DISSENTING OPINION OF JUDGE HIGGINS

1. I agree with all that the Court has to say as to why it must render this Opinion and much that it has to say on the substance of the question put to it. I have also voted in favour of paragraphs 2 A, 2 B, 2 C, 2 D and 2 F of the *dispositif*. The first four of these findings are in a sense stepping stones to the heart of the matter, which is to be found in paragraph 2 E. I have, with regret, been unable to vote for what the Court there determines.

2. In the first part of its Opinion the Court has rejected suggestions that it should in its discretion decline to give the Opinion on the grounds that the question is not legal, or is too vague, or would require the Court to make scenarios, or would require it to "legislate". But at paragraph 97 of its Opinion, and in paragraph 2 E of its *dispositif*, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts. I find this approach inconsistent.

3. I agree with most of the legal reasoning that sustains paragraphs 2 A, 2 B, 2 C and 2 D. Although paragraph 2 C is negatively formulated, it is clear from the Court's analysis that neither the Charter provisions, nor customary international law, nor treaty law, make the threat or use of nuclear weapons unlawful *per se*.

4. In its Judgment on *Military and Paramilitary Activities* the Court confirmed the existence of a rule of proportionality in the exercise of self-defence under customary international law. It there noted that the Charter "does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 94, para. 176). Importantly, in the present Opinion the Court makes clear (paras. 40-41) that notwithstanding the absence of specific mention of proportionality in Article 51, this requirement applies equally to the exercise of self-defence under the Charter.

5. In the *Military and Paramilitary Activities* case the terms used by the Court already made clear that the concept of proportionality in self-defence limits a response to what is needed to reply to an attack. This is consistent with the approach of Professor Ago (as he then was), who had made clear in the Addendum to his Eighth Report on State Responsibility that the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response (A/CN.4/

318/Adds.5-7, para. 121, *Yearbook of the International Law Commission*, 1980, Vol. II, Part One, p. 69).

6. Paragraph 2 E states in its first part that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of humanitarian law; and in its second part that the Court cannot conclude whether a threat or use of nuclear weapons *in extremis* in self-defence, where a State's very survival was at stake, would be lawful or unlawful.

7. I have not been able to vote for these findings for several reasons. It is an essential requirement of the judicial process that a court should show the steps by which it reaches its conclusions. I believe the Court has not done so in respect of the first part of paragraph 2 E. The findings in a judicial *dispositif* should be clear. I believe paragraph 2 E is unclear in its meaning (and one may suspect that this lack of clarity is perhaps regarded as a virtue). I greatly regret the *non liquet* offered in the second part of paragraph 2 E. And I believe that in that second sentence the Court is declining to answer a question that was in fact never put to it.

8. After finding that the threat or use of nuclear weapons is not prohibited *per se* by reference to the Charter or treaty law, the Court moves to see if it is prohibited *per se* by reference to the law of armed conflict (and especially humanitarian law).

9. It is not sufficient, to answer the question put to it, for the Court merely briefly to state the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to these principles and norms. The Court limits itself to affirming that the principles and rules of humanitarian law apply to nuclear weapons. It finds in paragraph 95, by reference to "the unique characteristics of nuclear weapons" that their use is "scarcely reconcilable" with the requirements of humanitarian law and "would generally be contrary" to humanitarian law (*dispositif*, para. 2 E). At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons. It reaches its conclusions without the benefit of detailed analysis. An essential step in the judicial process — that of legal reasoning — has been omitted.

10. What in my view the Court should have done is to explain, elaborate and apply the key elements of humanitarian law that it identifies. I agree with the Court that certain general principles emanating from the treaties on the law of armed conflict and on humanitarian law are binding, either as continuing treaty obligations or as prescriptions of customary international law. These principles stem from a variety of uncontested sources (by which I mean they are in no way dependent upon the provisions of Additional Protocol I to the Geneva Conventions of 1949

nor upon any views held as to the application of those provisions to nuclear weapons). Particular reference may be made to the St. Petersburg Declaration of 11 December 1868 and to the Regulations, annexed to the Hague Convention IV, 1907, Articles 22 and 23 *(e)*. The Court recalls that the Regulations annexed to Hague Convention IV were in 1946 held by the Nuremberg Military Tribunal to have become part of customary international law by 1939. (Opinion, para. 80.)

