

**METHODS OF WARFARE THAT CAUSE UNNECESSARY
SUFFERING OR ARE INHERENTLY INDISCRIMINATE: A
MEMORIAL TRIBUTE TO HOWARD BERMAN†**

ROGER S. CLARK^{*}

I. INTRODUCTION—HOWARD

Howard Berman was a card-carrying member of that esteemed professional community, the “Invisible College of International Lawyers.”¹ I really do not remember where we first met, although I am fairly sure that we were introduced by a friend from my Columbia Law School days, Tim Coulter of the Indian Law Resource Center. Howard worked with him between 1978 and 1981. We were introduced again by Virginia Leary of the Law School at SUNY Buffalo, where he had his first teaching appointment as an Adjunct Assistant Professor. She was eager to show off her colleague who taught Indian Law. He and I got together and talked, very informally, at all sorts of meetings over the next two decades. We exchanged a lot of phone calls and reprints. Alas, like most good professional relationships, ours did not generate a publishable correspondence. So this small tribute will have to suffice as a token of our friendship.

For the most part, we talked and shared documents for those twenty years about issues involving indigenous and colonized (or formerly colonized) peoples. He brought to the table not only a deep understanding of matters affecting Native Americans, but also a detailed knowledge of the ef-

† *Editor's Note:* Howard Berman was a Professor at California Western School of Law from 1987 until his death on June 18, 1997. The rest of the memorial tribute to Professor Howard Berman is contained in the introductory pages to this issue.

^{*} Board of Governors Professor, Rutgers State University School of Law, Camden, New Jersey; B.A., LL.B., LL.M., LL.D. Victoria Univ. of Wellington; LL.M., J.S.D. Columbia Univ. The author represents the government of Samoa at meetings of the Preparatory Committee on the Establishment of an International Criminal Court. Any views expressed here should not be attributed to that government.

1. See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. L. REV. 217 (1977).

forts of the International Labor Organization and the United Nations to draft international standards for the rights of such peoples. I brought some experience with the Maori, the *tangata whenua*, or people of the land, of my native New Zealand. We talked also about many other issues of contemporary public international law. It is easy to like people who we think are similar to us in some major respect. I liked him because he combined a scholar's regard for both principle and detail with the activist's urge to get involved with the real problems of real people, even if the issues he worked on were a little esoteric for some.

The last time we met was at the Annual Meeting of the American Society of International Law in April of 1997. He was very upbeat about his medical prognosis. We spoke for a long time about the ongoing negotiations to create an International Criminal Court ("ICC"). I have been representing the government of Samoa at the deliberations of the Preparatory Committee on the Establishment of an International Criminal Court, which have been taking place mostly in New York.² Those deliberations will culminate in a Diplomatic Conference to complete the drafting that will take place in Rome in June to July 1998. I also represented Samoa before the International Court of Justice in the advisory proceedings on the legality of the use or threat of use of nuclear weapons.³ A major focus of the conversation Howard and I had last April was on the connections between these two exercises, both of which, as I told him, have plumbed the depths of just about everything I ever learned about international law and international organizations. We talked about some broad issues, like whether the ICC will be a good thing, and whether its powers will be illusory because of interference by the Security Council. We also talked, in particular, about the way in which the substantive provisions of the proposed ICC statute might deal with weapons of mass destruction, including nuclear weapons. This is only one of dozens of issues that have arisen in the course of the drafting, but it seemed to Howard that it was especially interesting both intrinsically and because it raises many general issues about the nature of international diplomatic drafting.

When the ICC preparatory exercise began, many of us were hopeful that

2. The Preparatory Committee began drafting on the basis of the International Law Commission's Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of Its Forty-Sixth Session, May 2-July 22, 1994, U.N. GAOR, 49th Sess., Supp. No. 10, at 43, U.N. Doc. A/49/10 (1994). The debate has ranged much wider. Over a hundred governments have been participating in this open-ended Committee. At the time of this writing, the current Draft Statute for the Court (with many issues unsettled) is contained in Preparatory Committee on the Establishment of an International Criminal Court, Report of the Intersessional Meeting from Jan. 19-30, 1998, in Zutphen, the Netherlands, U.N. Doc. A/AC. 249/1998/L.13 (1998) [hereinafter Zutphen Draft]. Many informal meetings have taken place throughout the process. Particularly valuable have been the series of meetings in Siracusa under the auspices of the International Institute of High Studies in Criminal Sciences, which have produced numerous useful texts.

3. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. [hereinafter Nuclear Weapons Advisory Opinion]. On the role of Samoa and other Pacific nations in that proceeding, see *infra* note 25.

this exercise was an opportunity for a comprehensive codification of the general and special parts of international criminal law.⁴ It soon became clear that few governments wanted to go that far and that what we would produce is a relatively cautious document that addresses some of the issues, but which is essentially an instrument giving jurisdiction to a court over selected crimes that are already well established in general international law. Efforts have been made to draft some general savings clause that tries to ensure that the existence of this particular jurisdictional statement will not be seen as backsliding on current achievements or as freezing efforts in other forums to engage in progressive development of the rules.⁵ Traditional war crimes were the least controversial aspect of the Nuremberg and Tokyo trials. As one might expect, therefore, a significant part of the ICC's subject matter jurisdiction will be over offenses against the laws of armed conflict.⁶ There also seems to be a consensus among those participating that the offenses will be spelled out in rather more detail than was done at Nuremberg⁷ or Tokyo⁸ and in the Statutes for the Tribunals for Former Yugoslavia⁹ and Rwanda.¹⁰ It was in this spirit of seeking more detail that the Preparatory Committee had taken a first cut at the war crimes issue in general and the weapons issue in particular in a Working Group that met in February 1997.¹¹

4. This was the approach taken in the very useful "Siracusa Draft" produced by a number of NGOs as 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications, at Siracusa/Freiburg/Chicago (1996).

5. See currently, Zutphen Draft, *supra* note 2, at 16, art. Y:

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

6. Whatever else is ultimately placed within the subject matter jurisdiction of the ICC, it is now clear that it will at least deal with genocide, "war crimes," and crimes against humanity. Still undecided is whether it will have jurisdiction over aggression, terrorists, drug offenses, and offenses against United Nations and associated personnel. See Zutphen Draft, *supra* note 2, art. 5. Personally, I think some term such as "offenses against the laws of armed conflict" would be more accurate than "war crimes," since many of the offenses, derived from the law of the Hague and Geneva, will apply in cases of non-international armed conflict, as well as in the cases of international conflict for which the term "war" is more traditional. The term "war crimes" is, however, used in the Draft.

7. Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.

8. Charter of the International Military Tribunal for the Far East, established at Tokyo, Jan. 19, 1946, U.S. Dep't of State Pub. No. 2675.

9. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), including the Statute of the Tribunal, U.N. Doc. S/25704 & Add. 1 (1993).

10. S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994).

11. Decisions Taken by the Preparatory Committee at its Session held from Feb. 11-21, 1997, at 10-11, U.N. Doc. A/AC.249/1997/L.5 (1997). The draft produced on that occasion was based on the very general draft prepared by the International Law Commission, along with submissions made particularly by the United States, Switzerland, and New Zealand. The Swiss/New Zealand material was heavily influenced by the positions of the Inter-

After clarifying my thoughts on the weapons aspects of this first draft by talking to Howard, I wrote an Aide-Memoire, a revised version of which was ultimately circulated at the December meeting of the Committee on behalf of Samoa, as well as Solomon Islands and Marshall Islands.¹² In what follows, I have now worked the Aide-Memoire back into this very edited memoir of our last conversation as a tribute to Howard. I think he would be gratified by what follows. He helped me shape the issues, and the purpose that we were trying to serve is in line with what he tried to do all of his professional life—to protect human dignity.

