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I. INTRODUCTION

Weapon(s) of mass destruction (WMD) is not a legal concept. Nonetheless the social sciences regularly use this term to encompass nuclear, chemical and biological weapons to distinguish them from conventional weapons and indicate their inability to discriminate between civil and military targets. From a legal point of view, the international regulation of WMD belongs to the general law of disarmament and arms control. Their use under the strict conditions of the rule prohibiting states from using force in their international relations is governed by rules of international humanitarian law, most of them customary in nature. International treaties govern the production, ownership and maintenance of a stock of WMD and contain three different sets of rules; one for each WMD technology. In fact, the dominant international legal activity concerning WMD has been the negotiation and implementation of arms control treaties. Consequently, while some customary international norms restrict or

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prohibit the use of certain types of WMD, international law does not make the development and possession of WMD illegal outside the treaty context.¹

In the post-Cold War era, WMD have become a renewed problem for international peace and security.² Some old problems concerning membership, compliance and enforcement of the relevant treaties already in existence persist. Nonetheless, technological development, technical difficulties in controlling dual-use products and materials, disintegration of states, and international terrorism are at the root of some ‘new security concerns:’ control over the production and distribution channels of these weapons; and control over goods and products susceptible to dual military and civilian use. In addition, the political emphasis has shifted to the possibility of international terrorist groups using WMD and, within this framework, connections between such groups and some proliferant states. In this sense, the notion of ‘proliferation’ is shifting, as it comes to include the spread of WMD both among states and from states to non-state actors or terrorist groups.

International regulation and control of WMD is not a United States – European Union bilateral issue, but it appears on the political agenda of the transatlantic relation and agreements or disagreements between the two have international consequences. Agreements signal joint action by an important part of the international community and, often, can inspire or encourage universal commitments as well as other international actions. Disagreements, however, block such joint action and, sometimes, impede international measures of universal (or at least collective) scope. Within this context, the purpose of this article is to analyze how these two major international actors, the United States (U.S.) and the European Union (E.U.), define their strategies and policies to deal with problems—old and new—related to WMD. In fact, the U.S. approach to managing proliferation of WMD has undergone a remarkable evolution, if not a change, in the post-Cold War era.³ At the same time, it has been a period

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¹ As understood from the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. See Advisory Opinion 1996 I.C.J. 226.


³ This evolution began with the Counter-Proliferation Initiative, announced on December 7, 1993, by the U.S. Secretary of State Les Aspin, during his speech to the National Academy of Sciences’ Committee on International Security and Arms Control. The Initiative introduced for the first time a new military component in the U.S. policy against WMD. Other documents from the Clinton Administration including the military and the possible use of force as a component of the U.S. counter proliferation policy are as follows: Proliferation: Threat and Response - 2001, Department of Defense (Jan. 10, 2001); Proliferation: Threat and Response - 1997, Department of Defense
of remarkable changes for the European integration process, leading to the transformation of the European Communities (a specifically economic organization) into the E.U. (an obviously political entity). Although its policies and actions have long included much that is related to nonproliferation matters, the E.U. had not designed a general approach against WMD until two years ago.

Three criteria will guide the comparison between the U.S. and the E.U. policies against WMD: scope, objectives and instruments. The two reference documents are "The National Strategy to combat WMD" adopted on December 2002, and "The European Strategy against the proliferation of WMD," approved by the European Council on December 2003. The comparison should permit identification of the grounds for possible changes in the international regime of these kinds of weapons.


Disarmament and arms control are the two main axes of the international debate on WMD. The first puts the very existence of these weapons under discussion, seeking to destroy them, while the arms control perspective tries to establish an international legal framework for the use, production and development of these weapons. International actors' policy scope and objectives can be located on these two general axes; and the current international legal regime of WMD belongs, primarily, to the arms control perspective, although it includes important disarmament elements.

A. U.S. POLICY SCOPE AND OBJECTIVES

A narrow definition of the threat arising from WMD determines the scope of U.S. policy. Indeed, if compared with documents of relevant


4. See <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> and <http://ue.E.U.int/uedocs/cmsUpload/st15708.en03.pdf> The E.U. was reluctant to adopt a WMD Strategy based on a Common Position, a Joint Action or a Common Strategy, the legal instruments available under the E.U. Common Foreign and Security Policy. Consequently, the Strategy is a political declaration with an informal character. Concern that this would undermine implementation was offset by the commitment to review policy impact regularly and, every six months, the External Relations Council discusses a progress report on the implementation of the E.U. Strategy. The first of these debates took place on June 14, 2004, when the Council discussed and adopted the First Progress Report on the implementation of the E.U. Strategy. See Press statement, Council for General Issues and Foreign Relations, Sess. No. 2591, at 15 (Luxemburg June 14, 2004).

international organizations and with previous U.S. documents, the current U.S. diagnosis of the WMD threat is limited and restricted: only WMD in the possession of hostile states and terrorists are considered a threat.\(^6\) The U.S. Strategy does not define the criteria U.S. authorities will use to determine the hostility of states, leaving that as a political decision. Similarly, with no international definition of terrorism, the U.S. Immigration and Nationality Act set up a list of criteria according to which U.S. authorities regularly update a list of foreign terrorist groups; its content has been, sometimes, controversial.\(^7\)

