SEPARATE OPINION OF JUDGE GROS

[Translation]

Having begun my study of the questions put to the Court by an examination of the competence of the World Health Assembly, it seems to me to be useful to outline the considerations, additional to – and sometimes more far-reaching than – the reasoning in the Advisory Opinion, which have led me to agree to its conclusions, in particular those of paragraphs 48 and 49 and the operative clause.

There is nothing hypothetical about the question put to the Court ; the documentation supplied by the WHO, and other documents known to the public, show that it involves a request by almost all the member States of the Eastern Mediterranean Regional group that the World Health Assembly should decide to transfer the Alexandria office from Egypt to another country in the region – not that there has ever been any criticism of the performance by that office of its tasks, but solely for a reason of foreign policy which is totally unrelated to health affairs (cf. paras. 31 and 33 of the Opinion).

Such being the factual situation, the legal "cause" for the request for transfer of the Alexandria office is a political decision by a group of member States of the WHO, a counter-measure directed against Egypt which this group of States seek to have the other member States ratify, by deciding, in the World Health Assembly, the transfer of the office from Egypt (cf. the views of the Government of Egypt on this point during the discussion in Geneva on 23 May 1979, in document A32/B/SR/13, p. 6). When these facts are known throughout the WHO as well as to all well-informed members of the public, it seems to me that the Advisory Opinion should put them on record as an initial element for the legal analysis it is requested by the WHO to carry out. Since the real question is whether the legal status of the Alexandria office vis-à-vis the WHO contemplates and permits of a decision by the World Health Assembly to transfer it, and if so on what conditions and according to what modalities, the first part of the problem is to decide whether the WHO can, within the limit of its competence as a specialized agency, confirm political measures which concern only a limited number of States, when at no time has any health objective been invoked.

This fundamental background has been left aside by the Court, and it seems to me that the Advisory Opinion thus given is incomplete. To reply that there are conditions to be observed by the WHO and by Egypt to enable the hypothesis of a transfer to be put into effect "in an orderly manner" (para. 49 of the Advisory Opinion) by-passes the fundamental question of the lack of competence of a specialized agency to decide on

measures which do not fall within the functions attributed to it, and which by their nature are foreign to the objectives defined in its constitution.

It is of course not enough to assert that since the measures contemplated in the World Health Assembly are political actions, the Court cannot in any way take them into account. This is not a new problem. The Court has already had to study it, and has found that most of the questions of law put to the Court in requests from international organizations for advisory opinions had their origins in a political context. Thus the Court, on any request for advisory opinion, distinguishes the political motives from the object of the request, which must be directed to a legal question (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* pp. 61 and 64 ; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* pp. 70-72 ; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* pp. 155 and 157). In this case the Court therefore had to concentrate its examination on the actual object of the request, i.e., the question of the competence of the World Health Assembly to take a decision, by way of political sanction, to transfer the Alexandria office from Egypt, at the request of the other States in the region. Thus it is not a question of the grounds for the withdrawal, but of the content of the decision. The conditions in which the competence of an assembly is exercised are not without relevance for an examination of its power of decision ; this is shown by all decisions of courts entrusted with judicial control of decisions taken by the organs of an international institution. Thus examination of the competence of the World Health Assembly is, in my opinion, the initial element of the problem.

The extent of the discussion in 1962 and in 1971 *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971)* showed that the Court on a number of occasions has not hesitated to examine the lawfulness of measures taken by the General Assembly of the United Nations (cf. dissenting opinion, *I.C.J. Reports 1971,* pp. 331-332 and 339-341) ; the rule is the same for any international organization which is entitled to request an advisory opinion and in fact does so.

It has also been suggested in the present case that the Court should not deal with anything other than the object strictly described in the question put ; the Advisory Opinion gives a decisive reply on this question by pointing out that the "true" question is the legal status of the relationships between the WHO and the Alexandria Office, and with what has become the classic quotation from the second sentence on page 157 of the 1962 Advisory Opinion :

> "It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions ; the Court must have full liberty to consider all relevant data available

to it in forming an opinion on a question posed to it for an advisory opinion."

