept Annex I which is common to the four institutions is *a legal basis on which certain amendments to the orders notified on 12 December 1955 to the majority of the staff may be undertaken.*'

(9) *On 15 October* 1956, Communication No 56/13 was addressed to the staff. Its first sentence is worded as follows:

'The remuneration for the month of October 1956 *for those servants who accepted the proposals made in the context of harmonization* has been calculated on the basis of the new classification.'

(10) Finally, *on 30 November 1956,* the newly-appointed Bureau decided, *'whilst keeping the contested decisions in force',* to grant the applicants the suspension of application which they had requested.

I apologize for the length and exhaustiveness of this statement of the facts: I thought it necessary for a proper understanding of the context of the dispute, both in law and in fact.

From the procedural point of view, this action has two aspects, as the Court is aware, since the applicants through their counsel have brought before the Court one collective application for annulment and five individual applications for damages; the latter are submitted only in the alternative, in case, 'should the inconceivable occur', to use the expression beloved of French lawyers, the application for annulment should not be successful.

II — The application for annulment (Case 7/56)

The conclusions contained in Application 7/56 seek the annulment (I quote) 'of the decision dated 12 July 1956, issued by the Vice-President of the Common Assembly, implemented by Communication No 56/13 dated 15 October 1956, withdrawing from the applicants, who did not accept the harmonization measures which had the effect of demoting them, the benefit of the Staff Regulations which had been granted to them and replacing them under contract until 31 December 1956, upon which date they will be dismissed'.

In his statement of defence, counsel for the Common Assembly expresses his doubts as to the admissibility of the application in so far as it is directed against Decision No 56/13 of 15 October. However, he does not press the point, and relies on the wisdom of the Court in the matter.

In fact, as has been seen, the application does not attack that 'communication' of 15 October *in isolation*; it seeks the annulment of the decision of 12 July issued by the Vice-President of the Assembly. On the other hand, it does not attack the decision adopted by the Bureau on 1 October 1956 which formed the subject-matter of Communication No *56/12 of 10 October.*

Under Article 43 (2) of the Rules of Procedure of the Common Assembly, adopted pursuant to Article 25 of the Treaty and published in the *Journal Officiel de la Communauté No 13 of 9 June 1954,* the composition and organization of the Secretariat of the Assembly 'shall be laid down by the Bureau, which shall determine in particular the Staff Regulations and the conditions for the appointment of staff'. Paragraph (3) of

the same article adds: 'The Bureau shall determine the number of servants, the scales of their salaries, allowances and pensions and the estimates of extraordinary expenditure necessary to the functioning of the Assembly. The President of the Assembly shall be responsible for proposing the adoption of those conclusions to the Committee referred to in Article 78 (3) of the Treaty.' Thus the Bureau holds the powers exercised in the name of the Assembly in the field which concerns the Court today.

The Bureau itself adopted 'rules of internal administration' which were not published, but are annexed to the case file. In that field, they merely reiterate the provisions of the Rules of Procedure of the Assembly. However, they add (Article 3 (2)), that the Bureau 'shall also give its decision ... in all disputes which may arise between the administration of the Assembly and its servants'. Finally, the President represents the Assembly 'in ... administrative, judicial or financial measures'. He may delegate his powers by means of an order (Articles 1 and 5).

In the present case, it is clear that the decisions were adopted by the Bureau, but it is very difficult to ascertain *by what measure and in what way* the five applicants received notification of the decisions or merely were informed of them. It is even difficult to ascertain the date on which the decisions were adopted and whether they were adopted by the old or the new Bureau. It can apparently be accepted that they were adopted by the old Bureau, subject to confirmation by that which was to take up its duties in November 1956, and that the latter did expressly confirm them.

As to the question of the measure which gave expression to the Bureau's decision *in regard to the applicants,* there is room for doubt. Mr Vanrullen's letter of 12 July 1956, when taken together with that of 27 June, clearly appears as a decision, subject only to the condition of the absence of an answer from the person concerned, that is of a favourable answer: in that connexion, continued refusal appears to me to amount to the absence of a reply. That condition was fulfilled, since the refusal was in fact confirmed; let me point out, moreover, that at its meeting of 19 June 1956, the Bureau had 'delegated all its administrative powers to Mr Vanrullen for the purpose of carrying out the task which is mentioned under (2)', that is, 'resolving the problem of reclassification and the measures relating thereto, on the basis of the proposals made by the Delvaux Committee and adopted by the Committee of the Four Presidents at its meeting on 15 June 1956'. Was that delegation valid, and did it authorize Mr Vanrullen himself to take definitive decisions with regard to the servants concerned? It is most doubtful, but it appears difficult to me to infer therefrom that *there was no* decision. The most that can be accepted is that it was subject to *confirmation* by the Bureau, which is what took place.

Moreover, as counsel for the applicants quite rightly points out in the note which he submitted in reply to the questions asked by the Court, 'it was only Communication No 56/13 which enabled the applicants to realize, from the analysis of their remuneration as regards deduction for pensions, which was provided in answer to their request for details, that Mr Vanrullen's proposals had been confirmed by the Bureau, of which Communication No 56/12 made no mention whatever'.

In short, there appears to be no other measure brought to the applicants' attention which could have been contested by them as manifesting the decision adopted by the Bureau.

Therefore I am of the opinion that the application is admissible.

Another preliminary question, which should be examined by the Court of its own motion if there appears to be any doubt about it, is the question whether the Court has jurisdiction to give judgment on the action. As a basis for such jurisdiction, one may hesitate between Article 42 of the Treaty, which refers to an arbitration clause (and which formed the basis of the clause conferring jurisdiction contained in the Provisional Staff Rules while the staff remained under contract), and Article 58 of the new general Staff Regulations, under which 'any dispute between the Community and any person to whom these Staff Regulations apply shall be referred to the Court of Justice'. The two legal areas can also be combined: it is clear however that

there can be no 'hiatus' between the two systems, and that, since it has jurisdiction both in disputes arising under the contract and in those arising under the Staff Regulations, the Court must necessarily also have jurisdiction over a dispute in which an employee *under contract* seeks to rely upon vested rights resulting from a decision which involves an anticipatory application of the *Staff Regulations* in his favour.

I come now to the legality of the contested decisions. Only one submission is made in the application: that which is based on the *infringement of the vested rights* which each of the applicants derived from the order of 12 December 1955.

The first question concerns *the scope* of the various orders in relation to the point under consideration. Is it indeed an individual decision creating rights?

