SEPARATE OPINION OF JUDGE MOSLER

[Translation]

I. I subscribe to the operative provisions of the Opinion, as well as to the considerations upon which it is based. In particular, I am in agreement with the Court's definition in paragraph 35 of the question raised by the request, for the purpose of interpreting its legal scope, and I share the view there expressed that a precise determination of the questions submitted to the Court results from the requirements of its judicial character.

The Court arrives at the key passages of its reasoning (paras. 43-49) and at the operative provisions of the Opinion on the basis of an outline of the various opinions that have been expressed concerning the legal nature of the relationship between the World Health Organization (WHO) and Egypt with respect to the Regional Office at Alexandria which, though starting from different interpretations, all finally arrive at the same conclusions. The Court simply states these arguments, without giving preference to any of them (paras. 38-42). It rightly concludes that these partly divergent interpretations all lead to the conclusion that the contractual régime created between 1948 and 1951 still constitutes the foundation of the legal relationship between Egypt and the WHO (para. 43).

The method of reasoning followed by the Court is, in my view, justified in the present case by the duty incumbent upon it as a judicial institution to define the legal position as precisely as possible in the operative provisions of the Opinion as well as in its essential reasoning, even if some of that reasoning contains alternatives each of which, even if incompatible with others, forms part of a logical concatenation that leads to common conclusions.

On the other hand, the vote of a Member of the Court in favour of the Opinion inevitably leaves open the question of what his own view may be of all the problems raised by the request. I consequently propose to explain which of the alternatives described in the Opinion is, in my view, the one that should be adopted.

II. In paragraphs 11-32 of the Opinion, the Court has examined in detail the factual and legal context in which the request was submitted to it. On this basis, and adopting the definition of the problem to be decided to be found in paragraph 35, I can summarize my position as follows :

1. The 1951 Agreement was concluded "for the purpose of determining the privileges, immunities and facilities to be granted in Egypt by the Government to the Organization, to the representatives of its Members and to its experts and officials". Its provisions are based on numerous host agreements concluded between international organizations and States for

the purpose of regulating the legal status of the organization and of its premises, services and staff in the State in question.

For example, the Agreement between Switzerland and the WHO, which to a large extent served as the model for the Agreement between the WHO and Egypt, had as its object "to regulate the legal status of the World Health Organization" (*UNTS,* Vol. 26, p. 333) ; the matters dealt with in it are, *mutatis mutandis,* the same as those in the 1951 Agreement with Egypt.

In so far as the object and purpose of other agreements are the same as those of the Agreement between the WHO and Egypt, they may be taken into consideration in interpreting the latter. This method of interpreting a treaty by reference to another treaty, although it is sometimes contested, has rightly been admitted in the decisions of the Court. The closest case to the one with which we are at present concerned and in which the Court followed this method is that of the Advisory Opinion concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (IMCO) (*I.C.J. Reports 1960,* p. 150 at pp. 169 f.).

From a general comparison of host agreements it will be seen that some of them expressly mention the establishment of an office or service in a precisely defined town or place. Most of them are silent on this point, or make only a passing mention of where the headquarters has already been established, or is to be established through a process falling outside the written provisions of the agreement. On the other hand, the permanent establishment of an office or service is the raison d'être of a host agreement, which regulates in detail the legal status of such office or service. The establishment, the operation and the maintenance of the office or service in fact constitute the very essence of a host agreement. Apart from a few provisions concerning the legal position of the organization itself with respect to and within the State in question, the agreement would be pointless unless the office or service was in existence before its conclusion or was established pursuant to it. There is, in consequence, a close link between the establishment or the continued existence of the office or service on the territory of the State and the agreement which regulates its legal status with respect to and within the legal order of that State. This relationship is sometimes, as in the present case, made plain in the preamble and in certain provisions of the agreement which, by mentioning the office or service, presuppose its existence. But such a connection also exists in cases where the agreement is merely silent with respect to the town or place where the office or service is, or is to be, situated.

These considerations apply to the 1951 Agreement which was concluded with a view to the integration of the Alexandria Bureau with the WHO as its Regional Office for the Eastern Mediterranean.

