DISSENTING OPINION OF JUDGE MOROZOV

1. I voted against the Advisory Opinion because in substance it is an attempt to involve the Court to a greater or less extent in the handling of the serious political conflict existing in the Middle East between a number of States, and particularly States Members of the World Health Organization, relating to the question of the transfer of its Regional Office for the Eastern Mediterranean from the territory of Egypt for political reasons.

On the other hand, even if we take into account the viewpoint of those who consider that the WHO request relates to a purely legal question (a viewpoint I do not share), the Advisory Opinion is a clear and inappropriate intervention in the question of the implementation of any possible decision to make such a transfer, which is incompatible with the fact that all aspects of that question, including the conditions and modalities of a transfer, belong, in accordance with the WHO Constitution, to the exclusive internal competence of the Organization itself. Accordingly I could not accept the pretext on which the Advisory Opinion is based, that the Court allegedly should give that Opinion because the request was submitted to it by the WHO with reference to Article 65 of the Statute.

2. Exceptional care is taken in the Advisory Opinion to avoid any reference to the root of the political conflict between the member States of the WHO, which is revealed in the course of the discussions in the World Health Assembly and in the documents presented to the Court in accordance with Article 66, paragraph 2, of its Statute. Reference to these will immediately show that the political conflict among the States members of the WHO does not only relate to the political dispute in the framework of the WHO, but is a part of a political dispute between States which has an extensive character. In this connection I would refer in particular to the passage in the Written Statement made to the Court by the Government of the Syrian Arab Republic in which that conflict is correctly characterized as follows :

> "The cause of the increasingly tense and troubled situation obtaining in the Eastern Mediterranean Region, which has made it necessary to transfer the Regional Office, lies in the agreements signed at Camp David in the United States of America on 27 September 1978. These agreements have prevented the region from achieving the comprehensive and true peace, called for by the Arab States and now finally recognized by the whole international community (see, for example, resolution No. 7/2 of 29 July 1980, Seventh Special Session of the United Nations General Assembly)."

It should be recalled that the proposal for the transfer of the Eastern Mediterranean Regional Office was adopted by the votes of 19 States of the region concerned, the only vote against being that of Egypt.

3. The character of the political conflict existing between member States of the WHO, which is in particular the background to the political confrontation within the WHO, is of great importance in connection with the correct answer to the question of whether or not the Court should give an advisory opinion in the current case, taking into account Article 65, paragraph 1, of its Statute, which provides that :

> "The Court *may* give advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." (Emphasis added.)

Thus the Court has a *discretionary* right to give or not to give an advisory opinion even if the question is a *legal* one and presented by a duly authorized body.

In the situation of the present case the Court was not obliged to accept the request and to give an advisory opinion upon it.

The Statute of the Court conferred upon it freedom of choice, as mentioned above, to give an opinion or to refrain, specially for the purpose of avoiding the embarrassing situation with respect to the exercise of its judicial functions which would arise if, under the pretext of giving an advisory opinion, the Court were to be involved to a greater or less extent in the handling of a dispute between States which has a definite political character.

4. There are a number of points I would like to emphasize in connection with paragraph 33 of the Advisory Opinion, in which we may find the reasoning in the current case relating to the jurisprudence of the Court.

First, the Court recognizes that the situation in the present case is one "in which political considerations are prominent . . .". In this connection it endeavours to justify its incorrect approach *inter alia* on the ground that

> "it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution".

It should however be stressed that the WHO's request did not ask for any interpretation of the WHO Constitution, and was limited to a reference solely to interpretation of Section 37 of the 1951 Agreement. This formula, therefore, as well as the preceding sentence in the Advisory Opinion, which reads

> "that jurisprudence establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the

> normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request"

should be considered as an additional justification of the alleged existence of the right, claimed by the Court in the present case, not to reply to the request submitted and instead reply to a question drafted by itself.

Secondly, reference is also made in justification of the disregard of the purely political character of the present case, to the cases concerning *Conditions of Admission of States to Membership in the United Nations* (1948), *Competence of the General Assembly for the Admission of a State to the United Nations* (1950) and *Certain Expenses of the United Nations* (1962).

It is regrettable that this unconvincing argument should now be advanced as justification for interference by the Court in political disputes between States, namely the incorrect approach to advisory proceedings demonstrated by the Court in the past in those three cases. I have no wish to re-open consideration of the substance of the advisory opinions mentioned above, but would merely stress that it was pointed out at the time that the Court should not have accepted those requests for advisory opinion, which related exclusively to political disputes between member States of the United Nations. The attempt to resurrect this same incorrect approach after 30 years is unacceptable.

Thirdly, it is however not without interest for the current case to observe that in each of these three cases the Court did finally give a reply to the request for opinion in the form in which it was submitted.