There can be no doubt that it is. Let me quote paragraph (3) of the order again:

'From 1 January 1956, Miss Dini Algera ...

Shall benefit from the application of the Staff Regulations ...

shall be appointed to the grade of assistant I,

shall take seniority equivalent to the third step.'

The decision was not qualified by any condition, and did not contain any provision such as to render it temporary in nature. Finally, it was validly notified.

Moreover, its constituent parts appear to me to be indissociable. I do not think that it is possible, *inter alia,* to consider separately, on the one hand, the application of the Staff Regulations and, on the other hand, appointment to a definite grade and step. In fact, the application to a servant of the Staff Regulations is part of a whole operation, the purpose of which is to establish in the new services staff who are currently in service, *taking into account the nature of the posts to be filled and the qualifications of each of the persons concerned to fill those various posts.* This is what is expressed by Article 59 of the Staff Regulations where it states that 'servants (meaning staff who are currently in service) may be *established in any grade* of a category or service referred to in Article 24 of the Staff Regulations' if they fulfil certain conditions. Application of the Staff Regulations is expressed by appointment, either definitively or as a probationer, to a specific grade (Article 60), exactly as for future servants (Articles 1 and 2), the only purpose of the transitional provisions being, as I have stated, to exempt staff already in service from the conditions laid down by the Staff Regulations for future recruitment and to allow their direct appointment to any grade and step of seniority. Moreover since establishment entails the servants' renouncing the benefit of their contract, they are entitled, in order to be able to exercise their option with full knowledge of the facts, to be acquainted with the grade and the step in seniority to which the administration is proposing to appoint them, and not only the decision of principle considering them eligible to become officials under the Staff Regulations: at this point a certain contractual factor steals into the picture, as a consequence of this option in favour of staff.

Since it is thus established that the decision is of an indissociable nature, and at the same time that its legal nature is that of an individual decision creating rights, the question arises whether it could be revoked or amended.

At this point I think that reference should be made to the traditional distinction in administrative law between lawfully adopted decisions and illegal decisions.

Indeed, it is a principle that, when *individual* decisions comply with the law, they cannot be withdrawn: persons who are the addressees of those decisions derive from them an *individual* right and they are entitled to require that it should be respected. This is what distinguishes those decisions from measures in the nature of regulations or legislation which, except as otherwise provided, are automatically applicable to staff in service, the latter having no opportunity to seek to assert individual 'rights' allegedly acquired under the preceding legislation or regulations; it is enough if those measures do not have retroactive effect, in accordance with general principles. Thus, for example, a new salary scale, even a lower one,

a new age-limit, even a lower one, would be applicable to those officials who were in service on the day when the measure laying down that salary scale or that age-limit entered into force. On the other hand, an individual decision (for example, an appointment or a promotion) creates a vested right to its preservation from the day on which it is complete, provided that it has been legally adopted.

This solution, which meets the need to ensure the stability of legal relationships, and which, in the realm of unilateral public law relationships, corresponds to the effects of a contract in multilateral relationships, is common to the principles of the law of all six member countries.

The question of the withdrawal of *illegal* individual decisions is more difficult. In France, according to the thoroughly consistent—one might almost say classical—case-law of the Conseil d'Etat, the withdrawal of individual decisions which have created rights is possible when they are illegal, but only within the time-limit laid down for the commencement of legal proceedings or, if proceedings have been commenced, up to the time when judgment is delivered. The applicants mention this case-law, but, as there was no time-limit in the present instance (since that time-limit was laid down only by the Rules of Procedure of the Court of 21 February 1957), the applicants infer therefrom that the orders could not be revoked at all, which amounts to saying that illegal decisions should receive as much protection as lawful decisions.

That argument appears to me to be unacceptable. Let me point out that France appears to be the only member country of the Community in which the withdrawal of an illegal measure is limited to the period laid down for the commencement of legal proceedings. In Germany, the inviolability of the vested rights of officials was formally enshrined in the Weimar Constitution (Article 129) and is generally regarded as one of the 'traditional principles' which, according to the express provisions of the fifth paragraph of Article 33 of the Basic Law, govern the elaboration of civil service law: measures of *a retroactive nature,* affecting grading for example, have been considered as prejudicing the vested rights of officials (Bundesgerichtshof, Großer Senat, 11 June 1952, Neue Juristenzeitung, 52/933: Article 86 of the Bundesbeamtengesetz of 14 July 1953). However, although administrative measures which have created rights cannot be revoked at will, they can be withdrawn in a certain number of cases, and in particular when the measure contravenes a mandatory legal prescription or resulted from an invalid mode of procedure (for example, failure to obtain the assent of an authority whose agreement was required), and the fact that individual rights of a public law nature result from an administrative measure (for example appointment, grading, etc.) does not prevent that measure from being withdrawn if it lacks a legal basis (Hessischer Verwaltungsgerichtshof, 2 December 1949, Deutsches Verwaltungsblatt 50/681). It will be for the Court to decide whether, when the general time-limit laid down for the application of Article 58 is applicable (it is so now), it intends to lay down case-law modelled on the French case-law which will protect the vested rights of officials. For the time being, all that I would be inclined to accept for my part is the idea of a 'reasonable period of time': for it would be quite contrary to natural justice to allow an administrative authority to reverse established situations, even if they are illegal, which have been producing their effects for many months, or even years. On this idea, I am in agreement with Fischbach, *Kommentar zum Bundesbeamtengesetz,* 1954, p. 137. However, such is obviously not the case in this instance.

Is it therefore necessary to consider the question whether the orders of 12 December 1955 were lawful or illegal, with regard to the exercise by the Assembly and the Committee of Presidents of their respective powers?

Before being sure that such examination is required, I must clarify one further problem.

