SEPARATE OPINION OF JUDGE AGO

[Translation]

I. I subscribe to the Court's conclusions so far as the reply to be given to the request for advisory opinion is concerned. Those conclusions define the mutual obligations incumbent on the organization and host State in the present case, in terms which largely correspond to what I myself have found, though on the basis of grounds and reasoning which in part are different.

In its Advisory Opinion the Court has made a series of pertinent observations concerning the "establishment" of an international organization in the territory of a host State. I would however have liked it on this occasion to have given a precise and complete definition of the very concept of such establishment, for I am convinced that this would have been the best approach to the problem which the Court had to face.

An international organization is like a State, a subject of international law, but it is one which enjoys limited international legal capacity, and in particular, unlike a State, it is a subject of law which lacks all territorial basis. Its "establishment" in the territory of a given State is therefore a *conditio sine qua non* of its actually functioning as an organization, carrying on its activities and fulfilling its object and purpose. Furthermore, for this condition in turn to be met, it is indispensable that the appropriate mutual consent should crystallize between the organization in question and a State which is ready to offer it the possibility of establishing its headquarters – or a subsidiary seat – in its territory. Here, though it is certainly necessary that the international organization, following deliberations by the organs competent in the matter under its own constitution, should manifest a desire to establish its seat within the territory of a certain State, this is clearly not sufficient by itself. That intention has to be matched by an intention manifested on their side by the organs competent under that State's constitution to accommodate the organization permanently within its territory, and to create there the conditions essential to its functioning. "Establishment" is therefore necessarily the subject of a bilateral agreement between the "organization" as subject of law on the one side and the "host State" as subject of law on the other, for, while it is true that an international organization cannot be compelled to establish itself, contrary to its own wishes, in the territory of one State rather than another, neither can a State be compelled, if it is not so disposed, to welcome an international organization within its territory and permit it there to carry on, in the

conditions indispensable therefor, the activities laid down in that organization's constitution. In making this observation, I am simply enlarging in different language on the very appropriate remarks to be found in paragraph 37 of the Advisory Opion.

However, this is by no means the last word on the subject of the nature and specific content of the concept of establishment. That concept is a "legal" concept, and the term "establishment" is a term of law. It would be erroneous to understand establishment, a legal fact, as being the equivalent of physical installation, because this may lead to the mistaken belief that establishment has come about simply because a *de facto* installation has taken place. As to the content of this concept, there is no doubt that it involves quite a number of elements. Among these are some with entirely or partly physical connotations, even though sometimes enshrined in legal provisions : e.g., the designation of the town fixed upon as seat and, within it, of the locality where the organization is to have its office and of the buildings, whether existing or to be erected, in which it is to be installed ; likewise the timing and planning arrangements for this installation, and its eventual execution. But there are also elements of a legal nature, which are surely no less indispensable. These include, in particular, the determination of the legal status which the organization is to enjoy in the territory of the host State. The determination of this legal status is, in my view, the essential element of establishment *qua* legal fact : for upon it depends the possibility of the organization's taking up its functions and carrying on its activities in full independence, without any interference by the host State, while at the same time respecting the latter's territorial sovereignty.

I consider it necessary to stress this aspect, because in my view it would be absurd to imagine that the establishment of an organization in the territory of a State could come about without the conditions enabling it to exist and operate there as an international organization having first been defined. It is such a definition which makes possible that co-existence of two subjects of international law in one and the same territory which establishment essentially connotes. To take as an example the concrete case with which the present Advisory Opinion is concerned, I would point out that, had the Egyptian State insisted on certain conditions which at one stage in the negotiations it wished to see included in the agreement designed to fix the Organization's legal status in Egypt, and had the Organization, for its part, persistently regarded them as unacceptable, such an insuperable disagreement would obviously, it seems to me, have resulted in there not being any "establishment" whatever. The existing installation of the WHO Regional Office in the premises of the Alexandria Sanitary Bureau would then have been no more than a fact provisionally accomplished on the basis of an expected agreement which had ultimately failed to materialize : a fact destined to vanish no less rapidly than it had arisen.

This example aside, I would add that, for the purpose of defining the concept of establishment, it makes, to my mind, no real difference whether

its various component elements all materialize at the same time and, as sometimes happens, are lumped together in a single written instrument, or appear separately in a gradual process, with the written instrument being reserved for the final and conclusive element thereof, namely the determination of the legal status to be conferred upon the organization in the territory of the host State. This happens no less frequently and is, in fact, the present case.