It emerges from the historical background to the Agreement that at the time when the Government of Egypt took the necessary steps to offer the site of the building to the WHO, and when the Bureau's entry into service within the structure of the WHO was being contemplated, the project had

passed the preliminary negotiation stage and had reached the stage of the negotiation of a definite text. The measures which culminated in the placing of the Bureau at the disposal of the WHO ran parallel with the preparation and negotiation of the Agreement (see paras. 17-23 of the Opinion). It was of course expected on both sides that the negotiations would succeed ; Egypt had not made any reservation that would have enabled it, if necessary, to resume control of the office. It does not seem that it was envisaged on either side that this expectation might be disappointed. But it cannot be concluded from the silence of the parties that the arrangement which resulted in the integration of the Bureau was an independent and definitive agreement. My interpretation of the events in question and of the probable intentions of the parties leads me to the conclusion that the arrangement whereby the Bureau's entry into operation as the Regional Office of the WHO was brought about was a stage in more extensive negotiations for the establishment of the Bureau as a regional institution of the WHO, with all the factual and legal consequences that entailed. The establishment of the seat of the regional organization in Egypt consequently cannot be dissociated from the agreement regulating its legal status. I infer therefrom that the commencement of operations of the Regional Office in Egypt effected on 1 July 1949 by the bilateral arrangement between Egypt and the WHO was not, from a legal point of view, a definitive act consummated on that date and unrelated to the 1951 Agreement but that, on the contrary, that Agreement also contemplated the siting of the Regional Office in Alexandria. I consequently conclude that the negotiations between the WHO and the Egyptian Government must be regarded as a continuing process leading first of all to the transfer of the Bureau to the WHO as from 1 July 1949 and concluding with the entry into force of the Agreement of 25 March 1951 (cf. also para. 39 of the Opinion).

It follows that every provision of the Agreement capable of concerning the seat is applicable to any transfer of the Office from Egypt.

2. It is uncontested that, from the point of view of an international organization's constitution, the closure or transfer of its principal or regional headquarters is to be effected pursuant to decisions taken by the competent organ of such organization ; but the implementation of such a decision is subject to conditions resulting from the legal relationship between the organization and the State concerned.

It follows from the considerations set forth above that the transfer of the Office would deprive the 1951 Agreement of its principal object. Since such transfer would be tantamount to the extinction of the Agreement, it could be effected either by common action of the parties, cancelling that earlier common action which was expressed in the Agreement, or by a unilateral denunciation by the WHO provided the Agreement expressly or impliedly permits such denunciation.

(a) Section 37 reads as follows :

> "*Section 37.* The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other

concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice."

This formula is identical with that in numerous host agreements concluded by the WHO and other international organizations. It is also to be found in the model agreement between the WHO and a "host government". As already mentioned, the 1951 Agreement is based on the Headquarters Agreement between the WHO and Switzerland, Article 29 of which is entitled "Modification of the Agreement". The wording of that article is identical with that of Section 37, but the three sentences which the section contains are set out separately in Article 29 in three numbered paragraphs (*UNTS*, Vol. 26, p. 333, at p. 347). The draft agreement dated 16 October 1946 contains the same text. It does not seem to have been discussed between the parties.

The clause originates in the Agreement concluded between Switzerland and the International Labour Organisation concerning the latter's legal status in Switzerland, in which, in Article 30, the same text is to be found as in Article 29 of the Agreement with the WHO, set out in the same order of paragraphs (*UNTS*, Vol. 15, p. 380). As is well known, this wording was the result of a compromise between those negotiating on behalf of Switzerland and of the ILO respectively.

As was abundantly argued in the written and oral statements, this compromise and its antecedents lend themselves to divergent interpretations of the common intention of the parties as expressed in the text which eventually became Article 30 of the Agreement. If the term "revision" be understood in accordance with the ordinary meaning to be given to it (cf. Art. 31, para. 1, of the Vienna Convention on the Law of Treaties), it suggests the idea of introducing partial changes in a situation, agreement or status, rather than the abolition or complete and total cessation of the situation, treaty or status in question. Nothing is to be found in the context which might justify an interpretation departing from the ordinary meaning. I doubt therefore whether Section 37 is applicable in the present case, since I do not think that to cease to apply the Agreement can be construed as a *revision*. I admit that the word *revision* may in certain circumstances have the meaning of a radical and total change in a treaty ; but the second sentence in Section 37, which speaks of "modifications", prevents my interpreting the revision referred to in the first sentence of that same Section in this broader sense.