For it may be asked whether the decision adopted by the Assembly to accept the harmonization proposals made by the Delvaux Committee was in the nature of a novation enabling it to go back on the decisions of 12 December 1955, which were based on a different job-classification table. A moment

ago I pointed out that officials did not have a vested right to the preservation of decisions *in the form of regulations,* but merely the right to escape any retroactive effect of such decisions. Moreover, it is accepted that individual measures by a public authority must comply with the regulations, including those adopted by the authority itself. Thus if it is considered that, by accepting the common harmonization table, the Assembly took a decision in the form of a regulation, then must it not be accepted that the Assembly could, and even had to, consequently revise the individual classification previously carried out according to other standards? It would then become superfluous to decide the question of principle because one of two alternatives would have to apply:

Either the argument consistently defended by the Assembly and its President, to the effect that the Assembly has the power itself to draw up the table showing the correspondence of posts, is accepted: in that case, the orders of 12 December would be lawful, but the subsequent individual decisions, taken by virtue of a new correspondence table (in fact the freely accepted harmonization table), would also be lawful. It would seem that this is the meaning of Mr Pella's statement, quoted above, to the Bureau on 1 February 1956 in which he says that 'the Bureau's decision to accept Annex I which is common to the four institutions [let it not be forgotten that that annex comprises the correspondence table] is a *legal basis* on which certain amendments to the orders notified on 12 December 1955 to the majority of the staff may be undertaken';

Or an argument more restrictive of the Assembly's powers, to the effect that the orders of 12 December 1955 were *illegal,* is accepted: and in that case, according to the opinion which I have set out, those illegal orders could also be withdrawn, although on completely different grounds. Then it would remain only to verify that the fresh decisions were indeed taken after valid action on the part of the Committee of Presidents and therefore were not in their turn also illegal, like the first decisions.

The latter alternative is attractive in that it would make it possible to avoid the problem of Article 78, but I do not think that it can be adopted.

Because, if it is accepted that the Assembly had the power itself to fix the correspondence of posts to grades, the drawing up of the table of posts appears as a mere *internal* measure, intimately bound up with the organization of the services, and *without any connexion with the Staff Regulations:* from this point of view, the only measure in the nature of a regulation preceding the establishment proceedings is the *table fixing the scale of grades* and the corresponding salaries, drawn up by the Committee of Presidents. Since that table was drawn up by an authority external to the Assembly, namely the Committee of Presidents, the Assembly as an institution has the power freely to carry out individual classifications: once these have been made, they *create rights* in favour of those who are the subject of them, so long as the scale of the grades and the amount of the salaries have not been altered.

There clearly appears here the fundamental distinction between *rules pertaining to the Staff Regulations* and *rules for the organization of the service.*

The very concept of Staff Regulations implies that a validly appointed (or 'invested', to employ the term favoured by French theorists, to distinguish a unilateral system of staff regulations from a contractual system) official is the holder of his grade (he is sometimes even referred to as the 'proprietor'), and he can be deprived of it only in the circumstances laid down in the Staff Regulations. In this connexion, the present Staff Regulations do seem to comply with those principles, in particular if one refers to Article 59 which speaks of *'establishment in any grade* of a category or service' referred to in the Staff Regulations. Thus if it happens that the table of the correspondence of posts to grades is changed, such alteration can be applied to staff in service only in the future, that is on the occasion of a subsequent promotion, unless it is to be retroactive; it can be applied upon those conditions, because the Community Staff Regulations are not based on the *distinction between grade and post,* as for example in

France and England, but on the contrary establish a legal connexion between the grade and the post; but alteration of the correspondence table cannot make possible demotion with immediate effect or, even less so, with retroactive effect. Any other interpretation would lead to the denial of the very idea of Staff Regulations.
In these circumstances, the true alternative seems to me to be the following:

Either the Assembly had the power itself to draw up the correspondence of posts to grades, the scale of which had been drawn up by the Committee of Presidents; when it had done so and when it had subsequently, and according to this argument validly, carried out the individual classification of the servants by *appointing* them to a specific grade and step, it had exhausted its power and was not entitled to reverse those individual decisions in favour of a fresh classification of posts modifying the first classification;

Or the Assembly was not *alone* in holding that power: it had to share it with the Committee of Presidents. In that case, the individual decisions were illegal and could be revoked.

Consequently, the Court is under an obligation, in my opinion, to decide upon the interpretation of Article 78 of the Treaty.
It would be excessive to inflict a reading of Article 78 upon the Court, since the Court already knows it by heart and since, although certain difficulties attend its application, that article is not as obscure as has been suggested: as in naval warfare, obscurity is sometimes artificial ...
However, it is clear that that provision must be viewed in the general institutional context of the Treaty.
The Treaty is based upon delegation, with the consent of the Member States, of sovereignty to supranational institutions *for a strictly defined purpose*, namely the operation of a common market in coal and steel.
The legal principle underlying the Treaty is a principle of *limited authority*. The Community is a legal person governed by public law, and as such it 'shall enjoy the legal capacity *it requires to perform its functions and attain its objectives*' (Article 6), but only that capacity: this is the application of the principle of speciality, which is well known in public law. The way in which the functions are to be performed and the determination of the objectives to be attained are precisely fixed by the Treaty.
Moreover (same article), 'the Community shall be represented by its institutions, *each within the limits of its powers*'. Those powers are themselves carefully defined by all the provisions of the Treaty which confer powers, and the principle of limited authority (which is precisely called 'conferred authority') is expressly stated for each institution: it is Article 8 for the High Authority, whose duty it is 'to ensure that the objectives set out in this Treaty are attained *in accordance with the provisions thereof*'. It is Article 20 for the Assembly, which 'shall exercise the supervisory powers *which are conferred upon it by this Treaty*'. It is Article 26 for the Council, which 'shall exercise its powers *in the cases provided for and in the manner set out in this Treaty*'. Finally, it is Article 31 for the Court, which 'shall ensure that *in the interpretation and application of this Treaty*, and of rules laid down for the implementation thereof, the law is observed'.
That is an absolutely essential aspect of the Treaty. The Member States agreed to give up part of their sovereignty only in favour of institutions functioning under clearly defined conditions, which must be sufficient in themselves.
Therefore, none of the institutions can exercise powers other than those conferred upon it by the Treaty, either in relation to the other institutions or in regard to third parties, whether they be States or private persons. On the other hand, each institution, within the limits of its powers, is fully autonomous and cannot be subject to the authority of any other: it exercises its powers spontaneously and directly under the conditions laid down by the Treaty, with the Court appearing in this connexion as the body responsible for regulating the respective spheres of authority by virtue of Articles 33 and 38.
However, such 'autonomy' clearly could not be absolute as regards financial matters, since no institution, even a supranational one, can escape the necessity of submitting

to a certain amount of supervision in that area. Hence, Article 78 institutes *financial supervision,* which is entrusted to the auditor and which partakes of the nature both of an audit of expenditure undertaken and of a checking of accounts, and *budgetary supervision* which relates to the establishment of the budget of expenditure (since there is no budget of revenue, and consequently no budgetary balance to be achieved). For this reason Article 78 is based on a twofold concern for reconciliation:

(1) In presentation, Article 78 seeks to reconcile the principle of the autonomy of the institutions with the unity of the Community, which alone has legal personality: this is the system of estimates, drawn up by each institution as regards its own expenditure, but consolidated in the general estimate.