The restricted scope of U.S. policy against WMD has its parallel in U.S. goals. While titled “The National Strategy to combat WMD” and presented as a strategy for countering WMD, including their use and further proliferation, the document is very specific that the goal is the protection of the U.S., American forces and U.S. friends and allies from the “existing and growing WMD threat.” In this sense, the U.S. goal can be qualified as clearly subjective: WMD are not, in themselves, the problem, nor is proliferation. The U.S. objective is to protect itself and its allies or friends from a possible use of WMD by previously targeted actors.\(^8\)

This goal is given concrete expression in three target areas: counter-proliferation to combat WMD use, nonproliferation to combat WMD proliferation, and consequence management to respond to WMD use. The last relates to internal measures to react to and face the consequences

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6. As Cirincione says, the Bush Administration has changed the issue from “what” to “who.” See Joseph Cirincione, Speech: Proliferation Threats and Solutions, 19 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 344 (2005). This diagnosis means a clear change from previous U.S. National Security documents. For example, the 1999 U.S. National Security Strategy stated as follows: “WMD is a global concern that transcends national borders. It is the greatest potential threat to global stability and security. Proliferation threatens to provide rogue states, terrorist and international crime organizations with the means to inflict terrible damage on the U.S., our allies, and U.S. citizens and troops abroad.” See The White House, A National Security Strategy for a New Century 2 (Dec. 1999).

7. Foreign Terrorist Organizations (FTOs) are foreign organizations designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended. See <http://www.state.gov/s/crls/fs/37191.htm> (visited Aug. 10, 2005).

8. In this area, there are significant changes too. The U.S. National Security Strategy adopted in 1998 fixed the following goals: to deter and be prepared to counter the use or threatened the use of WMD; to reduce the threat posed by existing arsenals of WMD; to halt the smuggling of nuclear materials, identify the technical information, technologies and materials that cannot be allowed to fall into the hands of those seeking to develop and produce WMD, and to stop the proliferation of non safeguarded dual use technologies that place these destructive capabilities in the hands of parties hostile to U.S. and global security interests. See The White House, A National Security Strategy for a New Century 6 (Dec. 1998).
of a WMD attack. Internal measures are not relevant from the international legal point of view or, therefore, to the purposes of this article.\(^9\)

The counter-proliferation policy is intended to prepare the U.S. military and appropriate civilian agencies to deter and defend against the full range of possible WMD employment scenarios. It seeks to assure that U.S. forces can sustain operations to defeat WMD-armed adversaries. Counter-proliferation has, therefore, a specific meaning: deterrence, defense and, if need be, victory over hostile states and terrorists. At this point, it is relevant to point out the equal treatment that the Strategy envisions for state and non-state actors presenting a WMD threat.

The nonproliferation policy is targeted to prevent states and terrorists from acquiring WMD and missiles. To this end, the Strategy proposes enhancing “traditional measures” (diplomacy, arms control, multilateral agreements, threat reduction assistance and export controls) that seek to dissuade or impede those seeking access to sensitive technologies, material and expertise. Additionally, the policy purports to ensure compliance with relevant international agreements; to improve the capability to prevent unauthorized transfers of WMD and missile technology, expertise, and material; and to identify and pursue new methods of prevention, such as national criminalization of proliferation activities and expanded safety and security measures.

B. E.U. POLICY SCOPE AND OBJECTIVES

The scope and objectives of the E.U. policy with regard WMD seem to be in line with the major statements of international organizations. The scope of the E.U. policy is “proliferation of WMD,” defined as a threat against international peace and security and against the E.U. and its in-

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9. Nonetheless, Fidler considers that this is part of the ‘new’ strategy on WMD. He argues that WMD policy is moving from one dominated by arms control to a three-part strategy. The first part involves international law that addresses WMD threats presented by states (arms control treaties and the ‘new’ right of self-defense to address WMD threats from state actors). The second part comprises international law that attempts to address WMD threats posed by non-state actors, namely terrorists (multilateral antiterrorism treaties, efforts to use international law to improve the safety and security of WMD agents and equipment and military responses to terrorist threats). The third part of the trifurcated strategy focuses on domestic defense against and preparedness for WMD events: a "homeland security" framework that is taking shape through international cooperative efforts on improving domestic readiness for WMD attacks against vulnerable societies. See David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?* 14 DUKE J. COMP. & INT’L L. 39-88 (2004).
The risk that terrorists will acquire this kind of weapon "adds a new critical dimension to this threat" according the E.U. position.\textsuperscript{10} The different status of E.U. Member States as regards nuclear weapons (particularly, the status of France and the United Kingdom as legal nuclear powers under the Treaty for the Non-Proliferation of Nuclear Weapons--NPT\textsuperscript{11}) shapes the European position, preventing the E.U. from rejecting all WMD outright.\textsuperscript{12} On the other hand, the \textit{E.U. Strategy} clearly advocates for a universal ban on chemical and biological weapons, because all member states have ratified the Conventions on Biological and Chemical Weapons.\textsuperscript{13}

