

SAFEGUARDS PROVISIONS IN THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

■ Eirini Giorgou

- Legal adviser on weapons law in the International Committee of the Red Cross (ICRC).
- Previously Disarmament adviser in the Department of Foreign Affairs and Trade of Ireland.
- Licensed lawyer and PhD in International Law, University of Geneva, Switzerland.

INTRODUCTION

This text is a shorter version from its original article that was published on arms control law website on 11 April 2018. To read the full article go to: <https://armscontrollaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/>

Since its adoption by 122 states on 7 July 2017, the Treaty on the Prohibition of Nuclear Weapons (TPNW) has frequently been made the target of criticism as regards its Safeguards provisions. The following provides an analysis of these clauses as contained in the Treaty's Articles 3 and 4, outlines the main arguments that have been leveled against the Treaty in this regard, and responds to these.

Constructive (and de-constructive) criticism

The TPNW's Safeguards provisions are undoubtedly imperfect. Limited negotiation time, lack of expertise and at times a strong divergence of views resulted in what has been called a conservative, weak, vague and even ambiguous text. The main arguments of the TPNW critics will be addressed below in an attempt to evaluate to what extent they hold true and, where possible, to identify the reasons that led to apparent or actual shortcomings in the Treaty text.

“The TPNW weakens the existing Safeguards regime”

The TPNW has been accused of weakening the existing Safeguards regime by (a) not imposing as a prerequisite for ratification or accession the existence of a Safeguards agreement and (b) by not using the AP as the minimum ('golden') standard in this respect.

Under the NPT the conclusion of a CSA is mandatory for non-nuclear-weapon States Parties (as per Article III), whereas the conclusion of an AP is optional. Valid arguments were thus made by states that establishing the AP as the minimum acceptable standard in the TPNW would mean changing the former's nature

from optional to mandatory, something that would exceed the mandate of the Negotiating Conference.

In reality, the TPNW takes the same approach as the NPT, imposing upon (non-nuclear-weapon) States Parties the direct obligation to negotiate and agree a Safeguards agreement. Moreover, the Treaty goes beyond the NPT, by obliging States Parties to maintain, as a minimum, their existing Safeguards standards, thus making the AP mandatory for states that are bound by it when the TPNW enters into force.

The TPNW goes beyond the NPT also with regard to nuclear possessor States Parties, by imposing on them a direct obligation to negotiate, conclude and maintain an adequate Safeguards agreement. Currently nuclear-weapon States are under no such obligation under the NPT, although they do have voluntary arrangements in place regarding safeguards for some of their nuclear material.

“The TPNW’s Safeguards provisions are vague and lack specificity.”

As regards states not possessing nuclear weapons, the Safeguards standard is clear, insofar as it refers to INFCIRC/153 (Corrected), i.e. the model CSA. This argument therefore refers mainly to the Safeguards clauses contained in Article 4, which are applicable to nuclear possessor States Parties.

In this respect the text is indeed vague – and legitimately so. Indeed, it would have been neither possible nor appropriate to set one single standard a priori and applicable to all nuclear possessor states, irrespective of differences among nuclear arsenals and of possible future developments in such arsenals prior to the entry into force of the TPNW for the state(s) in question. Moreover, creating a new Safeguards standard would have clearly exceeded the mandate of the Negotiating Conference, in addition to being perceived as infringing upon the authority of the IAEA.

“The Treaty sets two different Safeguards standards. This discrimination is counterproductive...”

...the argument goes, as it is not conducive to confidence-building and thus to complete, verifiable and irreversible disarmament. The loophole identified regards states not possessing nuclear weapons after 7 July 2017 that do not have an AP in force at the time of entry into force of the Treaty – these are not obliged by the TPNW to adopt one, whereas states having possessed nuclear weapons after the cut-off date are required to adopt Safeguards equivalent in scope and purpose to those of a CSA plus AP.

It is also argued that *this differentiated treatment contradicts the NPT*, in particular Action 30 (agreed in the Final Document of the 2000 Review Conference and reaffirmed at the 2010 Review Conference), which provides that when nuclear weapons have been eliminated the highest standard of Safeguards applied by the IAEA – currently *CSA plus AP* – should be applied universally to all states.

It can validly be argued that what is currently stalling progress on nuclear disarmament is not the reluctance of a small number of states to adopt APs (for which they have no obligation), but the failure of nuclear-weapon states to implement their commitments under the NPT. It is also logical to argue that differentiated Safeguards standards are warranted considering how much easier it would be for a state having possessed nuclear weapons to conceal or re-acquire nuclear weapon-grade material and relevant technology, or to divert material to non-peaceful uses and/or to convert nuclear facilities, compared to a state that was not previously in possession of such weapons.

Let’s end with some universally acknowledged truths

One – the TPNW is not, and was never meant to be, a Comprehensive Nuclear Weapons Convention. What

principally distinguishes the former from the latter model is the existence of provisions, including obligations, related to the verification of the complete and irreversible elimination of nuclear weapons. These are indispensable for achieving and maintaining a world free of nuclear weapons – however, whether one likes it or not, this was not the role envisaged for the TPNW by its drafters.

Two – equally indispensable for a nuclear-free status quo are Safeguards capable of ensuring that any material and activity resulting in or involving nuclear energy is put to exclusively peaceful uses. Safeguards should be applied universally. The NPT sets the minimum standard for Safeguards applicable today, but states not party to the NPT are practically under no Safeguards obligations.

And three – when it comes to nuclear disarmament, there is no magic bullet. The road to global zero requires consistency, determination, good faith, and above all political will. The TPNW is not the end of the road, but a significant (and unprecedented) step in the right direction. As such, further steps, measures, building blocks or whatever else we may wish to call them will be needed to reach the destination.

The TPNW is now a reality. Despite its shortcomings, it shook the stagnating waters of nuclear disarmament. Instead of engaging in futile debates in favour or against it, states should join forces to maintain, and strengthen, this momentum. The fact remains, a solid majority of non-nuclear weapon states have made one additional effort towards the implementation of the NPT's Article VI. It's about time the nuclear-weapon states did the same – they have dozens of unimplemented undertakings and commitments to choose from.

The problem is, we may be running out of time.