(2) In substance, it seeks to reconcile the right of each institution freely to ensure the organization and functioning of its departments, which is the corollary of the principle of autonomy, with the necessity for sufficiently effective financial and budgetary supervision.

To consider only the preliminary budgetary supervision, which relates to the establishment of the budget of expenditure, that reconciliation is ensured in two ways:

(a) It is ensured first of all by the power given to the Committee of Presidents to *'adopt'* the general estimate, which is the sum of the four estimates: the term 'adopt', which is less strong than, for example, 'approve', but stronger than terms such as 'enact' or 'implement', clearly implies a power of supervision sanctioned by the power to 'refuse to adopt'. The choice of such an expression clearly demonstrates the concern to reconcile the needs of administrative autonomy with the no less important needs of the supervision of expenditure by an authority which is external to the institution but which by its very composition appears as a manifestation of the Community.

(b) However, this power which is exercised at the last stage of the preparation of the budget of expenditure is rightly seen to be incapable on its own of ensuring real budgetary supervision with any degree of effectiveness. That is easily understood, since the budget of expenditure comprises only *administrative expenditure,* the greatest proportion of which is represented by *staff expenditure,* which, in a national budget, would be almost entirely in the nature of obligatory expenditure, that is, expenditure which merely represents in figures the effect of pre-existing rights. It is well known that the only effective supervision in this area is *preventive* and must deal essentially with the fixing of the staff complement and the salaries and other pecuniary allowances. For this reason the Committee of Presidents was given responsibility for fixing *in advance* the number of servants, the scales of their salaries, allowances and pensions, and the extraordinary expenditure, in short all the items which make up the bulk of the administrative expenditure. Of course, this power also must be exercised in a way which is compatible with the autonomy of the institutions, as I have described it.

Bearing in mind these few ideas, which appear to me to emerge fairly clearly both from Article 78 and from the institutional provisions of the Treaty and in particular Article 6 thereof, it seems that the solution to the difficulties reflected in this dispute is relatively easy.

With their help, two arguments can be put aside, one of them resulting in a legal misconception and the other in a factual misconception of the powers of the Committee of Presidents.

(A) The first argument was developed with great conviction and much talent by the chairman of the Common Assembly's Accounts and Administration Committee in a document reproduced at length by Professor de Soto in his note. The argument consists in denying the Committee of Presidents any power of decision and supervision in relation to the Common Assembly's expenditure, on the basis of the 'sovereignty' of that Parliamentary Assembly.

I shall not spend long on that argument, not only because it conflicts with the basic provisions of the Treaty, as I stated them a moment ago,but also because subsequently the

distinguished chairman ceased to propose it in that absolute form. The mistake which in my opinion he makes results—once again— from the misuse of the word 'sovereignty' which is at present the cause of many misunderstandings and a source of many misfortunes. Leaving aside the matter of agreement on the meaning of the term, if anybody is 'sovereign' in the Treaty, it is the Community, and the Community alone; the Assembly is no more 'sovereign' than the other institutions: like the other institutions, it is only 'sovereign' to the extent to which it falls to it to exercise the powers which have been conferred upon it by the Treaty, and to tell the truth, among those powers the power of decision occupies a very limited place: this system may be regrettable, but the Court can only make a finding of fact. Fortunately, moreover, the Assembly has found ways other than the exercise of powers of decision to carry out its task of supervising the executive and to play its part in the progress of the Community. For this reason I prefer to use the term 'autonomy' when speaking of the institutions rather than the word 'sovereignty'.
In fact, on reading the report it clearly appears that its author's preoccupation, in which he doubtless echoes his colleagues, is to preserve the freedom of the Assembly in regard to '*the creation of the services* which the Assembly finds necessary in order duly to acquit itself of the rights and duties of supervision which are incumbent upon it'; referring to the Committee of Presidents, he states a little further on: 'that Committee can certainly not intervene, because the Assembly would thereby be impeded in the *creation of the services* which it deems necessary'. As will be seen shortly, I think that on this point the freedom of the institutions must indeed be acknowledged.

(B) The second argument which in my view must be set aside is that which gives an exhaustive scope to the clause appearing in the second subparagraph of Article 78 (3): 'However, the number of the Community's servants and the scale of their salaries, allowances and pensions, *where not fixed under some other provision of this Treaty or by rules laid down for the implementation thereof,* and any extraordinary expenditure, shall be determined in advance by a Committee, etc.'.

It has been argued that the 'rules laid down for the implementation' of the Treaty which are mentioned here apply in particular to the 'Rules of Procedure' of the Assembly (Article 25), to the 'Rules of Procedure' of the Council (Article 30), to the 'General Rules of Organization adopted by the High Authority' (Article 16) and, as regards the Court, to the rules which the Court is empowered to adopt in order to lay down the Staff Regulations of its staff (Article 16 of the Protocol on the Statute of the Court). It is argued that under these different provisions, each of the four institutions has sovereign power to fix the Staff Regulations of its staff, even to the extent to which the rules contained in the Staff Regulations cover the subjects set out in the second subparagraph of Article 78 (3), that is the staff complement, the scale of salaries and the pension scheme. It is argued that the Committee of Presidents could exercise its powers only if one or other of the institutions did not use its right in this connexion or used it only partially. In short, it is argued that Article 78, including even the provisions of the second subparagraph of Article 78 (3), cannot be regarded as obstructing the principle of the autonomy of the institutions, and that the Committee of Presidents has only a coordinating role to play. I do not share that opinion. On this point I am in complete agreement with Professor de Soto in thinking that the clause in question must be seen as no more than a mere safeguard clause. It is indeed clear that if a particular provision of the Treaty (or of rules laid down for the implementation of such a provision delegating powers to it for that purpose) had conferred power on an authority other than the Committee of Presidents to fix the staff complement or the amount of the remuneration of certain servants, that special provision would have taken precedence over the general rule contained in Article 78. However, in that case it can only be a *special provision.* If the case should arise, this could be true of Assistant Rapporteurs if the rules governing their service, which are laid down by the Council on a proposal from the Court (Article 16),

happened to include a provision making the Council responsible for the fixing of their salaries: since the decision in this connexion would then belong to an *institution other* than that which employs the persons concerned, the supervision required by Article 78 would exist, and 'the exception to the exception' would take on its full meaning: in that case there would no longer be any need for the external authority in the shape of the Committee of Presidents.