Concerning terrorism, the E.U. diagnosis reflects the current historical period in linking WMD with international terrorism, recognizing that international terrorism adds a new dimension to the problem of WMD, and expressing concern consistent with the perspective of other European organizations.\textsuperscript{14} This link, however, does not change or shift the responsibility for WMD proliferation away from states. In fact, the E.U. seems to be confident that exerting control over states can significantly reduce the terrorism risk, since internal state action can reduce the access of terrorists groups to the expertise, resources, technical infrastructure, and logistics needed to develop and use WMD.\textsuperscript{15}

With this delimitation of scope, the E.U. objectives are "to prevent, deter, halt, and where possible, eliminate proliferation programs of concern

\begin{thebibliography}{9}
\bibitem{11} See Treaty for the Non-Proliferation of Nuclear Weapons 729 U.N.T.S. I-10485.
\bibitem{12} In similar sense, see Gerrard Quille and Stephen Pullinger, \textit{The European Union: Tackling the Threat from Weapons of Mass Destruction, in ISIS REPORT (Nov. 2003) (visited July 1, 2005) <http://www.isis-europe.org/>}; see also Clara Portela, \textit{The Role of the E.U. in the Non-Proliferation of Nuclear Weapons, PRIF REPORTS NO. 65, 3-5 (2003)}.
\bibitem{14} According to E.U. analysis, the connection between WMD and terrorist groups is particularly strong in terms of chemical and biological weapons because their specific characteristics make them especially attractive to terrorists. See \textit{E.U.-WMD Strategy, supra} note 10, \textsuperscript{¶} 8.
\bibitem{15} The document states that non-proliferation, disarmament and weapons control can make a fundamental contribution to the global fight against terrorism. \textit{Id.}, \textsuperscript{¶} 3. The Assembly of the Western European Union (WEU) advocates for an approach to the state proliferation of WMD that differs from the strategy to deal with the WMD/international terrorism connection. See Report submitted on behalf of the Defense Committee by Mr. Schloten, \textit{Chemical and biological weapons control -- new challenges}, WEU Doc. A/1758 (Dec. 5, 2001); \textit{see also} Report submitted on behalf of the Defense Committee by Mr. Le Guen, \textit{Chemical, Biological and Radiological Terrorism}, WEU Doc. A/1858 (June 3, 2004).
\end{thebibliography}
worldwide.” 16 This is in fact a limited, but realistic, objective. Elimination of proliferation is subject to conditions of possibility (though their nature is not explained), and the objectives do not include each and every WMD program (which would be beyond E.U. capacities). Determining which programs are of concern worldwide is necessarily subjective. Concern worldwide does not mean Security Council determination. 17 The E.U. position is a universal one, but the Union remains reluctant, on this particular point, to limit possible action to only those programs determined by the Security Council to be a threat.

III. CONSEQUENT INSTRUMENTS

In order to compare U.S./E.U. instruments in the fight against WMD, I will use a double classification. The first classification distinguishes between unilateral and multilateral instruments. The second distinguishes between legal, diplomatic and operational instruments. Multilateral instruments include universal and regional, or restricted, cooperation among states and can have a formal legal basis (international agreement) or an ad hoc political basis. Finally, both unilateral and multilateral instruments can be legal, diplomatic or operational in nature.

A. U.S. INSTRUMENTS

U.S. policy against WMD differentiates between counter-proliferation and nonproliferation instruments. The U.S. counter-proliferation set of instruments builds upon three components: interdiction, deterrence, and defense and mitigation. Interdiction efforts seek to prevent the movement of WMD materials, technology, and expertise to hostile states and terrorist organizations. To this end, the strategy proposes to enhance U.S. military, intelligence, technical, and law enforcement capabilities. In other words, the U.S. approach relies on unilateral enforcement measures of both operational (military, intelligence and technical capabilities) and legal nature (law enforcement capabilities).

Deterrence instruments are used “to persuade potential adversaries not to seek or use WMD.” The special characteristics of contemporary adversaries (hostile states and terrorist groups) require, following the U.S. Strategy, new methods of deterrence. Beside a strong declaratory policy and effective military forces, the U.S. Strategy adds the right to respond with overwhelming force – including resort to all U.S. options – to the

17. Under the current state of international law on disarmament and arms control, the proliferation programs of states that are not parties to present international treaties can be questioned only if the Security Council determines that they are a threat to international peace and security.
use of WMD against the U.S., American forces abroad, or friends and allies. Deterrence instruments are, therefore, unilateral instruments of both diplomatic (strong declaratory policy) and operational nature (effective military forces with the right to respond with overwhelming force to the use of WMD).

Finally, defense and mitigation involves the capabilities, including preemptive measures, of U.S. military forces and civilian agencies to defend against WMD-armed adversaries. This requires an ability to detect and destroy an adversary’s WMD assets before they are used. In addition, it includes robust active defenses (such as air and missile defenses to disrupt, disable or destroy WMD targets) and passive defenses, as well as mitigation measures (against the effects of WMD attacks). Hence, they are unilateral instruments of an operational nature.