II. THE DRAFTING ISSUE

In a major drafting exercise like the creation of an ICC, everything turns on how everything else is resolved; thus, at any one moment, responding to each particular proposal is much like aiming at a moving target. A major feature of the product of the Working Group's efforts in February 1997 (and still of much of the text) was numerous square brackets indicating choices that had been postponed. Between then and the meeting of the Preparatory Committee in the following December, there was a gathering of what are known in diplomatic-speak as "interested delegations," all of them, as it happened, NATO members. They produced another version that ultimately became the focus of the debate in December. It is convenient to explore the issues by examining this text. As officially circulated, it offered two options:

Option I

- (o) employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:
 - (i) poison or poisoned weapons,
 - (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
 - (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
 - (iv) bacteriological (biological) agents or toxins for hostile purposes or

national Committee of the Red Cross, the guardian of the Geneva Conventions.

12. Aide-Memoire by Samoa, Marshall Islands and Solomon Islands, *Laws of War: Why We Prefer Option II of Draft Paragraph B (o) Concerning Methods of Warfare That Cause Unnecessary Suffering or Are Inherently Indiscriminate* (1997). Samoa, Marshall Islands, and Solomon Islands are three small island states located in the Pacific Ocean. They have taken a particular interest since their independence in issues relating to the laws of armed conflict, in particular to matters relating to weapons that kill and maim civilians and to weapons of mass destruction. Two of their territories were occupied and became venues for bloody battles during the Second World War. Much debris from that conflict is still with them. They all live in an area that was used by three of the nuclear weapons states for testing their material. The Marshall Islands was itself the scene of one series of those tests.

in armed conflict,

- (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option II

- (o) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate.

The Aide-Memoire argued strongly in favor of Option II. I turn now to the rationale behind that preference.

III. SOME HISTORY AND JURISPRUDENCE

At the outset, one must note the difference between the words of the chapeau in Option I, "calculated to cause," and the corresponding language of Option II, "of a nature to cause." The Option I wording seems to require that the prosecution prove a more specific intent than the alternative requires.¹³ I accept the statement by the International Committee of the Red Cross ("ICRC") that the language in Option II is an appropriate translation of the relevant provisions of the Hague Conventions of 1899 and 1907.¹⁴

The laws of armed conflict concerning weapons that, for the sake of

13. Jordan Paust, *The Preparatory Committee's "Definition of Crimes"—War Crimes*, 8 CRIM. L. F. (1997) (arguing for a "wanton or reckless disregard" standard for the mens rea for this offense). This drafting point also highlights a probably intractable problem with the current drafting. While the general part, Zutphen Draft, *supra* note 2, art. 23, defines the mens rea terms "intent," "knowledge," and "recklessness," the special part where the crimes are defined often uses words like "wilful," "calculated," "wanton," or "unlawful" to describe the mens rea element. It is probably not possible in the ICC negotiations to rework such formulations, since they are taken directly from existing treaty language, and one basic assumption within the group is that it is almost impossible to improve upon previously agreed text. The United States delegation to the Preparatory Committee has proposed addressing this problem, at least in part, by including detailed "elements of offenses" in the Court's Rules of Procedure and Evidence. An informal draft is available.

14. ICRC, COMMENTS ON INFORMAL WORKING PAPER ON WAR CRIMES OF OCT. 13, 1997, at 3 (New York, Dec. 2, 1997). The ICRC noted:

The French text in 1899 and 1907 used the same wording: "propre a causer des maux superflus." The French text of these Hague Conventions is the only authentic text. In 1899 the terminology was correctly translated into English, that is "to employ arms . . . of a nature to cause superfluous injury," but incorrectly translated in 1907 into "calculated to cause superfluous injury." This has been rectified in the wording of article 35 (2) of 1977 Protocol I ("of a nature to cause"), in article 3 of Protocol II (amended 3 May 1996) of the 1980 Convention ("designed or of a nature to cause") and recently, in the preamble of the Ottawa Convention on the prohibition of anti-personnel mines which provides for the "principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