In short, a hypothetical situation such as this would involve the solution adopted by the Treaty itself in relation to the Members of the High Authority and the Judges, Advocates General and Registrar of the Court of Justice, the pecuniary rules governing whose service are laid down by the Council under a special provision of the Treaty (Article 29). Moreover, Article 15 of the Statute of the Court provides that 'The salary, allowances and pension of the Registrar shall be determined by the Council, *acting on a proposal from the Committee provided for in Article 78 (3) of this Treaty*' (that is, the Committee of Presidents), which clearly shows that, even in a case where authority was conferred upon the Council, owing to the particularly important nature of the duties carried out, it was considered necessary to make the Committee of Presidents a party to the drawing up of the pecuniary rules governing the service of the person entrusted with those duties: how could it be imagined that, in all the other cases in which there is no guarantee of an external decision, it would depend only upon the will of the institutions to escape the supervision of the Committee of Presidents? That proposition appears to me absolutely untenable.

I thus come to the conclusion that Article 78 gives the Committee of Presidents certain *powers of decision* (moreover, the wording is perfectly clear on this point), but that since that attribution of authority derogates from the principle of the autonomy of the institutions, it must, like any exception, be strictly construed, taking into account the proper purpose of that article, which is a *financial and budgetary provision.*

I must now draw the inferences from that conclusion.

The first inference—which is doubtless not indispensable for the purpose of reaching a decision in the present action, but which I consider it necessary to mention in order to have an overall picture of Article 78—is that the Committee of Presidents does not possess any authority of its own to lay down the whole of the Staff Regulations of servants of the Community. In support of the contrary opinion, reliance has frequently been placed upon the provisions (which are even expressly referred to in the current Staff Regulations) of the third paragraph of Article 7 of the Convention on the Transitional Provisions, which is in the following terms: 'Until the Committee provided for in Article 78 of the Treaty [that is, the Committee of Presidents] has decided upon the size of the staff of the Community *and has laid down Staff Regulations,* the personnel required shall be engaged on a contractual basis'.

However, in my view it cannot be accepted that such a provision, of a purely transitional nature (and it is found in fact in the Convention on the Transitional Provisions) had the purpose, and can have the effect, of *permanently* conferring on the Committee of Presidents a power which it was not acknowledged to have by Article 78 of the *Treaty,* the latter constituting the basic provision in this regard, and which would also (as has been seen) be extraneous to the purpose of that article.

In reality, Article 7 of the Convention does not have—and could not have—any other purpose than to enable the Community to 'get started', if I may use that expression, before the financial procedures provided for by the Treaty, in particular Article 78, had had time to come into play. That is the reason why the second paragraph of Article 7 provides for repayable advances by the Member States until such time as the levy can be collected, since under Article 78 the revenue can be collected only by virtue of the general estimate, which itself must be adopted by the Committee of Presidents. Similarly, the fixing of the staff complement and of the scale of salaries, allowances and pensions is within the competence of the Committee of Presidents. The purpose of the third paragraph of Article 7 of the Convention is simply to enable indispensable staff to be recruited immediately without waiting for the decisions which the

Committee of Presidents must eventually take within the framework of the powers which it derives from the second subparagraph of Article 78 (3) of the Treaty. There is a close and obvious connexion between the two provisions, and when, repeating the wording of Article 78 of the Treaty on the point, Article 7 of the Convention states: 'Until the Committee provided for in Article 78 of the Treaty has decided upon the size of the staff of the Community *and has laid down Staff Regulations,* the personnel required shall be engaged on a contractual basis,' it can have in view only the *pecuniary provisions of the Staff Regulations* as described in Article 78. Neither Article 7 of the Convention nor Article 78 of the Treaty purported to come to any decision on the *legal nature* of the relationship which was to arise in the future between the Community and its servants or to draw a distinction between public law Staff Regulations and contract. Once again, it is a question of purely financial provisions.

Therefore, it appears that in law each institution remains free to fix the Staff Regulations of its servants, on a contractual or any other basis (the concept of staff regulations is not incompatible with that of contract, as is proved by the system in force in many international organizations); it remains free to do so, except on such points as have been reserved to the authority of the Committee of Presidents (the fixing of the staff complement and of remuneration).

Let me point out that, from this point of view, the provisions of Article 16 of the Protocol concerning the Court, under which the Staff Regulations of the officials and other servants of that institution 'shall be laid down by the Court', appears as an application of the general rule and not as an *exception* derogating *by implication* from a provision *of a general and permanent nature contained in the Convention on the Transitional Provisions*!

Of course, the independence of each institution with regard to drawing up the Staff Regulations of its servants in no way prevents the Committee of Presidents from playing a *coordinating* role, for it is highly desirable in a Community to arrive at common Staff Regulations, especially when all the administrative authorities have their seat in the same city, and one can only welcome the result obtained in this connexion; but, in my opinion, those common Staff Regulations must be considered as having been freely accepted by each institution, and from a strictly legal point of view (I am not speaking of the political point of view) it would doubtless have been more correct to implement four separate sets of provisions, each containing the few differences acknowledged to be necessary, instead of being obliged to relegate those differences to annexes.

In fact, the result of this is the paradoxical situation that the rules in regard to which the institution is autonomous (that is, the whole of the Staff Regulations proper) form the subject-matter of a single set of provisions purporting to be 'drawn up by the Committee of Presidents', whereas the points in regard to which that Committee has a power of its own are relegated to annexes 'drawn up by each institution' (Article 62). The least one can say is that such a presentation is apt to cause confusion amongst those who are not forewarned ...

Having thus established (1) that the Committee of Presidents possesses certain powers of decision, and (2) that those powers are however limited to financial and budgetary aspects and must be combined with the strictly administrative powers retained by the institutions, it remains for me to consider which matters, in a complex operation such as that which took place to effect the establishment of the staff within the structures of the new Staff Regulations, came under one sphere of authority and which came under the other: this brings me to the heart of the dispute.

In the remarkable opinion submitted by the Assembly, Professor de Soto of the Faculty of Law of the University of Strasbourg gave a very apposite analysis, isolating the various operations necessary to attain what is referred to as establishment (p. 12 *et seq.).* I can do no better than to refer to that analysis, which however I shall supplement somewhat.