I would add to this an earlier sentence in the same Advisory Opinion :

> "The Court . . . cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (*I.C.J. Reports 1962*, p. 155.)

As in 1962, "the question put to the Court is intertwined with political questions", but that is not a reason for refusing to examine the question whether the Constitution of the WHO, and the international agreements concluded by the Organization, confer competence on the World Health Assembly to decide what is contemplated for the Alexandria Office.

Naturally, the political motivation is not in itself the subject of the Court's examination, and the Court should devote itself solely to the question of the extent of the competence of the World Health Assembly to take a particular decision to transfer the seat of a regional office, defined by the Court as the "conditions and modalities" under which a transfer might be contemplated, in accordance with the applicable rules of law.

Like all "specialized agencies", within the meaning of Article 57 of the United Nations Charter, the WHO has special functions concerning public health (Chap. II, Art. 2, of its Constitution), with the objective of "the attainment by all peoples of the highest possible level of health" (*ibid.*, Chap. I, Art. 1). The States parties to that Constitution enumerated nine principles in its preamble, and undertook to co-operate "to promote and protect the health of all peoples" ; there is not a single one of these nine principles which is not exclusively directed to concern for public health. The structure of the WHO is organized as is usual in specialized agencies : an Assembly holding an ordinary session once a year, an Executive Board, and a Secretariat. Whichever of these organs may be concerned, power is only conferred upon them by the Constitution "to further the objective of the organization" (Art. 18 *(m)*, functions of the Health Assembly). The competence of the Organization was defined, by the States which set it up, as described by them in a text which is an international treaty, and as such is subject to the examination of the Court in the present case. Article 18, which sets out 13 functions of the World Health Assembly, connects them all with the "field of health".

In this context, Organization/member States, what was the sequence of events from the outset between the WHO and Egypt with regard to the Alexandria Office ? The Advisory Opinion gives a detailed history of these relationships in paragraphs 11 to 27, and deduces conclusions therefrom in paragraphs 43, 48 and 49. I would merely add that the true significance of the actual events becomes apparent if one recalls that from 1946 to 1948 there was as yet no WHO, but an Interim Commission, a sort of general staff without troops, which met in five sessions from 1946 to January 1948,

and that if the 1946 Constitution in Article 54 decided that "as soon as practicable" it should integrate "the Pan American Sanitary Organization . . . and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution", it is difficult to believe that the draftsmen, highly qualified specialists in international health problems and for the most part former delegates to prewar organizations, drafted a text which had no real content. The Pan American Organization is the only one specifically named, but if it had been unique the terms "all other . . . organizations" would have had no meaning. It has however been contended that the Alexandria Bureau was not, in 1946-1949, an inter-governmental regional organization, that Article 54 could not apply to it, and that for that reason the WHO could not have "integrated" the Bureau. The documentation supplied to the Court demonstrates that from 1938 to 1946 the international and regionally representative character of the Bureau was maintained. It should however also be added that the argument mentioned above is flawed by an error as to the powers of a court concerning assessment of the common action of the WHO and Egypt to "integrate" the Bureau between 1948 and 1951. The Court must decide on the legal status of the Bureau as it was set up by the parties (the Court has given a good account of this in paragraph 16 of the Opinion ; the World Health Assembly resolution of 10 July 1948 is clear, since it uses the terminology of Article 54 of the Constitution, and formally cites it). To say in 1980 that the WHO could not integrate the Bureau in 1949-1951 implies that the common action of the WHO and Egypt during that period, carried out according to Article 54, was unlawful and ought retroactively to be held void. Historians enjoy rewriting history, but the interpretation proposed here would amount first of all to denying what is evident from the facts, i.e., the action of integration which did take place – rightly or wrongly, that is all that critics could say of it – and furthermore to expunging the texts which established the legal status of the relations between the WHO and Egypt, the Bureau being declared to be disqualified *ab initio* after 30 years of functioning and of express recognition by the WHO as regional office. It would be unheard-of for an international tribunal to be able to "annul" agreements regularly concluded in the view of the parties, and applied between them without controversy, on the grounds of an original non-constitutionality. At no time during the WHO discussions on the possibility of a transfer of the Alexandria Office was there any question of any failure whatever by Egypt to comply with the obligations it undertook vis-à-vis the WHO under the status governed by their common action culminating in the 1951 Agreement. On the contrary, even the proponents of the transfer recognized that the Office was not in question as regards its action as a regional organ.