simplicity, we shall describe as causing unnecessary suffering or that are inherently indiscriminate, have developed at two levels of abstraction, what one might call the level of “principles” on the one hand and of “rules” on the other. Since at least the Declaration of St. Petersburg in 1868,¹⁵ states have accepted that the means of killing the enemy are not unlimited and that general principles establish limitations on broad categories of weapons and methods. In tandem with these principles, states have from time to time agreed to rules to the effect that certain named weapons are forbidden per se. Thus, in St. Petersburg, the parties banned any projectile of less than 400 grams that was explosive or was charged with fulminating or inflammable substances.¹⁶ At the Hague in 1899 and 1907, it was agreed that poison or poisoned weapons¹⁷ and dum-dum bullets were forbidden.¹⁸ In the 1925 Geneva Protocol,¹⁹ asphyxiating gases were banned (although many thought they were already illegal under customary law or under the Hague Conventions), and biological weapons were added to the list. There have, of course, been later additions to the list of absolutely forbidden items, notably weapons that injure primarily by non-detectable fragments and blinding laser weapons.²⁰ The Ottawa Land Mines Convention,²¹ signed on behalf of the three Pacific states in December 1997, is the most recent example.

Now, the most important point about those weapons banned per se is that it is never lawful to use them—never, under any circumstances. No considerations of military necessity can ever authorize their use. None of the justifications or excuses for an individual’s acts coming within the rubrics of self-defense and necessity—over which the Preparatory Committee also agonized at great length²²—can ever apply. An absolute rule is just that: absolute. Absolute, per se, prohibitions are good examples of the point made

15. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Dec. 11, 1868, reprinted in 1 AM J. INT’L L. 95 (SUPP. 1907).

16. The general language of the Declaration spoke of the “employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”

17. 1899 Hague Declaration 3 Concerning Expanding Bullets, July 29, 1899, 1907 Gr. Brit. T.S. No. 32 (Cmd. 3751), 1 A.J.I.L. Supp. 155.

18. Annex to Hague Convention IV Respecting the Laws and Customs of War on Land, Regulations, Oct. 18, 1907 36 Stat. 2277, 205 Consol. 277, art. 23 (a) (poison or poisoned weapons).

19. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

20. Protocol I to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 7 (“Convention on Conventional Weapons”) (non-detectable fragments); Protocol IV to the Convention on Conventional Weapons of 1980, Oct. 13, 1995, U.N. Doc. CCW/CONF./II/7 (blinding laser weapons).

21. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, 36 I.L.M. (1997).

22. See Zutphen Draft, *supra* note 2, art. 25, paras. (c)-(e) (grounds for excluding criminal responsibility).

by a United States Military Tribunal at Nuremberg in 1948 in convicting a German military leader, General List: "[T]he rules of international law must be followed even if this results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation."²³

But, of course, the existence of the particular absolute rules does not exhaust the meaning of the general principle. All those rules do is create cases where there is no room for argument about whether the general rule applies to the particular instance.²⁴

Marshall Islands, Samoa, and Solomon Islands had combined their resources on a previous occasion and sought to apply this understanding of humanitarian law to nuclear weapons in a joint presentation to the International Court of Justice in the advisory proceedings concerning the use, or threat of use, of such weapons.²⁵ It was their view that the laws of armed conflict, the law of human rights, and the law on the environment point inexorably, both separately and in combination, towards a *per se* rule that bans the use of nuclear weapons in all instances. They also contended before the Court that, at the very least, any use of nuclear weapons must be allowed only so far as it is compatible with provisions of the law of the Hague, such as those reiterated in Option II. The four nuclear powers and their allies who participated in the proceedings conceded this much.

The Court, apparently unanimously, endorsed the position adopted by the Nuremberg Tribunal, that while some of the norms in the law of the Hague might have been only conventional in origin, all of them have since become customary law.²⁶ Three of the fourteen judges accepted the anti-

23. U.S. v. List, Feb. 19, 1948, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1946-1949, at 1230, 1272.

24. Oliver Wendell Holmes made a similar point about the common law of negligence:

From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions. . . . It will be observed that the existence of the external tests of liability . . . while it illustrates the tendency of the law of tort to become more and more concrete by judicial decision and statute, does not interfere with the general doctrine maintained as to the grounds of liability.

