SEPARATE OPINION OF JUDGE ELIAS

After careful reflection I have reluctantly decided to go along with the majority of the Court in accepting the Order just made, but for reasons other than some of those given in the preambular paragraphs.

The present case is probably unique in that it was the first in which an applicant State brought a simultaneous and parallel action to the Court and to the Security Council asking both for legal and political remedies or reliefs. While this step would seem legally admissible, it clearly has its own problems and implications from which my dilemma has arisen. Without embarking here upon any detailed analysis of the relationship between the Security Council and the Court as co-ordinate principal organs of the United Nations under Article 7 (1) of the United Nations Charter, or the correct interpretation of Article 36 (1) of the Statute of the Court, both organs are competent each in its own sphere to deal with the matter submitted to it and come to its own conclusions thereon. The implications of this will be considered presently.

On the question of jurisdiction to entertain the Greek Application for the request for provisional measures of protection in this case, I accept the majority view that it is not necessary to decide the question for the purpose of indicating provisional measures of protection under Article 41 of the Statute of the Court.

*
* *

My main quarrel with the reason apparently given for the Order is that the Greek Government has failed to establish that it has suffered irreparable damage or harm to the continental shelf which would warrant the indication of interim measures of protection within the meaning of Article 41 (1) of the Statute of the Court, which can indicate such measures only "if it considers that circumstances so require". It does not seem to me that the Court, by appearing to lean more towards "preservation" of rights and less towards possible aggravation of the situation or expansion of the dispute, has maintained sufficient balance between the two elements as laid down in the Court's own jurisprudence.

Prejudice to the rights in question has commonly been claimed to consist in either physical destruction or disappearance of the subject-

matter of the dispute. It thus appears that the aggravation or expansion of the dispute must relate to a situation or state of fact which may be worsened by act of one or both parties pending the final decision—that is, something done which might frustrate the giving of an effective decision. On the other hand, consideration of the aggravation or extension is sometimes narrowly construed, as has happened in the present case. The argument in the present case seems to be that even if the Applicant has the rights claimed by it, they could be compensated for in cash or kind if the other side should ultimately be found to be in the wrong. This is not a satisfactory state of affairs.

Despite the Geneva Convention on the Continental Shelf of 1958, Article 2 (2) and (3) of which gives exclusive rights to the coastal State, the Turkish Government granted licences of exploration and exploitation, that is, oil concessions, to its national oil company, without the consent of the coastal State. This would appear to be prejudicial to the right of exclusivity claimed by the latter. The *obiter dictum* sometimes cited from the *Legal Status of South-Eastern Greenland* case (*P.C.I.J., Series A/B, No. 48, 1932*, p. 268) to the effect that even action calculated to change the legal status of the territory would not in fact have irreparable consequences for which no legal remedy would be available (pp. 284 and 288) must be regarded as limited to the peculiar circumstances of that case, in which the Court found "the state of mind and intentions" in both countries were so "eminently reassuring" that there was no need to indicate interim measures "for the sole purpose of preventing regrettable events and unfortunate incidents". To say the least, in both Greece and Turkey today the state of mind and the intentions are far from "reassuring".

The rights in the continental shelf in the Aegean Sea are not like those which hunting and farming rights connote in the *South-Eastern Greenland* case. Nor is there a true comparison between the case of groups of individuals inhabiting diverse parts of a sparsely populated continent over 40 years ago and that of two industrialized nations engaged in competitive exploitation of wasting assets like oil in the crowded Aegean Sea. In the latter, the danger of friction and even explosion is real and the resulting damage might be irremediable.

Rather than follow the *South-Eastern Greenland* formula religiously, it seems to me that a better and more relevant guide in our type of case is to be found in the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No. 79, 1939*, pp. 194-199). There the Court declared that Article 41 of the Statute of the Court:

> "... applies the principle universally accepted by international tribunals ... that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution

of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".

*
* *

There is the continuing danger that, in the face of standing armies on opposite coasts, the frequent surveillance of each other's movements by the overflying of aircraft, and the presence of a large fleet of landing vessels on the Turkish coast facing the Greek islands, an armed conflict will break out. It is, therefore, necessary to discourage both sides from maintaining the continuing harassment and infringement of alleged rights until the settlement of the issues that divide them. That is why the Court is, in my view, along the right lines when it emphasizes this point in paragraph 41 of the Order as follows:

> "Whereas both Greece and Turkey, as Members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above-mentioned resolution, the Security Council has recalled to them their obligations under the United Nations Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 39 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to their present dispute concerning the continental shelf in the Aegean; and whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to take account of the recommendations of the Security Council addressed to them with respect to their present dispute."

It seems to me that there are substantive as well as procedural questions raised in the consideration of the application of Article 41 of the Statute of the Court which require urgent and serious re-thinking by the Court. There is, for instance, the question of preliminary or incidental jurisdiction; and there is also the concept of the judicial criterion concerning aggravation and extension of a dispute. After all, the General Assembly recommended in its resolution 171 (II) of 14 November 1947:

> ". . . that it is also of paramount importance *that the Court should be utilized to the greatest practicable extent in the progressive development of international law*, both in regard to legal issues between States and in regard to constitutional interpretation . . ." (italics added).

*
* *

Finally, the apparent acceptance by the majority of the Court that, once any damage resulting from the exploration and/or exploitation by Turkey is capable of being compensated for in cash or kind, Greece cannot be said to have suffered irreparable damage does not seem to me to be a valid one. It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury by itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the action itself does not seem to matter. This is a principle upon which contemporary international law should frown: might should no longer be right in today's inter-State relations.

Despite some of the reasonings, with which I do not agree, it is important to underline the significance of paragraph 41 of the Order which, as I understand it, spells out as far as possible the substance of the Security Council resolution, which is that both sides should respect each other's rights and do nothing to worsen the situation pending meaningful negotiations and peaceful settlement of the dispute. Since this must be the main objective of the Greek Government's request and since the substance of the Security Council resolution which has thus been incorporated had been accepted as such by the Applicant, the Order has gone far towards achieving the desired result.

The original Greek request, it must be noted, could not in any case have been granted as prayed. Even if the Court were disposed to grant any request, it should have had to be limited to restraining *both* sides to keep the peace until negotiation and settlement. Although the Order speaks the language of refusal it is nevertheless to be hoped that it will serve the cause of peace.

(Signed) Taslim O. ELIAS.