In logical, if not chronological, order, those operations are the following:

(1) Drawing up of Staff Regulations for the

servants of the institution, comprising the general rules on recruitment, promotion, discipline, pensions, etc.

(2) Organization of the service, accomplished according to the requirements of the task which the institution has to carry out.

(3) Organization of the departments corresponding to that organization of the service.

(4) Determination of the grades and steps and, where necessary, division of the whole of the staff into categories (for example, administrative, advisory and clerical).

(5) Fixing of the salary pertaining to each of the grades and steps.

(6) Description of the work pertaining to the various posts (which has been called the 'job-description').

(7) Classification of each post in the scale of grades, taking account of the job-description.

(8) Fixing of the staff complement, that is, the number of posts in each grade, always taking into account the job-description.

(9) Finally, application of the Staff Regulations and individual establishment of each of the employees in the scale of grades, taking into account the post to which he is assigned (I have already said that in my opinion these two operations merge into one another).

Doubtless, such an analysis is somewhat artificial, inasmuch as each of the operations is not necessarily effected by a special decision, but in my opinion it enables it to be seen more clearly what is incumbent respectively upon the Committee of Presidents and upon the institution, if reference is always made to the distinction between those matters which come under the administrative power and those which come under the budgetary supervision.

On No (1) (Drawing up of the general Staff Regulations), I have already stated my view and I shall not cover the point again.

On No (2) (Organization of the service), it is my opinion that this comes within the institution's own authority: this is a fundamental point, and the Assembly rightly attaches great importance to it, because it must be seen to constitute the essential guarantee of what I have referred to as the principle of the autonomy of the institutions.

On No (3) (Organization of the departments corresponding to the organization of the services), it is my opinion that this also is a power of the institution, which is a necessary corollary of the foregoing.

On No (4) Table of grades and steps and, where necessary, division into categories), the authority of the Committee of Presidents is beyond dispute; moreover, it has exercised it.

The same applies *to No (5)* (fixing of the salary pertaining to each of the grades and steps).

I thus come to operations *(6) and (7).* It seems to me that the distinction between them, which was very well brought out by Professor de Soto, constitutes the key to the problem: in my opinion, operation *No (6)* (drawing up of the 'job-description') comes under the authority of the institution, whereas operation *No (7)* (classification of each post in the scale of grades, taking account of the job-description) comes under the authority of the Committee of Presidents. In fact, in the former case, it is a matter of describing the nature of the task required of the holder of the post, and the institution is the sole judge in this matter; in the latter case, it is a matter of assessing 'what the job is worth', taking that description into account, and that is indeed a budgetary power: when Article 78 gives the Committee of Presidents the power to fix 'the scale of *their* salaries' (the salaries of servants), it is clearly a question of doing so with regard to the nature of the posts which they occupy and by comparison with the other posts, and not solely in terms of an abstract, arbitrary salary scale. That is the only way in which the Committee can carry out its role and achieve what has been described as harmonization, that is, to make the same

classification in relation to posts which are of the same kind and which correspond exactly to the same tasks in two different institutions. In short, that solution seems to me to be the only one which complies both with the letter and the spirit of Article 78. Moreover, it seems that the first paragraph of Article 25 of the Community Staff Regulations must indeed be taken to mean this when it states: 'The list of posts corresponding to each grade in each of the categories and in each of the services shall be determined *in accordance with Article 78 of the Treaty*'.

For the sake of completeness, I should like briefly to finish with my list:

As regards operation *No (8)* (fixing of the number of posts per grade, *always taking into account the job-description*), I think that, for the same reasons, this is one of the powers of the Committee of Presidents; it is clear that, if it is done in advance, a merely general determination of the staff complement of a whole institution can only be arbitrary and exclusive of any serious budgetary supervision. In that case, the Committee could once again think of exercising a certain supervision only when it had occasion to 'adopt' the general estimate; but for the reasons which I have already stated at the beginning of my opinion, such supervision would be futile in practice, and moreover it would not be the supervision required by Article 78, since that article formally provides that supervision must be undertaken *in advance*. Doubtless, the supervision of the staff complement *by grade* must be reconciled with respect for, and the need for, the organization of the service as conceived by the institution; the operation of the service must not be made *impossible in practice* under the pretext of economies and budgetary supervision, which would constitute a sort of 'misuse of powers', but that is a problem pertaining to all financial supervision in all the administrations in the world, and it must usually be resolved in a spirit of reciprocal understanding, of the existence of which there can be no doubt in this Community: to deny that power, on the other hand, might prevent any rational achievement of a scheme of economies if ever it should prove necessary, or, what is worse, might reduce it to overall abatements proportional to the budget of each institution, thus perpetrating injustice under an appearance of equality of sacrifice. On this point, however, I must admit that a solution contrary to the one which I favour seems to have been accepted by the Staff Regulations in the second paragraph of Article 25.

Finally, operation *No (9)*, which relates to individual measures of establishment, can clearly come only under the authority of the institution alone.

Having thus in a sense 'dissected' the operations and apportioned the corresponding spheres of authority, I have now to consider a difficult problem of which Professor de Soto was well aware, namely the *way in which* authority *is to be exercised* in those respective spheres. In fact, as I have said, it is not possible in practice to demand that each of those operations should give rise to separate decisions, and on the other hand it must not be forgotten that the Committee of Presidents, although having powers of its own, *is not an institution of the Community*. It exercises its powers over internal matters, but it is doubtful whether it can publish or notify decisions which are directly applicable to third parties and enforceable of themselves: at all events, it has never done so up to the present time. It follows from this that decisions which it may take must be incorporated into the regulations or individual decisions of the various institutions upon which they are binding, and the legality of the measures adopted by the Committee of Presidents can be discussed, should the need arise, only 'through' them, as is the case in this action. Moreover, it could not be otherwise, since the only basis for litigation in this field is Article 58 of the Staff Regulations, which gives jurisdiction to the Court only over any dispute 'between the *Community* and any person to whom the Staff Regulations apply', and since under Article 6 of the Treaty 'the Community shall be represented by its *institutions*' of which the Committee of Presidents is not one.

For those reasons, in his opinion Professor de Soto suggests a formula for a 'concurring opinion', which to tell the truth is very in-

genious. He suggests that the Committee of Presidents exercises the powers which it derives from Article 78 through such a process.

