Amicus Memorandum to the Chair of the United Nations Negotiating Conference
for a Convention on the Prohibition of Nuclear Weapons

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To: H.E. Ambassador Elayne Whyte Gomez

Your Excellency,

I write this memorandum as a friend of both the principle and process of negotiating a legally binding prohibition on the possession and use of nuclear weapons under the auspices of the United Nations. I congratulate you sincerely for the success you have achieved thus far in this effort, as evidenced by the circulation of the Draft Convention on the Prohibition of Nuclear Weapons, dated May 22, 2017 (hereinafter the "draft treaty"). After careful review of this draft, I wish to offer my legal analysis and recommendations relating to this draft, for the sole purpose of contributing to the further evolution and refinement of the draft and the production of a maximally useful and effective final text of the treaty.

I will present this discussion in six sections, addressing the following issues:

Section 1 – Relationship to the NPT
Section 2 – Declaratory Provision
Section 3 - Application during Armed Conflict
Section 4 – Victim Assistance
Section 5 – International Cooperation
Section 6 - Amendments

Each section will conclude with a recommendation for revision of the draft treaty text.

Section 1 – Relationship to the NPT

I am happy to begin by observing that the draft treaty text is overall an excellent basis for a treaty prohibiting the possession and use of nuclear weapons. I note that the provisions have in general been constructed broadly yet concisely, without excessive detail or inclusion of controversial matters that might reduce political support for the treaty. I think this choice was both politically pragmatic and legally sound, in providing a first set of relatively broad and fundamental declarations and obligations that can be built upon in future international agreements.

I would also observe that the substance and scope of the basic obligations of the parties in Article 1 of the draft treaty appears to me quite sound. I am very pleased to see the inclusion of

prohibitions upon both testing and stationing. I know that these subjects have been the source of debate, but I congratulate you for including them.

With all of this being said, I would like to provide some commentary on the relationship between the draft treaty and the Nuclear Nonproliferation Treaty (NPT). I would like to address this issue first because it is important in establishing a conceptual and legal paradigm for the prohibition convention, which in turn should, in my view, inform the content of the draft treaty text.

I certainly understand the desire to demonstrate through provisions in the text that the draft treaty is not intended to undermine the NPT, but rather to contribute to its implementation. In doing so, it is tempting to include in the draft treaty text provisions from the NPT itself, in order to show the complementary nature of the two treaties. However, I think that in fact such duplication and redundancy of text and principle between the two treaties carries with it far more risk of interpretive and implementation confusion than likelihood of harmonizing benefit, and that it should be quite deliberately avoided.

In my view, the prohibition convention should be both legally and conceptually framed in a manner analogous to the Comprehensive Test Ban Treaty (CTBT), i.e. as an independent, stand-alone convention which is understood to exist in harmony with the NPT, but which is not explicitly textually linked to the NPT regime. Also like the CTBT, the ban treaty should in my view be structured so as to provide declarations and obligations of separate and additional value and role to those contained in the NPT, and should not include provisions which unnecessarily duplicate coverage of subjects already covered in the NPT.

I of course understand that, in order to have a full complement of basic obligations establishing a prohibition on the possession and use of nuclear weapons, some overlap between the provisions of the NPT and the provisions of the draft treaty is unavoidable. However, I think that overlap which is not necessary to the core purpose of the prohibition convention, and not an element of the value added to existing law by the prohibition convention, should be avoided.

The purpose of the prohibition convention, in my view, is to provide a formal instrument of international law in which the parties thereto declare their determination that the possession and use of nuclear weapons is contrary to established international law, and in which they obligate themselves never to acquire or use nuclear weapons, or to engage in actions that facilitate or assist in any way in the acquisition, continued possession, use or threat of use of nuclear weapons - thus forming a majority of states who, in addition to taking on this explicit obligation themselves, also contribute to the evolution of a universal norm of customary international law.

These declarations and obligations, just as the declarations and obligations in the CTBT, are in perfect harmony with the NPT. And just as with the text of the CTBT, this harmony should stand self-evidently from the text of both treaties. There is no legal need to address the relationship between the NPT and the prohibition convention in the text of the prohibition convention, and indeed there are considerable risks that accompany attempts to do so. Taking provisions of the NPT out of their context within that treaty, and inserting them in revised or summarized form into the text of the prohibition convention, will inevitably give rise to legal interpretive disputes, both for the NPT itself and for the prohibition convention.

A good example of this is the text currently comprising Article 3 of the draft treaty, on safeguards. The legal interpretation of the safeguards obligation in Article III of the NPT, and the related legal architecture of IAEA safeguards agreements, has developed through a long and complex history of normative evolution. This interpretation is highly dependent on the context in which the safeguards obligation provisions appear in the NPT. The insertion of language concerning safeguards in Article 3 of the draft treaty, and in the Annex of the draft treaty, which is significantly altered in both composition and context from the safeguards provisions of the NPT, is both unnecessarily redundant of the coverage of this subject in the NPT, and highly likely to introduce confusion into settled interpretive understandings regarding the safeguards obligations of state parties.