OLIVER WENDELL HOLMES, THE COMMON LAW 112 (1881) (discussing rules about falling on spears, the rules of the road, and shipping regulations).

25. The oral and written pleadings of the three Pacific Island States are contained in THE CASE AGAINST THE BOMB: MARSHALL ISLANDS, SAMOA AND SOLOMON ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE IN PROCEEDINGS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS (Roger S. Clark & Madeleine Sann eds., 1996). Other helpful discussions are contained in INTERNATIONAL REVIEW OF THE RED CROSS, No. 316, Special Issue (Jan.-Feb. 1997); JOHN BURROUGHS, THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE (1997).

26. Nuclear Weapons Advisory Opinion, *supra* note 3, paras. 79-82.

nuclear position about a per se rule on nuclear weapons having emerged by now. Seven of the judges (who with the casting vote of the President constituted a majority) came within a hairsbreadth of this position. They went so far as to say that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”²⁷ They added that they were “unable to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”²⁸

Fourteen of the judges—all who sat—held, as the anti-nuclear powers had contended and the nuclear powers conceded, that “a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which deal specifically with nuclear weapons.”²⁹ The Court’s unanimous opinion on this point is an emphatic endorsement of the application of the general principles contained in Option II to nuclear weapons, and by obvious implication, to other weapons that are not somewhere proscribed by name. In a particular (extremely rare) case involving nuclear weapons, since the majority did not go so far as to adopt a per se rule, it might be possible to argue that the requirements of the principle had been met. But the absence of a definitive per se rule did not mean that the general principle was not of great force.

There are then, in settled existing law, both general principles and specialized rules in the area in question. What would Option I do to this structure? It would say that the list of proscribed weapons therein represents the whole content of the general principle. The general principle has gone. All we are left with is a list of proscribed weapons, and a limited list at that.

Let me give an example of what this means. The list includes chemical and bacteriological weapons. It also includes dum-dum bullets and poison arrows. It does not include nuclear weapons. Think about it: It is absolutely forbidden to kill someone with a poisoned arrow, and the ICC could have jurisdiction. If, however, one were to incinerate a hundred thousand people with an atomic weapon, the ICC would have no jurisdiction. A nuclear weapon is not one of the “following” means of which the provision speaks! And there is no point in appealing to the general principle established by 1899; it has been emasculated except to the extent that it applies to the particular cases on the list in Option I. And the same is true of other weapons of mass destruction and other weapons that cause excessive suffering. If it is not on the list, there is no case—standing the law of armed conflict on its

27. *Id.*, dispositive para. 105 (2) E.

28. *Id.* The views of the seven covered a spectrum on this issue. See THE CASE AGAINST THE BOMB, *supra* note 25, at 24.

29. Nuclear Weapons Advisory Opinion, *supra* note 3, dispositive para. 105 (2) D.

head. It ought to be feasible to state a case in most such circumstances pursuant to the general principles.

Now, it may be possible for a creative prosecutor to repackage the atomic example (and other cases not expressly mentioned) under some other provisions in other articles of the draft text.³⁰ As is the case with domestic criminal laws, there will be some overlap among the offenses within the jurisdiction of the ICC, enabling prosecutors to have some discretion over what alternatives to charge. But is there not something intellectually unsatisfying to have a law that speaks to poisoned arrows but not to the most terrible weapons of mass destruction in our century, not addressing them even in terms of general principle? Is it really the case, in the words attributed to Honoré de Balzac, that “the laws are spider webs through which the big flies pass and the little ones get caught”?³¹ Are we really prepared to accept that the supposedly noble preparatory drafting exercise of creating an ICC deals with the small flies but not the big ones? In the words of Judge Weeramantry (albeit arguing for a *per se* rule) in the Nuclear Weapons Case:

At least, it would seem passing strange that the expansion within a single soldier of a single bullet is an excessive cruelty which international law has been unable to tolerate since 1899, and that the incineration of a hundred thousand civilians is not. This astonishment would be compounded when that weapon has the capability, through multiple use, of endangering the entire human species and all civilization with it.³²

“Passing strange,” indeed! Fortunately, the existing general law is not so strange. It contains the general statement in Option II, a statement that is appropriate to deal with the real cases. The Statute of the International Criminal Court should do no worse than to restate the existing law.