The U.S. Strategy clearly puts the emphasis on counter proliferation measures; it is the first pillar developed, and the words used emphasize this preference. U.S. counter-proliferation instruments are, basically, unilateral measures. Specifically relevant is the U.S. policy treatment of the use of force as a possible counter-proliferation instrument. With no reference to the principle prohibiting the threat or use of force, the formulation of the use of force in the document carries no constraint similar to the condition of proportionality required by customary international law on self-defense. In addition, the U.S. right to respond, as character-
ized in the *Strategy*, changes a traditional U.S. security assurance that it will not use nuclear forces against non-nuclear countries.\(^{20}\)

*Nonproliferation*, the second leg of the U.S. strategy, includes a wide set of actions that, nevertheless, do not always comprise concrete measures. The U.S. document begins by referring to "Active Nonproliferation diplomacy" to dissuade supplier states and to induce proliferant states to end their programs. This activity includes building coalitions to support U.S. initiatives; the document seems to refer to ad hoc coalitions, established on a case-by-case basis.\(^{21}\)

Second, concerning existing multilateral nonproliferation and arms control regimes, the document's emphasis is on improving their effectiveness and compliance by member states, but there are few mentions of concrete measures directed toward these ends. Particularly, the *Strategy* includes three measures regarding the NPT and the International Atomic Energy Agency (IAEA): ratification of an IAEA Additional Protocol by all NPT states, assurances that all states put in place full-scope IAEA safeguards agreements, and appropriate increases in funding for the Agency. The *Strategy* also proposes strengthening the Missile Technology Control Regime (MTCR) and, specifically, proposes support for universal adherence to the International Code of Conduct against Ballistic Missile Proliferation.

Third, under the title of "Threat Reduction Cooperation" the document includes the U.S. assistance program to Russia and other former Soviet states (security of WMD facilities, missiles, and related materials) and endorses international action through the G-8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction. These endorsements, however, do not come with any declaration in favor of increasing funding.

Fourth, controls on nuclear materials focus on discouraging the worldwide accumulation of separated plutonium and minimizing the use of highly enriched uranium. To this end, the document makes reference to the National Energy Policy and the goal of developing recycling and fuel treatment technologies that are cleaner, more efficient, less waste-intensive, and more proliferation-resistant. No other reference exists to,

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\(^{21}\) The document concludes this section with a statement that, if nonproliferation efforts fail, U.S. will have available operational capabilities to defend against WMD use.
for example, the Fissile Material Cut-off Treaty (FMCT)\textsuperscript{22} or any other measure related to the supply of nuclear materials for peaceful purposes.

The U.S. export controls system is the fifth line of action on nonproliferation efforts. The \textit{Strategy} proposes updating and strengthening that system while recognizing the needs of U.S. businesses. To this end, the U.S. will focus on truly sensitive exports to hostile or proliferant states, while removing unnecessary barriers in the global marketplace.\textsuperscript{23}

Finally, nonproliferation sanctions are treated as a component of the strategy against WMD proliferation. The U.S. document contains no discussion of the necessary legal basis of this instrument (the UN Security Council, regional organizations, etc.) and seems to anticipate the modification of the existing U.S. sanctions legislation to better integrate sanctions into overall U.S. strategy.\textsuperscript{24}

Generally, there is no clear U.S. preference for a particular set of nonproliferation instruments. Instead, the document contains general statements concerning universal regimes, with no reference to concrete measures directed at reinforcing their effectiveness and compliance. Nor is there any mention of ‘co-responsibility’ instruments, such as U.S. disarmament commitments and other self-constraint measures in the area of nuclear materials.

Finally, four enabling functions are aimed at integrating the pillars of U.S. policy. The first is improved intelligence collection and analysis of the full range of WMD threats. The second deals with research and development to develop cutting-edge technologies that can quickly and effectively detect, analyze, facilitate interdiction of, defend against, defeat, and mitigate the consequences of WMD. The third function, titled “Strengthened International Cooperation” refers exclusively to working

\textsuperscript{22} The FMCT is under discussion in the Conference on Disarmament. Following an initiative from President Clinton, the U.N. General Assembly adopted in Dec. 1993 Resolution 48/75L calling for the negotiation of a “non-discriminatory, multilateral and international effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.” For the full text of the U.N. resolutions and key documents of the Conference on disarmament related to the FMCT, see the Federation of American Scientists website <http://www.fas.org/nuke/control/fmct/>.

\textsuperscript{23} So, the recent legislation making exports of nuclear materials (highly enriched uranium) easier is not necessarily “an accident” in the U.S. legislative process. Among other critiques to this legal change, see Scott Parrish, \textit{Despite Nuclear Terrorism Risks, Congress Relaxes HEU Export Controls}, August 4, 2005, CNS Research Story (visited Aug. 16, 2005) <http://www.cns.miis.edu/pubs/week/050804.htm>; and Alan J. Kuperman, \textit{The Energy Bill’s Gift to Terrorists}, NEW YORK TIMES, August 11, 2005.

\textsuperscript{24} About the ‘usefulness’ and ‘employment’ of WMD-related U.S. unilateral sanctions, see Bolton, \textit{supra} note 19, at 397-398.
closely with like-minded countries on all elements of the U.S. nonproliferation strategy. Finally, the fourth function is to unite all elements of the overall strategy in targeted efforts against both supplier and recipient states and terrorist groups that seek to acquire these weapons.