It is, one may add, still more evident in the second of the two hypotheses that "establishment" is by nature a complex legal fact, and those Members of the Court who share the viewpoint described in paragraph 39 of the Advisory Opinion have made a point of stressing that in the present case the agreement governing the establishment in question, while, in the Court's words, a "single transaction", is none the less composed of various particular understandings which all converge to one goal and which, if they did not co-exist, could scarcely have effect. I believe in fact that even where the legal act covering all the various aspects of the establishment consists in a single instrument, the establishment as such remains a complex legal fact, this being intrinsically its nature. At all events, and quite aside from the search for the most appropriate theoretical definition, what really matters is that the establishment of an international organization in the territory of a host State postulates the eventual co-existence of a number of elements which, though distinct, all contribute to the crystallization of a single legal fact, which has no real existence unless and until it is completed and perfected by one indispensable element, namely the determination of the organization's legal status.

In sum, the establishment of an international organization in the territory of a host State is, to my way of thinking, a legal fact, emerging from bilateral action, possessing the characteristics and content indicated above, one which – as the Advisory Opinion points out in paragraph 43 – connotes the inception of a lasting bilateral relationship between two separate subjects of international law which are destined to co-exist in the territory of the same State.

II. It follows that the existence of this bilateral relationship, and the nature of the legal fact which underlies it, have to be kept in view whenever either party shows signs of intending to bring this legal relationship to an end. From that point of view it makes no appreciable difference whether such an intention is evinced by the organization wishing at a given moment to transfer its seat elsewhere, or by the State wishing to put an end to a presence in its territory which it is not disposed to countenance in future. Whatever the situation, I find it obvious that the party contemplating the cessation of the legal relationship in question is under an obligation to inform the other of its intention and of the reasons why it has come to harbour it, and that both jointly must then review in good faith the causes having prompted one of them to seek the termination of that relationship, consider the possibilities of overcoming any difficulty that may have arisen

and, failing these, seek ways and means of bringing the hitherto existing establishment to an end in the most appropriate manner and with the least detriment to the interests of either. For it must always be borne in mind that, objectively speaking, given the very nature of an international organization and the requirements for its functioning, any change of seat on its part – whether involving its headquarters or a major office – has to be regarded as an exceptional event which can hardly be accomplished without more or less profound and protracted disturbances in the lives of both the organization and the State which has been affording it hospitality.

Paragraph 43 of the Advisory Opinion very properly emphasizes that the legal relations between an international organization and the host State constitute a special régime. The paragraphs which follow it treat at length of the obligations to consult, negotiate and co-operate which this special régime implies, defining them in correct though cautious terms. At the same time they draw attention to the solid foundation for these obligations which already exists in the principles of general international law concerning the subject of international organizations, as well as what may be called the common principles emerging from the whole body of conventional instruments concluded between States and international organizations. I have myself nothing to add on this subject. On the other hand I would like to make a few further observations with regard to the treaty-law specifically binding upon the WHO and Egypt, for I am one of those who consider that the provisions of the Agreement of 25 March 1951 also apply to the eventuality of a transfer from Egypt of the seat of the WHO Regional Office for the Eastern Mediterranean.

I do not propose to dwell at any length on the question whether the Agreement of 25 March 1951 is a "host agreement" *(accord de siège)*. I find it hardly feasible to contradict the opinion concordantly expressed by the two contracting parties on this point. On page 357 of Volume I (1948-1972) of the *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board* the successive stages in the conclusion of this Agreement are set out under the heading "Host Agreement with the Government of Egypt" ("Accord de siège avec le Gouvernement de l'Egypte" in the French *Recueil*), and the same title is used on pages 356-358 for the Agreements of the same nature – based moreover on the same model – concluded with the Governments of Switzerland, India, the Phillipines, France and Denmark. The expression "host agreement" was also used in the correspondence of 1950 between the Government of Egypt and the WHO Regional Office concerning the negotiation of that Agreement ; it was as a "host agreement" that the instrument was defined in the Royal Decree submitted to the Egyptian Parliament and received parliamentary approval. In addition to these formal pointers, others may be derived from an examination of the substantive content of the agreement.