When the WHO Constitution came into force on 7 April 1948, the WHO wished to incorporate into itself the experienced sanitary organizations which had survived the war period, 1939 to 1945, in order to begin to function otherwise than on paper. Furthermore, there was more to this procedure, described in Article 54 of the Constitution, than a merely

provisional and *ad hoc* approach. For lack of staff and finance, the WHO could not hope to replace the innumerable research centres, national or international, official or private, which had long been occupied with health problems throughout the world. The WHO itself describes its role as one of assistance to national health services, of stimulating efforts to eradicate diseases, of ameliorating hygiene, developing research and co-operation, etc. ; primarily its role is one of encouragement, information and co-ordination. The negotiations for the incorporation of the Alexandria Bureau, and those for the association with the Pan American Committee during the very first years of the WHO, were not the only implementations of this kind. The International Agency for Research on Cancer, established in 1965, works in collaboration with the WHO without being a subsidiary organ thereof ; its Statute has been published as Appendix 2 to *Basic Documents*, 1980 edition, published by the WHO. It is the 11 Participating States of the Agency who undertake the financial responsibility, and an independent governing Council, made up of a representative of each Participating State plus the Director-General of the World Health Organization, directs its work. Similarly, a recent effort to combat six serious tropical diseases has been directed towards co-operation between States, with voluntary participation. The role of the organs of the WHO must be understood within this varied body of formulae for encouragement of the most effective efforts, thus reducing to the level of an illusion the theory, which was put forward in the World Health Assembly and before the Court, of the "sovereignty" of that Assembly. In the performance of the weighty task defined in the preamble to its Constitution, the WHO depends on the conjunction of goodwill on all sides ; it has concluded numerous agreements with organizations or with States for this purpose. Any international agreement is binding on the parties ; the WHO should respect the agreement which it concluded with Egypt for the Alexandria Office.

In the absence of a "super-State", each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the functions which its constitutive charter has defined. This is thus a *compétence d'attribution*, i.e., only such competence as States have "attributed" to the organization. It is a misuse of terminology to speak of the sovereignty of the WHO or the sovereignty of the World Health Assembly ; States are sovereign in the sense that their powers are not dependent on any other authority, but specialized agencies have no more than a special competence, that which they have received from those who constituted them, their member States, for the purpose of a well-defined task. Anything outside that competence and not calculated to further the performance of the task assigned lies outside the powers of the organization, and would be an act *ultra vires*, which must be regarded as without legal effect. In my view, that is the situation shown by the dossier in the present case ; the World Health Assembly has been called on by certain member States to take a decision to transfer a regional office without any

ground of health being asserted, by way of political sanction, and such an action does not fall within its competence.