Similarly, the text currently comprising Article 19 of the draft treaty, stating that the convention does not affect the "rights and obligations" of the state parties to the NPT, is entirely unnecessary from a legal perspective, and introduces an at least possible revised nuance of meaning – i.e. the determination of just what precisely are the rights and obligations of the NPT - that could produce new and unhelpful legal dispute. Some nuclear weapons states have for some time argued that the NPT gives them a "right" to possession and to further production and refinement of nuclear weapons. In my view this assertion is totally unsupported by the text of the NPT. However, Article 19 of the draft treaty, as it currently stands, by referring *in abstracto* to "the rights and obligations" of the NPT, could provide unhelpful mud for the interpretive water on this point.

I am aware that the inclusion of the current text of Article 19 has been sought particularly by states wishing to clearly reference the "inalienable right" to the enjoyment of peaceful nuclear energy in Article IV(1) of the NPT. Again, however, that is simply legally unnecessary. The NPT will continue to exist even after the prohibition convention comes into force, and the inalienable right will still be codified therein, in its proper NPT context. Since the draft treaty does not address the issue of the right to peaceful uses of nuclear energy, there is no danger of the right codified in NPT Article IV(1) being affected by the prohibition convention. No good is achieved, and indeed much mischief may be produced, by an insistence on inclusion of this language in Article 19 of the draft treaty.

Recommendation #1: *I therefore strongly recommend that the present text of Article 3, Article 19, and the Annex to the draft treaty be removed from the treaty text entirely.* Doing so will not bring into question the harmony of the prohibition convention with the NPT, just as there is no question of the harmony of the CTBT with the NPT, and it will ensure that unnecessary and unhelpful legal disputes are avoided. I would also note that this removal should not be seen as a weakening of the prohibition convention's nuclear weapons disarmament verification provisions. The safeguards language in Article 3 and in the Annex is not related to nuclear weapons disarmament, but rather to the normal safeguards applied by the IAEA to nuclear materials and facilities within every safeguarded state. The draft treaty's provisions related directly to nuclear weapons disarmament verification are located in Article 4, and would remain unaffected by the change.

Section 2 – Declaratory Provision

As noted previously, one of the primary aims of the prohibition convention is to contribute to the clear establishment of an international norm prohibiting the possession and use of nuclear weapons. It is the hope of many treaty proponents that this norm will eventually take the form of a rule of customary international law. In my view, this goal would be facilitated by the insertion of a declaratory provision in the draft treaty text, in addition to the existing provisions establishing obligations for the treaty parties themselves.

Declaratory statements in treaties are most common in the areas of international human rights law and international criminal law. They serve as a statement of the determination of the states parties to the treaty of the legality or illegality of some act of states or individuals. For example, the 1948 Genocide Convention begins in Article 1 by stating: "The contracting parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and to punish." Such a declaratory statement serves to express the determination, or *opinio juris*, of the states parties to the treaty, regarding the underlying illegality of the prohibited behavior in general international law.

As presently constituted, the draft treaty text does not include declaratory statements in its operative paragraphs regarding the possession and use of nuclear weapons – i.e. the two principles which states proponents of the treaty are most keen to establish as rules of customary international law.

Recommendation #2: *I therefore recommend that a declaratory provision be added to the draft treaty text as Article 1.* The current Article 1 text would then be moved to comprise Article 2. This declaratory provision would express the determination by the states parties to the treaty that both possession and use of nuclear weapons are already presently prohibited by international humanitarian law. Such a provision could be drafted as follows:

> The States parties to this Convention confirm that the development, production, manufacture, other acquisition, possession, stockpiling, and use of nuclear weapons or other nuclear explosive devices, are prohibited by international humanitarian law.

This declaratory statement would then provide the normative foundation explaining why in Article 2 of the treaty the states parties proceed to obligate themselves never to engage in any of these actions. The statement would also provide a clearer normative foundation for the evolution of a rule of customary law.

Section 3 – Application during Armed Conflict

The fact that the draft treaty is based upon states parties' considerations of international humanitarian law is of course stated clearly in the Preamble. I am concerned, however, that the question of the application of the prohibition convention during armed conflict is not addressed specifically in the operative paragraphs of the treaty.

As you are no doubt aware, several of the nuclear weapon states have long argued that NATO nuclear sharing agreements are not a violation of NPT Articles 1 & 2 because, pursuant to these sharing agreements, control over the nuclear weapons, in the form of transmission of the weapons' launch codes, is not contemplated to occur until the outbreak of an armed conflict This argument has been used to justify, for example, nuclear weapons being carried by planes flown and controlled by pilots from NATO states which are non-nuclear weapon states under the NPT. Once an armed conflict has begun, the argument proceeds, the NPT is no longer applicable as a source of obligation. I consider this argument to be wholly erroneous, and would support this conclusion by reference to the International Law Commission's 2011 Draft Articles on the Effect of Armed Conflicts on Treaties, Article 3. However, notwithstanding its erroneous nature, this argument has unfortunately persisted and has gained some traction in military and diplomatic circles.