For this purpose it is enough to take account of such essential articles as Article III, which guarantees the Organization and its principal or subsidiary organs "independence and freedom of action" as well as "absolute freedom of meeting, including freedom of discussion and decision", or again Article X, directed to guaranteeing Egypt against any prejudice to its security resulting from the activity of the WHO. These are undeniably provisions characteristic of an agreement whose primary purpose is to render possible and effective the "establishment" of that major organ of the WHO known as the Eastern Mediterranean Regional Office and not merely, as some would have it through rather facile deduction from its title's short list of purposes, to heap the enjoyment of certain privileges and immunities upon an "establishment" already realized and perfected from every point of view. I therefore find it evident that the 1951 Agreement must be seen as a component element of that "establishment" of the WHO Eastern Mediterranean Regional Office in Egypt whose nature as a legal fact I have been striving to make plain. It must in fact be seen as the final and conclusive element in the whole process covered by the expression "establishment", the element which contributes to it the indispensable definition of the legal status of the organization in the territory of the State in which it establishes its seat. I do not think that I need expatiate further on this point.

The point on which, on the other hand, I consider it desirable to make some further observations relates to the divergence of views – so amply and efficiently summarized in paragraphs 40 and 41 of the Advisory Opinion – which has come to light among those who, while agreed in recognizing that the 1951 Agreement formed part of the single though composite transaction whereby the establishment of the WHO Regional Office in Egypt was accomplished, nevertheless remain divided with respect to one specific question. Their views in fact part company on the question whether the provisions of Section 37 of Article XII of the Agreement can be considered applicable in the event of a transfer of the seat of the Office from Egypt.

I recognize that the wording of Section 37 is not a model of clarity. At first sight it can certainly lead the reader to hesitate as to the answer to the above question. On reflection, however, considerations of two kinds lead me to think that the answer must be a positive one.

(a) In the first place, I must say that a careful consideration of the text, such as it is, of Section 37 suffices in itself to persuade me that it is highly improbable, not to say impossible, that the parties can have intended to provide so grave a sanction as the unilateral denunciation of the entire Agreement merely to meet a possible failure to agree upon a partial revision concerning this or that provision. Denunciation by Egypt of the 1951 host agreement would thus leave the Eastern Mediterranean Regional Office, after expiry of the period laid down in the final provision of Section 37, totally deprived of its special legal status and, consequently,

of the conditions indispensable for its functioning [1]. The maintenance of its establishment in Egypt would manifestly become impossible. The inescapable conclusion, therefore, is that in granting each other a power of unilateral denunciation the contracting parties had in view difficulties of a major kind liable, on account of their serious nature, to affect the desire of the Organization or of the host State to maintain the Regional Office's presence in Egypt.

I would add that the transfer to another country of the seat of the Regional Office would not be a step which must necessarily lead to the extinction of the 1951 Agreement. The parties might possibly decide that it should remain in force in respect of those provisions not bound up with the existence in Egypt of the Regional Office, as well as such provisions as might be added pursuant, precisely, to an agreed revision. For example, the replacement of the Regional Office by a mere field office, or by an Egyptian office linked to the Organization by some form of collaboration, might serve as an occasion for so acting. In any case, it would be going much too far, in my view, to regard the applicability of Section 37 to the eventuality of one of the parties wishing to transfer the seat of the Regional Office from Egypt as ruled out because such a transfer would exceed the theoretical bounds of any "revision" of the Agreement.

The same kind of consideration impels me to make just one further remark. I would find it hardly explicable if, in the process of contracting an agreement, the parties, on specifically broaching in one of its clauses the question of its possible denunciation, should have chosen to settle it but partially and deliberately left a vague possibility of denunciation under general international law to subsist alongside the one textually provided for in the agreement.

(b) Secondly, I would point out that the question which has been raised in this connection could not in any event be resolved without a close examination of the origins of the clause embodied in Article XII, Section 37, of the Agreement of 25 March 1951.

What those origins were has been abundantly stated and proved in the course of the proceedings. The World Health Organization merely borrowed, quite consciously, from Article 30 of the Agreement between the Swiss Federal Council and the International Labour Organisation, adopted and signed on 11 March 1946 "to regulate the legal status of the Organisation in Switzerland", the wording which it first employed in the clause it inserted in Article 29 of the Agreement concluded with the Swiss Federal Council "to regulate the legal status of the WHO" in July-August 1948. The WHO subsequently reproduced it, practically unchanged, in

[1] It should not be forgotten that at the time Egypt had not even become a party to the Convention on the Privileges and Immunities of the Specialized Agencies, which it was to ratify only later ; furthermore, this general convention does not contain clauses comparable with those to be found in an agreement for the establishment of an organization in the territory of a host State, such as Articles III and X of the 1951 Agreement.