11. The legal principle by which parties to an armed conflict do not have an unlimited choice of weapons or of methods of warfare cannot of itself give the answer to the question before the Court. Its purpose is to ensure that weapons, both in the context of their use, and in the methods of warfare, must comply with the other substantive rules.

12. It is not permitted in the choice of weapons to cause unnecessary suffering to enemy combatants, nor to render their death inevitable, nor to aggravate their sufferings when disabled. Equally, the Report of the International Military Commission in St. Petersburg of 1868 made clear that harm to civilians as a means of securing victory over the enemy was not a legitimate right of war; and that even in seeking to disable the military not every method was lawful. There has been, in many of the written and oral submissions made to the Court, a conflation of these two elements. But the Court itself makes clear, in paragraph 78 of its Opinion, that the prohibitions against means of conflict that cause unnecessary suffering is directed towards the fulfilment of the second, progressive, limb — namely, that even in seeking to disable the military forces of the enemy, there is a limitation upon the means that may be employed. These provisions are not directed at the protection of civilians — other provisions serve that purpose. It is in any event absolutely prohibited to attack civilians, whether by nuclear or other weapons. Attack upon civilians does not depend for its illegality upon a prohibition against "superfluous injury" or aggravating the sufferings of men already disabled.

13. If then the "unnecessary suffering" provision does not operate as a generalized prohibition, but is rather directed at the protection of combatants, we must ask whether it still does not follow that the appalling primary effects of a nuclear weapon — blast waves, fires, radiation or radioactive fallout — cause extensive unnecessary suffering? These effects indeed cause horrendous suffering. But that is not necessarily "unnecessary suffering" as this term is to be understood within the context of the 1868 and 1907 law, which is directed at the limitation of means against a legitimate target, military personnel.

14. The background to Article 23 *(a)* of the Hague Regulations was the celebrated provision in Article 22 (which opens a Chapter on the means of injuring the enemy) that the means of injuring the enemy is not unlimited. A certain level of violence is necessarily permissible in the exercise of self-defence; humanitarian law attempts to contain that force

(and illegal uses of force too), by providing a "balancing" set of norms. It is thus unlawful to cause suffering and devastation which is in excess of what is required to achieve these legitimate aims. Application of this proposition requires a balancing of necessity and humanity. This approach to the proper understanding of "unnecessary suffering" has been supported, *inter alia,* by the Netherlands (Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Written Statement, para. 27), the United Kingdom (*ibid.*, Written Statement, paras. 36 ff. and oral statement (CR 95/34)); the United States (*ibid.*, Written Statement, para. 25) and New Zealand (Written Statement, para. 69, submitted in connection with the present request for advisory opinion).

15. Subsequent diplomatic practice confirms this understanding of "unnecessary suffering" as established in the 1907 Regulations. In the Lucerne Conference of Governmental Experts on the Use of Certain Conventional Weapons of 1974, the Experts were agreed both what was meant by "suffering" and by "unnecessary". As to the latter:

> "This involved some sort of equation between, on the one hand, the degree of injury or suffering inflicted (the humanitarian aspect) and, on the other, the degree of necessity underlying the choice of a particular weapon (the military aspect)." (Conference Report, published by the International Committee of the Red Cross (ICRC), 1975, para. 23.)

They were in accord that the concept entailed a "balancing" or "equation" rather than a prohibition against a significant degree or even a vast amount of suffering. Any disagreement rather lay in whether, on the military necessity side of the equation, all that was permitted was to put enemy personnel *hors de combat*, or whether it was permitted also to attack enemy material, lines of communication and resources (*ibid.*, para. 25).

16. It is this understanding of the principle that explains why States have been able to move to a specific prohibition of dum-dum bullets, whereas certain weapons that cause vastly greater suffering have neither been the subject of specific prohibitions, nor, in general State practice, been regarded as clearly prohibited by application of the "unnecessary suffering" principle. The status of incendiary projectiles, flamethrowers, napalm, high velocity weapons — all especially repugnant means of conducting hostilities — have thus remained contested.