In the best of all worlds, restating the existing law would mean restating both the general principle and, in a separate article, a list of the specific *per se* items. The problem with that approach, in the present setting, is that delegations might never agree on what to include on the list. I would want to include such items as anti-personnel mines, and, like the ICRC,³³ weapons that primarily injure by non-detectable fragments,³⁴ as well as

30. See, for example, Zutphen Draft, *supra* note 2, art. 5 (War Crimes section), Part A (grave breaches of Geneva Conventions), “any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions: (a) wilful killing; . . . (c) willfully causing great suffering, or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

31. Philippe Sands, *Oral Presentation for Solomon Islands*, in *THE CASE AGAINST THE BOMB*, *supra* note 25, at 279.

32. Nuclear Weapons Advisory Opinion, *supra* note 3, dissent of Judge Weeramantry, at 8 (mimeo edition).

33. COMMENTS ON INFORMAL WORKING PAPER, *supra* note 14.

34. *Supra* note 20.

blinding laser weapons.³⁵ Others might argue that the conventional prohibitions of these particular engines of inhumanity are too recent and not widely enough ratified to have found their way into the general law. Some could also be tempted into insisting that we should accept in these negotiations the advice of the three judges in the International Court who believe that there is a per se rule against nuclear weapons.³⁶

IV. WHAT HAPPENED

The result of the December debate was not, as might have been expected, the triumph of reason. Instead, it was the creation of more options, so that we now have Options 1 to 4, with the fourth option having two alternatives.³⁷ All the possibilities are now on the record, and it looks as though the issues will not be resolved until the Diplomatic Conference.

Option I, discussed above, has now become Option 1; Option II has now become Option 3. A new Option 2 contains the language "which are of a nature to cause" in its chapeau, rather than the words "which are calculated to cause." It then has as its exclusive list the same weapons as in Option 1 (and the old Option I), with this addition:

(vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law.³⁸

While this version introduces a welcome note of flexibility that allows for subsequent developments, it seems to be too open-ended for some of the major powers, while at the same time it is unacceptable to many small ones because of the exclusive nature of the list. Option 4 in its first incarnation would have an exclusive chapeau, drafted in the same language as Option 2. In its second version, the chapeau would read:

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffer-

35. *Id.*

36. That is one way to interpret the reference to nuclear weapons in para. B 4. (k) (v) at 11 of U.N. Doc. A/AC.249/1997/L.5 from the Preparatory Committee's Feb. 1997 Session.

37. Decisions Taken by the Preparatory Committee at its Session Held from Dec. 1-12 1997, at 5-6, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997), Zutphen Draft, *supra* note 2, art. 5, War Crimes, B (o).

38. In one respect, this formulation follows the wisdom of HOLMES, *supra* note 24. Holmes envisaged the creation of new per se rules either by the legislature or by the courts. This formulation (produced by the Canadian delegation, building on a suggestion from the ICRC) contemplates development either by treaty or by custom. Where it departs from Holmes is that it is part of a list of rules that now swallows up and completely exhausts the general principle. The (almost successful) strategy of those who promoted the I.C.J. nuclear proceeding, *supra* notes 3, 25, was to invite the Court to declare a further per se category, while retaining the general principle.

ing or which are inherently indiscriminate, such as³⁹ but not limited to:

What follows the chapeau in each instance is the list contained in Option 2, with the addition of nuclear weapons, anti-personnel mines, and blinding laser weapons.

As one who pushed the old Option II, now Option 3, last December without forging a consensus, I am probably the wrong person to predict where we might go. I still think that this option probably has the best chance as most delegates' second choice. It has the beauty (and the liability) of being just a little vague. But I leave you, where Howard was forced to leave us, with much work undone.

V. FAREWELL

Vale Howard! But stay tuned.

39. A helpful NGO proposal, circulated at the meeting as Proposal of the Weapons System Caucus, suggested the words "including, but not limited to."