B. E.U. INSTRUMENTS

Four main principles guide the European approach to proliferation: multilateralism, comprehensive action, co-responsibility, and gradualism. Multilateralism incorporates the defense, implementation, and reinforcement of international disarmament and nonproliferation treaties and agreements, as well as support for multilateral institutions that verify and control compliance. The comprehensive action principle implies the employment of all the Union’s resources and tools to achieve E.U. goals and the integration of nonproliferation into all E.U. policies. Co-responsibility acts in two different directions: first, through export control on dual use goods and technologies and, second, through the E.U.’s contribution to solving the main causes of instability (development assistance, reduction of poverty, and promotion of human rights). Lastly, the principle of gradualism guides the application of anti-proliferation measures, which are both preventive and coercive. The former constitutes the first line of defense against proliferation for the E.U. and includes political and diplomatic actions as well as reliance on competent international organizations. The latter embraces measures envisaged in Chapter VII of the United Nations Charter and under international law, which the E.U. would consider using only if preventive measures fail. Concerning adoption, the document is not clear about what the measures actually entail or whether they are an exclusive Security Council matter. It mainly states that this body “should play a central role.”

From these principles, the E.U. Strategy designs an action plan with four groups of measures: (1) measures to implement an effective multilateral response; (2) measures to promote international and regional stability; (3) measures to implement cooperation with key E.U. associates; and (4) internal structural and organizational measures. The last group relates to issues not relevant for the purpose of this article. The bulk of E.U.

25. These principles underlie the E.U. Strategy and they can be found, specifically, within paragraphs 14 and 15.

26. The E.U. Council machinery dealing with the implementation of the E.U. Strategy includes a Personal Representative of the Secretary General and three Working Groups acting under the CFSP pillar: CONOP (non-proliferation), CODUN (on UN Disarmament issues), and COARM (on conventional arms exports). These groups include representatives from Member States, the Commission, and the Personal Representative and meet once a month. Within this context, the E.U. Strategy calls for the establishment of a specific unit within the Council’s Secretariat to reinforce the present arrangements. This unit would function as a monitoring center, entrusted with the monitor-
measures propose effective multilateralism in determining what action to take against those who proliferate WMD.\textsuperscript{27}

1. Measures to implement an efficient multilateralism

The E.U. tackles the execution of an efficient multilateral response against proliferation with a large set of measures that can be separated into three groups:\textsuperscript{28} (i) promotion of relevant legal regulations regarding WMD; (ii) reinforcement of verification mechanisms and control of international legal regulations; and (iii) avoidance of the misuse of dual use (civil and military) goods and processes.

(i) The promotion of relevant legal regulations regarding WMD is pursued through three complementary measures. First, \textit{diplomatic action} seeks the universalisation of existing international treaties, including their verification regimes – like those contained in the Additional Protocols of the IAEA.\textsuperscript{29} Second, \textit{direct assistance} - technical and/or financial - is provided to third states to ensure the correct implementation of international agreements on WMD. This refers specifically to the implementation of two agreements, the BTWC and the CWC, that seek to overcome the administrative (legislative, institutional, etc.) and/or financial difficulties (implementation costs) that some states face in complying with these international commitments. Third, \textit{financial support} is given to relevant multilateral institutions (IAEA, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO),

\begin{footnotesize}
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\item At the end of each semester, the Council debates and adopts a progress report on the implementation of this action plan. These reports are a great tool in evaluating the advantages and obstacles of the E.U. as a nonproliferation actor as well as the agreements and disagreements of its member States on specific aspects of measures envisaged in the action plan. Until now, there are three Reports. See Council of the E.U., Doc. 10448/04, Brussels, June 10, 2004 (First Progress Report); Doc. 15246/04, Brussels, December 3, 2004 (Second Progress Report); and Doc. 9898/05, Brussels, June 8, 2005 (Third Progress Report) (visited July 1, 2005) <http://ue.E.U.int>.
\item The document groups these measures into six main tenets: (1) the universalisation of current legal regulations and verification regimes regarding disarmament and non-proliferation; (2) emphasis on the role of the UN Security Council in increasing the amount of available information; (3) reinforcement of widespread support for verification regimes; (4) reinforcement of policies and export control practices; (5) development of security for materials and equipment to prevent unauthorized access and diversion risks; and (6) intensification of the fight against illegal trafficking.
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and the Organization for the Prohibition of Chemical Weapons (OPCW)).

(ii) The second group of measures seeks to reinforce the verification mechanisms and control of international legal regulations related to WMD. To this end, the Strategy proposes the effective use of existing mechanisms and the design of new ones. This commits the E.U. to promote challenge inspections within the CWC framework and to continue the study of the verification instruments for the BTWC and the CWC. In regard to the BTWC, the E.U. seeks to establish a group of experts to assist with compliance with its norms.30

(iii) The third group contains measures to avoid the misuse of dual use (civil and military) goods and processes through export control, equipment and materials security, and the fight against illegal trafficking.