(b) If what seems to me the more plausible interpretation is followed, that of not applying Section 37 to denunciation without a prior attempt at revision, one must nevertheless not lose sight of the application of the principle of general international law that, even in the absence of a denunciation clause, the parties to an international agreement may bring its operation to an end if it appears from an interpretation of the provisions

of the agreement as a whole, and from its inherent meaning, taking into account the legitimate interest of the parties, that its revocation must be possible.

This argument finds reinforcement in Article 56 of the Vienna Convention on the Law of Treaties, and the considerations which have led the International Law Commission to insert the same text in a corresponding article of its draft on treaties between States and international organizations. These two articles state a rule permitting the denunciation of any international agreement which contains no provision on this point, provided that:

(i) it is established that the parties intended to admit the possibility of denunciation or withdrawal ; or
(ii) a right of denunciation or withdrawal may be implied by the nature of the treaty.

The negotiations on the provision that was to become Article 30 of the Agreement between Switzerland and the ILO show that it was Switzerland's intention to reserve the possibility of denunciation. There is nothing to suggest that the compromise wording, which envisages denunciation only after an attempt at revision, implies that Switzerland renounced any possible exercise of denunciation (even though it is not mentioned in the Agreement), should this be required for an orderly winding-up of the ILO Headquarters in Switzerland. The Agreement between the WHO and Egypt lends itself to an analogous interpretation. It cannot be presumed that the WHO intended to commit itself for ever neither to transfer nor to close its Office. Its Constitution did not allow it to commit itself without any possibility of changing the seat of a regional organization (cf. Art. 44 of the Constitution).

I consequently conclude that by virtue of a right deriving from the provisions of the Agreement as a whole and not from its inherent meaning, either party may put an end to its operation under conditions which now fall to be determined.

3. If my view be adopted, that the Agreement may be denounced by virtue of a rule which is implied in it, the consequences which result therefrom with respect to the modalities for its termination are as follows :

(a) Since an implied rule by its very nature contains no provision concerning the modalities of its application, the parties must get in touch in order to enter into consultations and negotiations with respect to the time-limits and measures which may be appropriate for enabling the transfer to be effected in an orderly manner. The parties' obligation to reach an understanding with respect to the consequences of denunciation results from the contractual link between them, which requires them to work out in common a solution to the problems arising from the application of the Agreement where no express rules are laid down to govern the matter. The Court has analyzed the parties' responsibilities in this connection in paragraph 48 of the Opinion and has specified them in paragraph 1 of the operative provisions.

(b) Although I support the operative provisions and what is stated in paragraph 49, I would like to add one observation in the event of the attempt to arrive at a solution by common agreement being unsuccessful. In that case, the text of Section 37 may furnish a solution. To be sure, it is clear from the wording of that provision that the denunciation which is there envisaged is limited to cases where prior negotiations undertaken after a request for revision have failed. But the contracting parties nevertheless envisaged the eventuality of bringing the Agreement to an end as the result of its denunciation. Furthermore, they agreed, again in another context but nevertheless within the framework of the Agreement, on a notice-period of two years, which they considered appropriate for bringing the Agreement to an end. This interval between notice of denunciation and the date on which it takes effect was considered proper and reasonable for taking the necessary steps to wind things up. The common intention of the parties as thus expressed gives an indication of how to carry out that same operation even where it is the consequence of a right of denunciation deriving from a different legal basis, namely, the implied rule which I have just stated. On this hypothesis, the notice-period of two years provided for in Section 37 can be applied by analogy.

I thus reach the conclusion that if the parties do not manage jointly to solve the problems caused by a transfer, either of them has the right to give notice of denunciation of the Agreement, to take effect two years later.

(Signed) Hermann MOSLER.