17. The prohibition against unnecessary suffering and superfluous injury is a protection for the benefit of military personnel that is to be assessed by reference to the necessity of attacking the particular military

target. The principle does not stipulate that a legitimate target is not to be attacked if it would cause great suffering.

18. There remains unanswered the crucial question: *what* military necessity is so great that the sort of suffering that would be inflicted on military personnel by the use of nuclear weapons would ever be justified? That question, in turn, requires knowing the dimensions of the suffering of which we speak and the circumstances which occasion it. It has been suggested that suffering could be relatively limited in the tactical theatre of war. The Court rightly regards that evidence as uncertain. If the suffering is of the sort traditionally associated with the use of nuclear weapons — blast, radiation, shock, together with risk of escalation, risk of spread through space and time — then only the most extreme circumstances (defence against untold suffering or the obliteration of a State or peoples) could conceivably "balance" the equation between necessity and humanity.

19. To show how it reached its findings in paragraph 2E of the *dispositif*, the Court should, after analysing the provisions of humanitarian law concerning the protection of combatants, then systematically have applied the humanitarian rules and principles as they apply to the protection of civilians. The major legal issues in this context which it might have been expected the Court would address are these: does the prohibition against civilians being the object of attack preclude attack upon a military target if it is realized that collateral civilian casualties will be unavoidable? And in the light of the answer to the above question, what then is meant by the requirements that a weapon must be able to discriminate between civilian and military targets and how will this apply to nuclear weapons?

20. For some States making submissions to the Court, the large number of civilian victims was said *itself to show* that the collateral damage is excessive. But the law of armed conflict has been articulated in terms of a broad prohibition — that civilians may not be the object of armed attack — and the question of numbers or suffering (provided always that this primary obligation is met) falls to be considered as part of the "balancing" or "equation" between the necessities of war and the requirements of humanity. Articles 23 *(g)*, 25 and 27 of the Annex to the Fourth Hague Convention have relevance here. The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack. One is inevitably led to the question of whether, if a target is legitimate and the use of a nuclear weapon is the only way of destroying that target, any need can ever be so necessary as to occasion massive collateral damage upon civilians.

21. It must be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the "military advantage" must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available.

22. It is said that collateral damage to civilians, even if proportionate to the importance of the military target, must never be intended. "One's intent is defined by what one chooses to do, or seeks to achieve through what one chooses to do." (Finnis, Boyle and Grisez, *Nuclear Deterrence, Morality and Idealism*, 1987, pp. 92-93.) This closely approximates to the legal doctrine of foreseeability, by which one is assumed to intend the consequences of one's actions. Does it follow that knowledge that in concrete circumstances civilians will be killed by the use of a nuclear weapon is tantamount to an intention to attack civilians? In law, analysis must always be contextual and the philosophical question here put is no different for nuclear weapons than for other weapons. The duty not to attack civilians as such applies to conventional weapons also. Collateral injury in respect of these weapons has always been accepted as not constituting "intent", provided always that the requirements of proportionality are met.

23. Very important also in the present context is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

24. The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack. There has been considerable debate, as yet unresolved, as to whether this principle refers to weapons which, because of the way they are commonly used, strike civilians and combatants indiscriminately (*Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effects,* Report of the Work of Experts, published by the ICRC, 1973) or whether it refers to whether a weapon "having regard to [its] effects in time and space" can "be employed with sufficient or with predictable accuracy against the chosen target" (Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 1974, Report published by the ICRC, 1975, pp. 10-11, para. 31; see also Kalshoven, "Arms, Armaments and International Law", *Receuil des cours de l'Académie de droit international de La Haye*, Vol. 191 (1985-II), p. 236). For this concept to have a separate existence, distinct from that of collateral harm (with which it overlaps to an extent), and whichever interpretation of the term is chosen, it may be concluded that a weapon will be unlawful *per se* if it is

incapable of being targeted at a military objective only, even if collateral harm occurs. Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful.