Despite its flexibility, I do not think for my part that that process can be accepted, because a concurring opinion allows only a negative power, a right to veto, to be exercised. It is my opinion that, in the cases in which it has authority, the Committee of Presidents must exercise its authority *fully*. For example, when it determines 'the number of the Community's servants', it must fix that number positively and not confine itself to refusing its assent to proposals made to it until those proposals comply with its wishes. Similarly with the problem before the Court: when dealing with the proposals of the institutions involving the classification of posts into various grades, it must be able where necessary to *alter* that classification and draw up a new table itself, provided only that it does not alter the job-description of the posts without the agreement of the institution.

That does not prevent the final decision which it arrives at from being notified to the institutions, which must then comply with it by drawing up the table which must appear in the annexes and which may alone be relied upon against third parties.

However, if it was open to me to express a wish in this connexion, I should say that in my opinion it is most desirable that stricter formal habits should be adopted both by the Committee of Presidents and by the institutions. It could be desired in particular that, at the end of its proceedings, the Committee of Presidents should draw up *formal* decisions, duly notified to the institutions and separate from the minutes. For their part, the institutions should, where appropriate, *refer to* the decisions thus adopted by the Committee of Presidents in their own decisions; when their own decisions take the form of regulations (such as the annexes to the Staff Regulations and the tables incorporated therein), they should be published either in the Official Journal or, failing that, by being posted up on the premises, or by any other means of publication having the effect of validly and officially informing the staff of them. In that way the nature of the activity of the Committee of Presidents as being *internal to the Community* could be reconciled with the need for a scheme clearly exhibiting that each was exercising its respective powers. Thus Professor de Soto's preoccupations with regard to litigation could be laid to rest, since only the decisions of the institutions would be subject to appeal, which would not of course prevent the parties from discussing the legality of *every part of* those decisions, including such parts as might originate with the Committee of Presidents.

In short, I am of the opinion that the individual orders of 12 December 1955 were illegal, in that they were issued before the Committee of Presidents had exercised its power to draw up the correspondence between posts and grades, and that for that reason they could be withdrawn.

It remains to be considered whether the further decisions of the Assembly are themselves valid from the point of view of prior action on the part of the Committee of Presidents. In that connexion, it does seem to emerge from the whole of the proceedings of the Committee of Presidents which took place during 1956 that, having prompted the drawing up of a harmonization table (which was the work of the Delvaux Committee), the Committee of Presidents adopted it, if only by finding that the institutions were in agreement over that table. To tell the truth, the table was never formally approved, since the Committee of Presidents was concerned above all—and quite properly so—to attain agreement between the institutions, and since certain points remained in abeyance. None the less, signs of the exercise on its part of a power of decision of its own can occasionally be seen: for example, the following appears in the minutes of the 19th meeting on 15 June 1956: '... (3) As regards the Court of Justice, the Committee of Presidents *agrees* that the administrator should be classified in Grade 3 under the title 'Administrator of the Court of Justice acting as Assistant Director'. At all events, it is not disputed that the fresh classification of the five applicants, which moreover they refused, *corresponded to the part of the harmonization table upon which agreement had been reached and which had been approved by the Committee of Presidents.*

On all those grounds, I am of the opinion:

That the Court should dismiss Application 7/56; and
That the costs should be borne by the applicants.

III – The applications for damages (Cases 3 to 7/57)

Here again, there are questions of admissibility and problems going to the substance of the case.

As regards *admissibility,* the Assembly has raised an objection of inadmissibility based on the fact that the applications for damages are submitted *in the alternative* to the single application for annulment and are inconsistent with it, since they presuppose that it will be dismissed. It is objected that that procedure is not correct.

I do not see why that should be so. It frequently happens that litigants commence several sets of proceedings, either before the same court, or before different courts, and there is nothing to prevent this in the case of autonomous procedures on separate legal grounds and when the actions also have a separate legal subject-matter. It is quite usual for civil servants, for example, to claim annulment of administrative decisions which concern them and, on the other hand, compensation for the damage which they consider that the administration has caused them. In such a case, it can happen that, by virtue of its retroactive effects and of the obligations with regard to *restitutio in integrum* which it may entail, annulment deprives the conclusions in the action for damages of their subject-matter; but this is in the nature of any pleading in the alternative. The fact that in the present case the conclusions in the alternative formed the subject-matter of separate applications may be explained by the difference between the legal nature of an action for damages and that of an application for annulment.

On the substance of the case, after the long explanations which I felt obliged to go into regarding the application for annulment and after the excellent oral arguments which the Court heard yesterday morning, my own comments will be short.

As in any action for damages, three questions have to be answered: (1) Is there any liability entailing reparation? (2) If the answer is in the affirmative, is there any damage? (3) If so, what is the amount of it?

(A) *Liability*—The applicants did not specify the *legal basis* upon which they were founding their applications for damages. In support of their case, they referred only to the seventh paragraph of Article 34 of the Staff Regulations of the Community, which provides for the granting of certain pecuniary allowances to servants assigned non-active status following the abolition of posts. That provision is clearly not applicable *of itself* in the present case: in my opinion (and apparently also in that of the applicants, when they speak of 'analogy', it can be used only as an *indication* in assessing the damage suffered by the persons concerned if it is considered that they were the victims of a wrongful breach of the link between them and the administration. No express reference was made to Article 40 of the Treaty.

However, although the legal basis of the applications was not specified, the *legal grounds* on which they rest seem fairly clear, especially following the oral arguments.

In my view, there are *two* legal grounds: that of wrongful breach of contract, and that of wrongful act or omission. In fact, counsel for the applicants spoke of 'a breach' of the links between the administration and its servants 'having the nature of a wrongful act or omission', and he also spoke of the 'fraudulent conduct', of the 'excessive haste', of the 'recklessness' and of the 'capriciousness' with which the administration acted towards the applicants: all of those are indeed factors which constitute a wrongful act or omission on the part of the Community such as to make it liable under Article 40, which is the ordinary law of quasi-delictual liability in the Treaty.

(a) *On the contractual ground,* it cannot be

found that there is any liability. In fact, the alleged breach could only be that which occurred in July or October 1956. As the Court has clearly seen, no breach of a *contractual link* was involved at that time: it was a question of a unilateral *decision* relating to the establishment of servants under the new Staff Regulations, by which the Assembly altered the classification as effected by the orders of 12 December 1955. The contract was *renewed,* whereas the first decision (the one upon which the applicants rely as having created rights in their favour) *terminated it as from 31 December 1955:* it cannot be said in these circumstances there was a breach of the contract, and moreover the pecuniary allowances received by the applicants from 1 January 1956 are clearly much higher than the amount of the termination allowances provided for in the contracts. Finally, the decision in Case 1/55, *Kergall* v *Common Assembly,* does not apply here, since there was no refusal to renew the contracts, and no refusal to apply the Staff Regulations to the persons concerned in disregard of the 'eligibility' therefor which they had acquired before the Staff Regulations came into force.