Concerning export control, the Strategy seeks to reinforce the E.U. regime, as well as to ensure some degree of E.U. foreign policy coherence in these matters.31 It calls for the establishment of a program to assist those countries with insufficient knowledge about exports control and the adoption of two specific restrictive measures. Together, these establish the Nuclear Suppliers Group (NSG) to subject exports to the ratification and implementation of the IAEA. Additional Protocol and encourage reinforced export controls over intangible transfers of dual use technology.

In regard to physical security, unauthorized access, or the potential of diverting equipment and materials, the E.U. pursues effective control of highly radioactive sources as well as the physical protection of nuclear materials and facilities.32 Moreover, the E.U. proposes reinforcing con-

30. Additionally, the E.U. participates in the annual meetings of States Parties and experts meetings leading up to the BTWC Review Conference in 2006. In March 2005, the Personal Representative put forward suggestions on how the E.U. can promote universality and implementation of the BTWC and the relevant E.U. working groups are currently examining a preliminary draft E.U. joint action on support for the BTWC, which would be implemented in 2006. In addition, a Joint Action in support of the CTBTO verification system is under consideration and, as we have already mentioned, the E.U. endorses the establishment of the IAEA Additional Protocol as the verification standard mechanism.

31. The Strategy calls for coordinating E.U. policies within the framework of existing regimes; supporting the compliance of new member states with these regimes; promoting the Commission’s participation in these international regimes; and stimulating when necessary the introduction of catch-all clauses in export control regimes.

32. Concerning E.U. internal action, see Council Directive 2003/122/EURATOM of 22 December 2003 on the Control of High Activity Sealed Radioactive Sources and Orphan Sources, 2003 O.J.E.U. (L 346) 57-64 (Euroweb). In addition, all member states have ratified the Convention on Physical Protection of Nuclear Materials and have agreed to convene a Conference to widen the scope of this Convention.
controls on pathological microorganisms and toxins, and promoting a dialogue between E.U. and U.S. industries to increase the awareness of WMD issues, particularly those related to biological weapons. The E.U. external action has focused on radioactive sources and is being implemented through the IAEA structures. Nonetheless, the E.U. also carries on autonomous actions supporting the nuclear nonproliferation and security programs in Russia.

Finally, the document proposes three measures to fight illegal trafficking: the adoption of common E.U. penal sanctions; measures to control the transit and transfer of high-risk materials; and support for international initiatives aimed at combating illegal trafficking. Their implementation includes a European Community Regulation amending the Community Customs Code to ensure enhanced safety and improvement of risk analysis, the declaration of the E.U. Council of June 1, 2004 - which supports the Proliferation Security Initiative (PSI) - and, in particular, the Statement on Interdiction Principles adopted on September 4, 2003 by the states that participate in the PSI. In contrast, discussion continues on the adoption and possible implementation of common policies related to criminal sanctions for illegal export, brokering and smuggling of WMD related material.

2. Measures to promote international and regional stability

Reflecting the E.U.’s position emphasizing international cooperation for achieving international and regional stability, the action plan proposes...
reinforcing E.U. cooperative threat reduction programs and integrating WMD nonproliferation concerns into the E.U.'s political, diplomatic, and economic activities and programs. The Russian Federation is the main target of those programs and, thus, the first E.U. action in this field has been the Council Joint Action of November 22, 2004. 37

The second action envisaged in the E.U. Strategy is to increase E.U. financial support for disarmament and nonproliferation 38 by including a specific line in the European Community budget for WMD disarmament and nonproliferation activities and encouraging member states to contribute financially. 39 Unfortunately, a specific Community budget line for WMD has yet to be created. 40 Nor has the E.U. adopted the technical assistance program for third countries envisioned by the strategy. This program should have the aim of guaranteeing security and control over high-risk material, facilities, and information by facilitating the conversion of WMD expertise.

Better results have been achieved with the implementation of mainstreaming nonproliferation policies into the E.U.'s relations with third countries, including a nonproliferation clause in agreements with those countries. Although the clause does not have the same language and scope in all these treaties, in all cases it requires effective action against proliferation risks and implementation is monitored using regular political dialogue between the parties to the agreements, at both ministerial

37. This joint action extended the E.U. disarmament and nonproliferation program to the Russian Federation after June 2004 by supporting the physical protection of a Russian nuclear site. This extension is linked to, and is a result of, the extension of the period of application of the Common Strategy on Russia. See Council Joint Action 2004/796/CFSP of 22 November 2004 on the issue of support of the physical protection of a nuclear site in the Russian Federation.

38. The E.U. committed itself, during the G8 Summit in Kananaskis, to support the G8 International Association with $100 million (euros) over a period of 10 years in order to fight against the proliferation of weapons and materials of mass destruction.

39. The credits included in the E.U. budget under the heading "Non-proliferation and disarmament," are meant for two purposes. First, to fund actions which contribute to the reduction of WMD and, second, to fund operations to fight against the spread of light weaponry and illicit arms trafficking, unless these actions are mentioned in the Cotonu Agreement (which deals with this type of actions within the ACP countries). This budget structure persists to the present.