One last point on this question. It has been contended that, in the absence of an international tribunal competent to pass upon the legality of the acts of an international organization, the only control of the legality of the decisions of the World Health Assembly is through the votes of the Organization's member States on each decision, that once a majority has been obtained the decision is binding on all. This is not a correct description of the powers of the WHO Assembly. The World Health Assembly has not the power to set aside by unilateral decision treaties it has concluded with a member State. In order for this to be the case, the WHO would have to be a super-State, the very notion of which has previously been rejected by the Court. A decision of the WHO which is contrary to international law does not become lawful because a majority of States has voted in favour of it. The WHO and, in particular, its Assembly were created by the member States in order to carry out that which they had decided to do together, and that alone ; member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act. Consequently nothing is settled by a decision taken by a majority of member States in matters in which a specialized agency oversteps its competence. Numbers cannot cure a lack of constitutional competence. In 1962 the Court stated : "Save as they have entrusted the Organization with the attainment of these common ends, the member States retain their freedom of action." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 168). The coming together of member States' delegates in the World Health Assembly does not make of that Assembly anything more than what the Constitution specifies : an assembly to consider and express itself with respect to health objectives. That which those State delegates could not do in isolation, i.e., set aside agreements between an organization and a member State, they similarly cannot do when meeting together in an assembly the sole common objectives of which relate to health.

It is of course regrettable that in no organ of the WHO and at no level did a concern for the legality of the step of withdrawal lead to its being properly studied and considered. The dossier transmitted to the Court by the WHO does not meet the obligations laid down in Article 77 of its Constitution, which provides that the Director-General "shall make arrangements for the presentation of the case before the Court, including arrangements for the argument of different views on the question". It has not been possible to learn sufficiently from the documents supplied, unsupported by any commentary, what was done within the Organization during the critical period 1948-1951 nor what precisely was the attitude with respect to the integration of the Alexandria Bureau of the authorities who controlled the WHO's actions. Nevertheless, the then Director-General was perfectly conversant with the *travaux préparatoires* on Article 54

of the WHO Constitution and with the intention to "integrate" regional organizations, and the Head of the WHO Legal Division had followed all the negotiations up to and including the conclusion of the 1951 Agreement. Questions put by the Court or by its Members were met by generalities or evasions (for example, the answers to the questions I put on 28 October and 18 November 1980 concerning the problems that had arisen since January 1978 in relation to a transfer of the WHO's Geneva headquarters). An international administrative service is under an obligation to maintain such conditions as ensure the proper functioning of the organization, which implies a duty to give detailed study and consideration to problems which raise a question of the constitutional and legal propriety of an action of the organs of that organization. At the first meeting of the Working Group "on the question of a transfer of the Regional Office for the Eastern Mediterranean Region" on 29 May 1979, the Secretariat stated that "it would be very important to draw a line between the political role of the members and the neutral role of the secretariat". The entire proceedings before the Court have been marked by this misconception both of the obligations of the member States of a specialized agency and of the role of an international secretariat. The member States are bound by the obligation which they assumed in the Constitution to act within the WHO only with health objectives in view, whilst the Secretariat must carry out the same task of working for health, and there cannot be any question of "neutrality" for it when it is a matter of applying the Constitution and ensuring respect for the international obligations which bind the Organization. The same uncertainty of views is reflected in the text which the Director-General submitted to Committee B at its meeting on 24 May 1979 (doc. A 32/B/SR/14, p. 3), whereby it would be decided to undertake a study of the effects of the implementation of the transfer "taking necessary steps for its implementation", which seems to regard a decision to remove the Office as a foregone conclusion even before the aforementioned study of its consequences had begun. (Compare the detailed study carried out by the United Nations Food and Agriculture Organization on the problem of its Regional Office for the Near East, submitted before the Conference session in November 1979, which, on 28 November, adopted resolution 20/79 emphasizing the need to find "a solution which would respect the interest of all Member Nations" and requested the Director-General to use "his best and unfettered judgment".)

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Having thus set forth the reasons why I consider that the Court ought to have gone further than it has in the reasons it gives for its Opinion, it remains for me to indicate very briefly the reasons why I was able to vote for its provisions.