I think it is quite important, therefore, to be explicit in the text of the prohibition convention that the states parties specifically intend for the treaty to remain applicable and fully valid as a set of binding obligations during armed conflict. Pursuant to Article 4 of the Draft Articles on the Effect of Armed Conflicts on Treaties, such a statement within the operative paragraphs of the treaty text will be effective in overcoming arguments to the contrary.

Recommendation #3 – *I therefore recommend that an operative paragraph be added to the draft treaty text, in which it is explicitly stated that this treaty will remain valid and applicable during armed conflict.*

Section 4 – Victim Assistance

While I certainly understand and am sympathetic to inclusion of the text currently comprising Article 6 of the draft treaty, I think that the text of Article 6 paragraph 1, as currently constructed, is both legally problematic and politically unwise.

Although paragraph 1 of Article 6 has clearly been carefully drafted, it nevertheless still establishes a legal obligation for states parties to the convention that have carried out nuclear weapons tests and other uses in the past, to provide compensation for the harm to persons and the environment caused by these actions. This structure is in essence an acceptance by states parties of legal responsibility for harms flowing from these past actions. This in turn will be perceived, not wholly incorrectly, by many states as an admission that these actions constituted wrongful acts under the law of state responsibility.

I think that any state which has engaged in these actions in the past will be reluctant to accept such a provision in the prohibition convention. In fact I think that Article 6, as currently constituted, could provide a very significant legal disincentive for former nuclear weapon states to join the prohibition convention.

With some revision, however, I think that Article 6 paragraph 1 can retain the essential principle of a general obligation of assistance to victims, but be made less legally problematic for former

nuclear weapon states to accept. I think this can be done by removing some of the terms which most strongly implicate legal liability for past actions.

Recommendation #4 – *I therefore recommend the following highlighted revision of the current text of Article 6 paragraph 1of the draft treaty:*

> Each State Party in a position to do so shall with respect to individuals affected by the use or testing of nuclear weapons, contribute to environment cleanup and restoration, age-and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as social and economic inclusion.

Section 5 – International Cooperation

Article 8 paragraph 2 of the draft treaty text appears to me to be quite problematic in its structure, and unlikely to yield significant practical benefit. Providing for a generalized "right to seek and receive assistance," without any specification of some corresponding obligation on the part of some specific actor or group of actors to provide this assistance, or any caveat or conditionality (e.g. "where appropriate"), is quite a strange legal formulation in my view.

I have written quite extensively on the subject of the rights of states in international law, and would advise that rights language should be used sparingly and deliberately in treaty text. I think that the essential principle recognizing that states should be encouraged to seek assistance from other states, who are obligated under Article 8 paragraph 1 to cooperate in the convention's implementation, can be included in Article 8 paragraph 2 with language that does not enlist the states rights concept.

Recommendation #5 - *I therefore recommend the following highlighted revision of the current text of Article 8 paragraph 2 of the draft treaty:*

> In fulfilling its obligations under this Convention each State Party may seek and receive assistance.

Section 6 - Amendments

Finally, I would observe that, while the procedure contained in Article 11 paragraph 1 for amendment to the treaty seems unobjectionable and within standard treaty practice, the mechanism outlined in Article 11 paragraph 2 for entry into force of amendments is not a common feature of treaty construction. The reason for this is that, under the mechanism as currently structured, an amendment would not automatically be universally applicable to all states parties to the treaty, but rather would only be applicable to those states parties which deposit instruments of ratification of the specific amendment. This mechanism has the potential to result in differential obligations existing as among the states parties to the treaty, i.e. as between those states which ratify an amendment and those which do not. I am not aware of a similar mechanism for the adoption of amendments in other treaties. This mechanism seems to

me more suited to the adoption of optional protocols to a treaty, as in the context of the 1982 U.N. Law of the Sea Convention. This mechanism seems to me an unnecessary and imprudent addition to the prohibition convention text. Again, this is because of its potential to produce differential obligations among states parties, and thereby significantly complicate the legal relationship among states parties, in a manner similar to the functioning of treaty reservations, which the draft treaty text disallows per Article 17.

Recommendation #6 - *I therefore recommend that the text currently constituting Article 11 paragraph 2 of the draft treaty be removed from the treaty entirely.*

Conclusion

Your Excellency, let me in closing state again my strong support for the effort in which you are engaged. It is my hope that the foregoing analysis and recommendations will contribute to the production of a final treaty draft which is systemically coherent, and which is maximally useful and effective in establishing an international legal prohibition on the possession and use of nuclear weapons. If I can be of any further assistance to you, please do not hesitate to contact me directly.

With highest regards,

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