40. Consequently, the E.U. financial resources in the non-proliferation area come from the CFSP budget ($15 million (euros) in 2004 and $17 million (euros) in 2005) and the Community budget (around $40 million (euros) per year, particularly through the TACIS program). In addition, the European Parliament introduced an amount of $3 million (euros) into the 2004 and the 2005 EC budget for a Pilot Project, the purpose of which is to investigate measures by which the E.U. instruments can support actions against the proliferation of WMD and combat the proliferation of light weapons and illicit arms trafficking. Out of this, the Commission used $1.5 million (euros) under the 2004 budget to finance the Research Institute SIPRI to analyze how the Community could contribute to WMD non-proliferation and disarmament, related materials, equipment and technologies. For 2005, the Commission will use the $1.5 million (euros) for launching cooperative actions in the field of export control. See Third Progress Report, supra note 27, at 11-12.
These agreements do not provide for specific enforcement mechanisms and the enforceability of such clauses is surrounded with specific legal problems. Nonetheless, they do provide a basis for continued pressure and permit the E.U. to initiate the necessary dialogue and work with the third country in order to achieve effective compliance with the nonproliferation clause.42

Lastly, the Strategy refers to increasing E.U. efforts to solve regional conflicts by using all available instruments, in particular the framework of the Common Foreign and Security Policy (CFSP) and the European Security and Defense Policy (ESDP). This is very much in accord with the general E.U. policy of addressing the root causes of the problem while adopting measures to counter proliferation in the shorter term. The E.U. Strategy does not specify particular measures for the Mediterranean region, despite previously classifying it as a priority. Nonetheless, E.U. is taking steps in order to restart a dialogue on disarmament and nonproliferation in the context of the Barcelona process.43

3. Measures to implement cooperation with associate countries

The point of departure is simple: international cooperation on nonproliferation should begin with agreement among associate and main ally countries. This section of the E.U. Strategy alludes to the need to ensure adequate supervision of the Joint Declaration for Nonproliferation be-

41. This clause includes a commitment against WMD proliferation and its vectors by, among other means, the complete implementation of existing international instruments and the creation of an efficient system for national exports control. The nonproliferation clause has been inserted in the Partnership and Cooperation Agreement with Tajikistan and in the Association Agreement with Syria. In addition, a clause referencing cooperation in countering proliferation of WMD (based in the nonproliferation clause) has been inserted in the revised ACP-E.U. Cotonou agreement concluded by the E.U. with 78 countries and signed on June 24, 2005. In parallel, Action Plans with the countries of Eastern Europe and the Mediterranean in the context of the European Neighborhood Policy include a WMD chapter, containing the key elements of the WMD clause. In the case of Pakistan, a parallel instrument to the Community Agreement that would contain a nonproliferation clause is to be negotiated by the Council and, as a follow-up to the E.U.-Indian Summit in 2004, an Action Plan with India is being negotiated which will include some actions related to WMD. For more details on these issues, see Third Progress Report, supra note 27, at 13-14.

42. Annalisa Giannella, Permanent Representative of the Secretary General/High Representative on the Non-proliferation of WMD, explained it clearly: "Once we [the E.U.] have concluded the agreement, we should not leave the other country alone and then, after a certain period of time, assess whether they are complying or not; we have to work with this country and see what they need in order to comply with the clause." See House of Lords, European Union Committee, Preventing Proliferation of Weapons of Mass Destruction: The E.U. Contribution, 13th Report of Sess. 2004-2005 (April 5, 2005) Minutes of Evidence, Question 58.

43. See Third Progress Report, supra note 27, at 14.
between the E.U. and the U.S. and coordination with other key associate countries and the adoption, if necessary, of joint initiatives.

As the United States is a critically important actor in the campaign against WMD proliferation, nonproliferation is on the agenda of every E.U.-U.S. summit meeting and a cooperative action plan was agreed on at the June 2004 summit. This was renewed at the 2005 summit, under the title of "Joint Program of Work on the Non-Proliferation of Weapons of Mass Destruction." In addition, the E.U. and the U.S. have developed a tradition of consulting whenever important international events in the area of nonproliferation and disarmament arise (at the expert level as well as at political directors and ministerial levels) and there are regular staff-to-staff contacts.

E.U. interaction and cooperation with other international actors also exists, but with different features. The E.U. assists Russia and other ex-Soviet Republics financially and technically in the area of nonproliferation and disarmament (protection of sites, conversion of scientists, etc.). India, Pakistan and China are all on the priority list of the strategy and, specifically, the E.U. plans to assist them with the setting up of export control legislation and implementation systems.

IV. THE GROUND TO FURTHER CHANGES IN THE INTERNATIONAL REGIME OF WMD

The comparison between the U.S. and the E.U. strategies reveals deep differences on the diagnosis, goals and treatment of the risks and challenges posed by WMD nowadays. These differences ground the current situation of the WMD international regime and the emergence of new trends in the nonproliferation arena.