25. I do not consider it juridically meaningful to say that the use of nuclear weapons is "generally . . . contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law" (*dispositif,* para. 2 E). What does the term "generally" mean? Is it a numerical allusion, or is it a reference to different types of nuclear weapons, or is it a suggestion that the rules of humanitarian law cannot be met save for exceptions? If so, where is the Court's analysis of these rules, properly understood, and their application to nuclear weapons? And what are any exceptions to be read into the term "generally"? Are they to be linked to an exceptional ability to comply with humanitarian law? Or does the term "generally", especially in the light of paragraph 96, suggest that if a use of nuclear weapons in extreme circumstances of self-defence were lawful, that might *of itself* exceptionally make such a use compatible with the humanitarian law? The phraseology of paragraph 2 E of the *dispositif* raises all these questions and answers none of them.

26. There is a further reason why I have been unable to vote for paragraph 2 E of the *dispositif.* It states a negative consequence of humanitarian law and (unspecified) possible exceptions. The role of humanitarian law (in contrast to treaties of specific weapon prohibition) is to prescribe legal requirements of conduct rather than to give "generalized" answers about particular weapons. I do not, however, exclude the possibility that such a weapon could be unlawful by reference to the humanitarian law, if its use could never comply with its requirements — no matter what specific type within that class of weapon was being used and no matter where it might be used. We may believe that, in the present stage of weapon development, there may be very limited prospects of a State being able to comply with the requirements of humanitarian law. But that is different from finding the use of nuclear weapons "generally unlawful".

27. The meaning of the second sentence of paragraph 2 E of the *dispositif,* and thus what the two sentences of paragraph 2 E of the *dispositif* mean when taken together, is unclear. The second sentence is presumably not referring to self-defence in those exceptional circumstances, implied by the word "generally", that might allow a threat or use of nuclear weapons to be compatible with humanitarian law. If, as the Court has indicated in paragraph 42 (and operative paragraph 2 C), the Charter law does not *per se* make a use of nuclear weapons illegal, and if a specific use

complied with the provisions of Article 51 *and* was also compatible with humanitarian law, the Court can hardly be saying in the second sentence of paragraph 2 E that it knows not whether such a use would be lawful or unlawful.

28. Therefore it seems the Court is addressing the "general" circumstances that it envisages — namely that a threat or use of nuclear weapons violates humanitarian law — and that it is addressing whether in *those* circumstances a use of force *in extremis* and in conformity with Article 51 of the Charter, might nonetheless be regarded as lawful, or not. The Court answers that it does not know.

29. What the Court has done is reach a conclusion of "incompatibility in general" with humanitarian law; and then effectively pronounce a *non liquet* on whether a use of nuclear weapons in self-defence when the survival of a State is at issue might still be lawful, even were the particular use to be contrary to humanitarian law. Through this formula of non-pronouncement the Court necessarily leaves open the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful. This goes beyond anything that was claimed by the nuclear-weapon States appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and the *jus in bello* (see Advisory Opinion, para. 86).

30. That the formula chosen is a *non liquet* cannot be doubted, because the Court does not restrict itself to the inadequacy of facts and argument concerning the so-called "clean" and "precise" weapons. I share the Court's view that it has not been persuasively explained in what circumstances it might be essential to use any such weaponry. Nor indeed may it be assumed that such types of weapons (perhaps to be used against submarines, or in deserts) can suffice to represent for a nuclear-weapon State all that is required for an effective policy of deterrence.

31. The formula in the second part of paragraph 2 E refers also to "the current state of international law" as the basis for the Court's *non liquet*. I find it very hard to understand this reference. Paragraph F of the *dispositif*, and the final paragraphs of the Court's Opinion, indicate that the Court hopes for a negotiated and verified total disarmament, including nuclear disarmament. But it cannot be the absence of this goal which means that international law has no answer to give on the use of nuclear weapons in self-defence. International law does not simply consist of total prohibitions. Nor can it be that there is no substantive law of self-defence upon which the Court may offer advice — this, all said and done, is one of the most well-developed areas of international law.

32. Can the reference to "the current state of international law" possibly refer to humanitarian law? This is one of the many elements that is unclear. This aspect appears to have been disposed of already in the first

part of paragraph 2 E. In any event, humanitarian law too is very well developed. The fact that its principles are broadly stated and often raise further questions that require a response can be no ground for a *non liquet*. It is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations. This is precisely the role of the International Court, whether in contentious proceedings or in its advisory function.