5. In the World Health Assembly only 53 delegations voted in favour of the request, 46 against, and there were 20 abstentions. Those who opposed the United States suggestion for involving the Court in the matter stated that they considered the request as a political manoeuvre with the purpose of *delaying by any means* settlement of the transfer of the Office, at least for two or three years. They demonstrated that the text of Section 37 of the Agreement of 1951 between the WHO and Egypt on the question of the privileges, immunities and facilities to be granted to the WHO as a whole, and particularly to its Eastern Mediterranean Office, is so clear that there is no need for any interpretation, and that the Agreement could not be applicable to the possible decision to transfer the Office.

Their opponents objected and stated that Section 37 of the Agreement should be applicable in the above-mentioned case.

6. The outcome is very well known. The request was submitted to the Court in the following terms :

> "1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?

2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?"

7. It is in vain that one may try to find in the Advisory Opinion a positive answer to Question 1, and it goes without saying that only after a positive answer to that question would it be logical to attempt to answer Question 2. Instead of replying to Question 1, the Advisory Opinion confines itself to a description of the existing differences of interpretation, and to the statement in paragraph 42 that :

> "*Whatever view may be held on the question whether the provisions of Section 37 are applicable to the case of a transfer of the Office from Egypt, the* fact remains that certain legal principles and rules are applicable in the case of such a transfer." (Emphasis added.)

The last part of this sentence ". . . the fact remains that certain legal principles and rules are applicable in the case of such a transfer", even if it is combined with paragraphs 49, 50 and 51, does not mean that the Court gives an affirmative answer to Question 1 of the request. Paragraph 42 of the Advisory Opinion even criticizes severely the text of the original request. It is there said that ". . . the emphasis placed on Section 37 in the questions posed in the request distorts in some measure the general legal framework in which the true legal issues before the Court have to be resolved".

8. What legal miracle has happened in the course of the drafting of the greater part of the Advisory Opinion? Why is it that, while avoiding giving an affirmative answer to the question of applicability of Section 37 of the 1951 Agreement, the Advisory Opinion at the same time has in a very detailed way itself established the above-mentioned "legal principles and rules"?

This happened because the request which was really submitted to the Court by the WHO was put aside, and replaced by a new text of the request in the following terms :

> *"Under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected ?"*

But this question, as I have said, was not submitted by the WHO ; it emerged as a result of very detailed research into numerous circumstances which are not related either to the Agreement of 25 March 1951 or to the legal provisions regulating the relationship between the WHO and Egypt in connection with the activities of the Eastern Mediterranean Regional Office. I consider that all this should be qualified as an attempt to give a legal appearance to an artificial basis on which paragraphs 48 and 49 of the Advisory Opinion, as well as the whole of the operative clause, were grounded.

Furthermore, the statement that the Court "decides to comply with the request for advisory opinion", in the first paragraph of the operative part, as well as the reference to "the event specified in the request" in paragraph 2 of the operative part, does not change the substance of the situation. In reality what the Court is doing is to "comply with" its own drafting of the request.

9. I would like to spare the reader of my dissenting opinion any exhaustive analysis of all the arguments used in the Advisory Opinion for justification of such a more than unusual exercise of the judicial competence of the Court to give an advisory opinion. I therefore limit myself to a few remarks.

10. The clear substitution in the Advisory Opinion of a new question for the question put in the request was also explained by the wish of the Court "to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction", for which reason, it is said, "it must ascertain what are the legal questions really in issue in questions formulated in a request". The Advisory Opinion continues :

> "a reply to questions of the kind posed in the present request may, if incomplete be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization" (para. 35).

By way of justification of the substitution of one question for another, reference is made to the cases of *Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956,* and *Certain Expenses of the United Nations, I.C.J. Reports 1962.*

I do not wish, as I have said, to re-open the substance of the Advisory Opinion on the question of *Certain Expenses of the United Nations* (against which five Judges voted). I would merely say that I consider that that Opinion included some element of twisting of the facts and the law. However, for the purpose of my dissenting opinion in the current case I should repeat once more that in the above-mentioned case as well as the case of *Admissibility of Hearings of Petitioners by the Committee on South West Africa* the Court, after all the analysis it made in elaborating its Advisory Opinion did ultimately give its answers to the requests as they were submitted, without an attempt to replace the questions put in those requests with its own text.

11. Reference is made to two advisory opinions delivered by the Permanent Court of International Justice, of the League of Nations, in the years *1923* and *1928.* This was done with the same purpose, that of justifying replacement of the request submitted to the Court by its own text of the question. We read in paragraph 35 that the Court has

> "in some cases first to ascertain what were the legal questions really in issue in the questions posed in the request".