Section 37 of Article XII of the 1951 host agreement with Egypt and in the corresponding provisions of the host agreements concluded with other States accepting regional offices on their soil.

The underlying provision – that in the ILO/Switzerland Agreement – had itself had a somewhat unusual origin. Instead of taking place, in the usual way, after the final choice of the seat of the organization, the negotiation of this agreement had, on the contrary, come first. In other words, the legal status of the Organisation was defined by mutual agreement on the basis of the expectation that Geneva would definitely be chosen for that seat. The object of thus anticipating this choice was obviously to enable the ILO administration to tell the Twenty-Ninth Session of the Conference, which was to be held at Montreal in the summer of 1946 and to consider constitutional questions including the location of the Organisation's headquarters [1] : (1) that the Swiss Government had indicated "that the International Labour Office would be most welcome in Geneva at any time", and (2) that, in accordance with the intention it had evinced on the same occasion, of guaranteeing, through an agreement with the Organisation, "the full independence necessary for the effective discharge of its international responsibilities" [2], the Swiss Government had in fact already, on 11 March 1946, concluded an agreement with the ILO confirming this intention.

Now, as is briefly mentioned in paragraph 41 of the Advisory Opinion, there were two conflicting approaches during the negotiations between the two parties, who were respectively represented by two jurists, the late lamented Wilfred Jenks and Paul Guggenheim. Seeking to protect the agreement from any possible reconsideration by the host government and, above all, to ensure the permanent stability of its establishment in Switzerland, the Organisation proposed the insertion of a provision to the effect that the agreement might only be revised by common accord between the parties and that accordingly no unilateral denunciation should be allowed. The Swiss Government, on the other hand, preferred to keep open the possibility of such denunciation. The parties accordingly settled on a compromise, and it is that compromise which is found enshrined in the wording of Article 30 of the ILO/Switzerland Agreement.

In the light of these facts, and given the respective standpoints of the contracting parties, there are, I find, two interlinked conclusions which must be drawn, namely that they were both agreed upon a power of unilateral denunciation strictly contained within the limits of the provisions of Article 30, and that the term "revision" as used in this clause was understood in its widest connotation and thus covered in particular the

[1] A question that had become pressing owing to the need to amend the article of the Constitution which provided that the ILO should be established at the seat of the League of Nations.

[2] See, in connection with all this, the reports of the Conference Delegation on Constitutional Questions on the work of its first session, held in London from 21 January to 15 February 1946 (*Constitutional Questions*, Part 1, para. 32, p. 24).

eventuality of the radical revision which would be entailed by a change in the seat of the organization. Considering, therefore, that the WHO plainly intended to follow the model so conveniently afforded by the 1946 ILO/Switzerland Agreement when it came to conclude its own Agreement with the same State in 1948, as also in proceeding to the conclusion of all its other host agreements, I find it truly difficult to imagine that this formula acquired in what, so to speak, were derivative instruments some other meaning and scope than it possessed in the underlying model.

The reader of these conclusions will readily appreciate that I have not been persuaded by the reasoning of those who argue that the provisions of Section 37 in Article XII of the WHO/Egypt host agreement of 25 March 1951 must be regarded as totally irrelevant to the questions laid before the Court in the present case.

Being *lex specialis,* a treaty provision in force between two parties has inherent priority over such rules of a general nature as may also be applicable between them. It consequently remains my view that consideration of the provision in question ought to have been given pride of place in the process by which the Court reached its opinion in the case. At the same time, I would not for a moment deny that it was useful, indeed needful, to turn to general international law in order to seek in the overall principles and rules governing the law of treaties and the law of international organizations a confirmation of the conclusions drawn from those of treaty-interpretation. It is moreover a fact that, in the present case, the parties' mutual obligations are finally expressible in the same terms, no matter from what source derived. One could scarcely detail the obligation of consultation laid down in the second sentence of Section 37 more effectively in respect of the present case than has been done in paragraph 49 and the operative part of the Advisory Opinion. Even where the obligation of notice stated at the end of Section 37 is concerned, it must not be forgotten that this provision is obviously a residual rule intended to provide a fair yardstick for application solely if it proves impossible to agree upon the "reasonable period of notice" mentioned in subparagraph *(c)* of the Court's definition of the parties' obligations. It was from this standpoint that I felt able to concur in the conclusions of the Court and the Advisory Opinion in which they are set forth.

(Signed) Roberto AGO.