33. Perhaps the reference to "the current state of international law" is a reference to perceived tensions between the widespread acceptance of the possession of nuclear weapons (and thus, it may be presumed, of the legality of their use in certain circumstances) as mentioned by the Court in paragraphs 67 and 96 on the one hand, and the requirements of humanitarian law on the other. If so, I believe this to be a false dichotomy. The pursuit of deterrence, the shielding under the nuclear umbrella, the silent acceptance of reservations and declarations by the nuclear powers to treaties prohibiting the use of nuclear weapons in certain regions, the seeking of possible security assurances — all this points to a significant international practice which is surely relevant not only to the law of self-defence but also to humanitarian law. If a substantial number of States in the international community believe that the use of nuclear weapons might *in extremis* be compatible with their duties under the Charter (whether as nuclear powers or as beneficiaries of "the umbrella" or security assurances) they presumably *also* believe that they would not be violating their duties under humanitarian law.

34. Nothing in relevant statements made suggests that those States giving nuclear assurances or receiving them believed that they would be violating humanitarian law — but decided nonetheless to act in disregard of such violation. In sum, such weight as may be given to the State practice just referred to has a relevance for our understanding of the complex provisions of humanitarian law as much as for the provisions of the Charter law of self-defence.

35. For all of these reasons, I am unable to see why the Court resorts to the answer it does in the second part of paragraph 2 E of the *dispositif*.

36. It is also, I think, an important and well-established principle that the concept of *non liquet* — for that is what we have here — is no part of the Court's jurisprudence.

37. The Court has, of course, on several occasions, declined to answer a question even after it has established its jurisdiction. Reasons of propriety (Article 65 of the Statute; and the *Monetary Gold Removed from Rome in 1943* and *Northern Cameroons* cases) or important defects in procedure (the *Asylum* case, the *Haya de la Torre* case) have been given. But "[in] none of these cases is the *non-liquet* due . . . to deficiencies in the law" (Rosenne, *The Law and Practice of the International Court,* 2nd rev. ed., p. 100).

38. This unwelcome formulation ignores 65 years of proud judicial history and also the convictions of those who went before us. Former President of the International Court, Judge Elias, reminds us that there are what he terms "useful devices" to assist if there are difficulties in applying the usual sources of international law. In his view these "preclude the Court from pleading *non liquet* in any given case" (Elias, *The International Court of Justice and Some Contemporary Problems,* 1983, p. 14).

39. The learned editors of the 9th edition of *Oppenheim's International Law* remind us:

> "there is [not] always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law*" (Jennings and Watts, Vol. I, p. 13).

40. Nor is the situation changed by any suggestion that the problem is as much one as "antimony" or clashes between various elements in the law as much as alleged "vagueness" in the law. Even were there such an "antimony" (which, as I have indicated above, I doubt), the judge's role is precisely to decide which of two or more competing norms is applicable in the particular circumstances. The corpus of international law is frequently made up of norms that, taken in isolation, appear to pull in different directions — for example, States may not use force/States may use force in self-defence; *pacta sunt servanda*/States may terminate or suspend treaties on specified grounds. It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another is to be preferred in the particular case. As these norms indubitably exist, and the difficulties that face the Court relate to their application, there can be no question of judicial legislation.

41. One cannot be unaffected by the knowledge of the unbearable suffering and vast destruction that nuclear weapons can cause. And one can well understand that it is expected of those who care about such suffering and devastation that they should declare its cause illegal. It may well be asked of a judge whether, in engaging in legal analysis of such concepts as "unnecessary suffering", "collateral damage" and "entitlement to self-defence", one has not lost sight of the real human circumstances involved. The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect. In the present case, it is the physical survival of peoples that we must constantly have in view. We live in a decentralized world order, in which some States are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other States are believed clandestinely to possess, or to be working

shortly to possess nuclear weapons (some of whom indeed may be party to the NPT). It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2 E best serve to protect mankind against that unimaginable suffering that we all fear.

(Signed) Rosalyn HIGGINS.