But in reality this sentence should be considered in the context of those

advisory opinions of 1923 and 1928. The former Court in those cases gave its answer, and did not put the texts of the requests aside as the present Court has done. It is hardly necessary to add that the substance of the matter on each of these two cases does not give any grounds for any analogy.

Also from the point of view of language, the expression "to ascertain . . .", used in the Advisory Opinion, does not mean the same as to "change" or "replace" one question by another or to disregard the question as it is. Of course there could not be any objection to the normal method of thinking about, and taking into consideration, all facts related to the question put in the request for opinion ; but what has happened in the current case is something which ultimately suggests an intention by any means to avoid answering Question 1 in the request submitted by the WHO.

12. By way of justification for its substitution of a new question for those put in the request of the WHO, and the elaboration of what are referred to as certain "legal principles or rules", the Advisory Opinion includes particularly a detailed analysis of the activity of the Egyptian Alexandria Sanitary Bureau, which has no relation to the provisions of the 1951 Agreement, or to the question of possible transfer of the Office.

It could not be used as evidence that establishment of the Regional Office was, as is alleged, based not only on Article 44 of the Constitution of the WHO but also on Article 54 of that Constitution.

With the same purpose in view, the Advisory Opinion also includes an analysis of the activity of the United Nations and the various specialized agencies, and an attempt to elaborate some common general principles and rules of contemporary international law concerning the establishment of offices of these organizations, and the conditions and modalities to be observed in the case of transfers of offices of international organizations in general. All such research should be considered as having no relationship to Question 1 of the request of the WHO, even if one is ready to consider that question, in the form in which it was submitted, as a legal one.

13. It is necessary to add that from the very outset Question 1 in the WHO request was based (whether deliberately or not makes no difference) on an incorrect presumption. The question is worded as follows :

> "Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that *either* party to the Agreement *wishes* to have the Regional Office transferred from the territory of Egypt?"

The request was expressed in such specific terms as to incorporate an erroneous presumption, related to an intention to obtain from the Court only a positive answer, and at the same time to give a broad hint on the substance of the matter as to what that positive answer should be.

The error is that the WHO and Egypt in the text of the question were put

on the *same legal footing*, and the same legal rights attributed to them. But the WHO has, in accordance with its Constitution (Art. 44), the right to take the decision on the question of the establishment of its Regional Office or its transfer. The rights of Egypt on the question of location are limited to one vote along with the other States Members of the WHO, as well as one vote in the course of the discussion of any question related to the transfer of the Office.

The special procedure provided by Section 37 of the 1951 Agreement relates only to the question of revision of the character and scope of privileges, immunities and facilities granted by Egypt to the WHO and its Regional Office.

This is so clear that it is virtually recognized in the Advisory Opinion, when we find in it not an answer to Question 1, but to the question elaborated in the Advisory Opinion itself. It would be logical to put a full stop in the Advisory Opinion at this point, because the negative answer to Question 1 of the request excuses the Court from answering Question 2.

14. But instead of that, Question 2 in the Advisory Opinion followed the fate of Question 1, and in its turn was redrafted on the same lines, so as to permit the Court, contrary to the Agreement of 1951, to intervene by its advice in the purely administrative activity of the WHO in the event of the Organization deciding to transfer its Regional Office from the territory of Egypt.

15. It is important to stress that the key paragraphs of the Advisory Opinion (49 and 51) provide certain recommendations to the WHO dominated by the idea of the allegedly *equal legal rights of the Organization and Egypt*, at least as to the question of the conditions and modalities in accordance with which a transfer of the Regional Office from Egypt may be effected. But the same dominating idea of equal legal rights was also expressed, of course with a wider meaning, in the draft resolution submitted by the United States to the World Health Assembly and adopted by the votes of less than half the member States.

The whole collection of very detailed recommendations given in the Advisory Opinion to the WHO does not coincide with the Constitution of the WHO, which provides for an exclusive right of the Organization to take *the decision* relating to the establishment of its Regional Offices, and consequently to their transfer, including all steps for the implementation of the decision concerned. These recommendations do not afford an answer to the request of WHO as it is, and go beyond its framework ; they are an attempt first to establish some legal principles and rules for the activity of international organizations on certain specific occasions, which these organizations could and should decide without any interference in their exclusive competence in accordance with their constitutional instruments, and secondly to use them *ex post facto* for the question of the conditions and modalities of transfer of the Eastern Mediterranean Regional Office from the territory of Egypt.

16. As a matter of principle, the approach to advisory proceedings used in the present Advisory Opinion, when first the Court unavoidably becomes involved to a greater or less extent in the handling of a political dispute between States under the pretext of the request for advisory opinion, and secondly the Court arbitrarily replaces the request submitted to it with a text of its own, is incompatible with the judicial functions of the Court as defined in Chapter IV of its Statute.

(Signed) Platon MOROZOV.