The absorption of the Alexandria Bureau within the WHO through the "common action" of the WHO and Egypt, in conformity with Article 54 of the Constitution, was a valid operation comprising several successive acts

culminating in the 1951 Agreement, which is applicable to any difficulty that may arise between the parties with regard to the Office's operations or its legal status. To bring the Regional Office's existence in Egypt to an end does not fall within the discretionary power of either party ; that which was done by "common action" can only be undone by agreement. If it is not possible to reach such agreement, either party may secure the termination of the 1951 headquarters agreement under Section 37, which confers a right of revision and denunciation. In the first place, the semantic discussions concerning the word "revise" seem to me irrelevant, since in any event Section 37 allows a request for modification of the Agreement and, in the event of a refusal, the denunciation of the agreement. It is carrying formalism a long way to say that only a request for partial revision is possible ; it would, in fact, be easy to demand a modification unacceptable to the other party and then to denounce the Agreement. Secondly, the WHO has itself recognized the following chain of events in the history of its negotiation of the headquarters agreement with Egypt : the 1951 Agreement follows the model draft host agreement drawn up by the WHO, which is copied from the WHO's Headquarters Agreement of 1948-1949 with Switzerland, which is based on the ILO's Headquarters Agreement with Switzerland of 11 March 1946. And with respect to this last-named agreement, the Court has seen extracts from the report of the ILO delegation to the 1946 Montreal Conference, in which Mr. Wilfred Jenks, who negotiated the text of the Headquarters Agreement with Switzerland, concluded that in his view "the arrangement is terminated by mutual agreement" (*Constitutional Questions*, para. 32). The 1951 Agreement is a headquarters agreement, based on the model host agreement prepared in the WHO, and its provisions were intended to regulate the legal status of the Regional Office established in Egypt. Both the WHO and Egypt have, from the very beginning until the present day, taken the view that the 1951 Agreement between the WHO and the host country was concluded essentially to lay down the reciprocal obligations of the parties arising from the establishment in Egypt of a regional office. The agreement of the parties perfected the various actions which contributed to that establishment with a headquarters agreement regulating the operations of the Office in Egypt and, from a legal point of view, making them possible. A transfer of that Office makes the "revision" of the Agreement necessary because it deprives it of its object and purpose by moving the seat of the office. The agreement of the parties on the Alexandria "establishment" would be broken. Section 37 is a clause that protects the parties so that the provisions of the headquarters agreement may be implemented in an orderly manner ; should any particular difficulties arise, "revision" is provided for and, *a fortiori*, where a party wishes to put an end to all the obligations it has contracted and without taking account of what the other party has provided nor of the services it has rendered.

Examination of the legal relations established between the WHO and Egypt has shown the existence of a series of acts, distinct but connected by their common objective, namely the establishment of a WHO Regional

Office in Egypt, and which culminated in the conclusion of the headquarters agreement of 25 March 1951, which specified the legal status of the Office, of this regional headquarters, of its staff and, above all, of its activities in Egypt. The WHO devoted much attention between 1949 and 1951 to the conclusion of the 1951 Agreement, which was indispensable to it in order that the Regional Office might function ; not only was it the WHO which proposed the text, but it carefully discussed it with all the competent bodies of the Egyptian State. As between the two parties, the series of acts which led to the establishment of the Regional Office constitutes an agreement to bring about a continuation of the health activities of the Alexandria Bureau, integrated by common accord as a Regional Office ; this agreement is enshrined in a treaty approved by the two parties in proper form. Implementation in good faith of the undertakings entered into by the WHO with Egypt for the purpose of integrating the existing Alexandria Bureau within the WHO requires that all the provisions of the 1951 Agreement be applied, including Section 37, which makes possible an examination of the problem of the revision and, possibly, the termination of the treaty, whilst respecting the legal obligations assumed by the parties.

The Advisory Opinion did not adopt this view, but did summarize it in its analysis of the opinions which have been advanced, and an endeavour has been made to amalgamate those opinions on a basis which was necessarily that of the lowest common denominator.

That being the case, it is with the benefit of all the foregoing observations that, taking into account the precise legal obligations enshrined in the operative clause of the Opinion, I have been able to subscribe to it. Above all, I maintain that the WHO Assembly lacks competence to terminate the Regional Office's legal status unilaterally for reasons other than the health objectives laid down in the Constitution of the WHO.

(Signed) André GROS.