(b) Therefore the true—and only—legal ground is that of a wrongful act or omission based on Article 40. The question is, 'what wrongful act or omission?'

I unequivocally refuse to accept as constituting a wrongful act or omission such of the conduct of the Assembly as concerns the decision of July-October 1956, at least in so far as that decision is considered as being lawful. A moment ago I maintained that it was lawful, first, because it could lawfully reverse the orders of December 1955 and, secondly, because it had itself been adopted in accordance with the classification drawn up by the Committee of Presidents, at least as far as the posts occupied by the applicants were concerned. An administration can—sometimes—incur liability by virtue of adopting a lawful decision, but it certainly cannot do so on the ground of a wrongful act or omission.
On the other hand, the question arises to its fullest extent *in relation to the orders of December 1955,* which in my submission the Court should find to be illegal.
I think, and I frankly say, that there is such a wrongful act or omission; I do not describe it as 'serious', or 'gross', or 'unjustifiable', all of which expressions have a significance in legal language which in no way corresponds to the facts of the case. There were neither fraudulent manoeuvres, nor any intention to cause harm—quite the contrary! On the other hand, the error of law which underlies the decision is, as has been seen, most excusable, and the Assembly has *never varied* its argument in law. The true wrongful act or omission does not lie there. In reality, it lies in a general mode of behaviour which counsel for the applicants has described, this time in terms of which I fully approve, as 'excessive haste', 'recklessness', and 'capriciousness'. Doubtless those responsible for that excessive haste were to a large extent the Assembly, as a deliberative body, which had for a long time been continually pressing for the implementation of the Staff Regulations, and also the staff themselves, whose conduct certainly had the same purpose.
However, this does not lessen the liability of the institution as such. In truth, two courses of action were possible: either, placing its reliance upon what it thought was its right, and judging the moment opportune, the Assembly on its own could have adopted the decisions concerning its servants without waiting any longer and, to be consistent with itself, could have implemented its own Staff Regulations; or (which was obviously the reasonable course), while persisting in its reservations regarding its autonomous powers concerning the classification of posts (in accordance with its argument in law), it could have *voluntarily* accepted to take part in efforts to reach harmonization with the other institutions, under the aegis of the Committee of Presidents. I say that that was the reasonable course, because it is the only one which complied with the very idea of the Community, if that idea is to embody a living reality and not only the abstract legal concept contained in Article 6 of the Treaty; subsequently, the President of the Assembly came to understand this very well. But then, quite clearly, individual implementation should not have been proceeded with

before the completion or an attempt at the completion of the harmonization work: to take any other course of action was to end in deadlock.
Therefore I am of the opinion that the Assembly was guilty of a 'wrongful act or omission' which renders it liable under Article 40 of the Treaty.

(B) *Reparation for the damage*—In this connexion, the question is the extent to which the wrongful act or omission caused the applicants an injury in respect of which they are entitled to reparation.
First of all, there can be no question of considering as an injury capable of conferring entitlement to reparation *anything which relates to the effects of the decision of July-October 1956* (at least, if the Court, as I submit, considers it to have been lawful) that is, the consequences of the lowering of the applicants' administrative status on account of the new classification which was applied to them (and which they refused). No one can be entitled to the perpetuation of an illegal situation the illegality of which has been duly acknowledged, or to pecuniary compensation for being deprived of the advantages which would have resulted in the future from such a situation: in reality that would be to sanction vested rights resulting from the initial illegal decision, whereas, *ex hypothesi,* there were no such rights because of the very illegality of that decision. It appears to me that no doubt is possible on this point.
The only question which was open to discussion in this connexion concerns the *retroactive* regularization which the administration could have contemplated effecting, that is, if it had caused *repayments* to be made corresponding to the difference between the salaries pertaining to the new classification and the salaries actually received pursuant to the first decision. In that case, it would have been possible to think of *offsetting* those repayments by the grant of an allowance for a wrongful act or omission. However, that question does not arise, since the administration did not act in that way, and following the new classification which was refused by the persons concerned, refrained from establishing them, re-applied their contract and did not issue any repayment order against them.
Does that mean that the applicants have suffered no damage in respect of which they are entitled to reparation? I do not think so. It is clear that they have suffered what could be termed a *perturbation* in their lives due to the course of action adopted by the Assembly, which I have described and which I see no purpose in recapitulating. I think that, in the circumstances in which the events of this case have taken place, this must be seen as an undoubted injury, albeit one which is difficult to assess.

(C) *Amount of the injury*—If account is taken of all the measures adopted by the Assembly with regard to the persons concerned, it can only be considered that *the material parts* of the injury have been to a large extent made good. In this connexion, it is enough to point out that not only, as I have said, was no repayment demanded from them, but (1) they *received the offer* of the continuation for two years of the pecuniary status resulting from the first classification in the form of a differential allowance; (2) in fact, despite the refusal of this offer and their being kept under contract, that contract was declared to have been extended until 31 December 1956, and (3) finally, by virtue of the suspension of implementation granted by the administration, the persons concerned still continue today to benefit from the Staff Regulations resulting from the orders of 12 December 1955. Moreover, it must also be pointed out that no evidence whatever has been submitted concerning the reality and importance of the 'offers' which the applicants allegedly received from outside the institution and which they were allegedly led to refuse by the more advantageous classification on which they believed they were entitled to count.

On the other hand, I think that there is in this case a *non-material factor,* the effects of which are not capable of being fully compensated by the material advantages granted by the Assembly, *however great they may be.* I think that the Court must itself sanction the course of action adopted by the Assembly, and that a judgment dismissing the applications, on whatever grounds it was

based, would not fully attain that result. For that reason, borrowing a concept which finds frequent application in the case-law of certain member countries, I think that the Court could order the Assembly to pay symbolic damages of 1 franc.

I am of the opinion, regarding Cases 3 to 7/57:

That the Common Assembly should be ordered to pay each of the applicants the sum of 1 franc;

That the Court should dismiss the other conclusions in the applications;

That the costs should be borne in their entirety by the Common Assembly.