As a preliminary conclusion, it is possible to define U.S./E.U. approaches as reactive and proactive, respectively. The scope and goals of U.S. policy belong to the parameters of classical state defense: targeted enemies - hostile states and terrorists - and protection against those ene-

mies, specifically against their WMD capabilities. Consequently, the U.S. has adopted a self-defense approach that explains the dominance of counter-proliferation and unilateral measures in the U.S. Strategy. 47 Significantly, the U.S. strategy assigns no role to U.S. disarmament in the combat against WMD, eroding the fundamental bargain that underlies the nonproliferation regime. In the case of the E.U., its diagnosis and goals are determined by the real nature of the E.U.: an international organization used to deal with international problems through a multilateral mechanism. Since two of its member states are legal nuclear powers, the E.U. does not ask for a complete disarmament of WMD. Instead, the E.U. focus on proliferation follows a logical nexus of causality that links proliferation to an increased risk of utilization. Within this context, the E.U. designs measures to contribute to the achievement of a double aim: the elimination of proliferation programs and the reduction of diversion. The E.U.'s structure also explains its pragmatism in establishing goals in the fight against WMD and reveals the current debate on the scope of the principle prohibiting the threat or the use of force.

U.S.-E.U. differences set a limit to the scope of new international legal obligations and the application of the international legal rules already in force. In fact, the U.S. diagnosis of the WMD threat makes the elaboration of new general norms with universal scope difficult because, from the U.S. point of view, the threat has no objective delimitation: it does not come from the mere existence of WMD or, even, from proliferation but depends on the characteristics of their ‘owners.’ Only on the link between WMD and terrorism can the U.S. and the E.U. strategies find some common understanding, although their tone, attitudes and diagnoses of the threat differs substantially. Denying terrorist groups access to WMD has become the arena for specific U.S.-E.U. joint action. In contrast, problems arising from ‘proliferant states’ become political questions, and U.S.-E.U. joint action depends on the concrete circumstances of each case.

Political emphasis on the risks coming from the link between WMD and terrorism has consequences for the application of international obligations and rules related to WMD. This emphasis has its main expression in UN Resolution 1540, adopted by the Security Council on April 28, 2004, under the aegis, among others, of the U.S. and the E.U.. Acting under Chapter VII, the Security Council decided that all states shall adopt and enforce appropriate effective laws and domestic controls to

47. Using Bolton’s words, the Bush Administration “is reinventing the nonproliferation regime it inherited” and its policies show “that a robust use of the sovereign authorities that we [U.S.], and our allies, have at our disposal can bring about real results.” See Bolton, supra note 19, at 395.
avoid the access of non-state actors to WMD and their means of delivery. The Security Council also established a committee that will report on the implementation of this resolution. Even if the Security Council recognizes that some states may require assistance in implementing the provisions of this resolution in their territories, there is no provision organizing an international mechanism to provide that assistance. Instead, the resolution calls for the voluntary cooperation of those states in a position to offer such assistance. Examples of this voluntary cooperation are the U.S. program of nuclear threat reduction (Nunn-Lugar Program), focused on minimizing the proliferation risks attached to nuclear material in the former Soviet Union, as well as the G-8 initiative agreed upon in June 2002, which had similar goals and territorial scope. As we have seen previously, the E.U. is developing this kind of assistance program. Yet, their benefits and advantages do not entirely banish distrust. Many countries, not only Russia, have difficulty implementing the SC Resolution and other WMD obligations, and important gaps arise in the destruction and control of WMD, as in the case of biological weapons. This is not to deny the achievements of voluntary international cooperation but to point out its risks and deficits and the desirability of international mechanisms to provide assistance to states 'unable' to find voluntary partners.

Concerning compliance, the U.S. policy scope (hostile states) introduces discriminatory criteria when determining whether any country has fulfilled its international obligations. This affects the application of international treaties and other WMD-related obligations not endowed with verification and enforcement mechanisms, because a very relevant international actor - the U.S. - will not pay attention to cases of noncompliance coming from states not hostile to U.S. security or other interests. The U.S. policy sends a clear message to the international community: noncompliance with WMD obligations can be counterbalanced by a 'healthy' political relationship with the U.S. In fact, since the U.S. will not be bothered with these cases, these proliferation programs will not be of 'concern worldwide' and, consequently, will not meet the requirements established in the E.U. strategy for European attention.

The diverging approach of the U.S. and the E.U. on the role, application and development of international verification mechanisms to monitor

48. The Security Council adopted the resolution unanimously. Nonetheless, the debates reflect many points of concern, as it is the appropriateness of using the Security Council to "legislate" on such an issue or the need to stress the relationship between proliferation and disarmament. See U.N. Doc. S/PV.4956 (2004).

49. On the current difficulties and obstacles of this program, see Richard G. Lugar, Nunn-Lugar in the Second Term, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233 (2005).
states' compliance with their WMD Treaty obligations is well known. U.S. opposition to international verification mechanisms, made evident with regards the BTWC, in December 2001, prevented the adoption of a protocol with such a mechanism. The U.S. also sought to revise the existing negotiating mandate for the Fissile Material Cutoff Treaty (FMCT), which called for an "effectively verifiable" treaty, because it considers that an effectively verifiable FMCT that does not compromise U.S. national security interests is not achievable. A similar argument justifies the U.S. refusal to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT). Instead, U.S. policy relies on unilateral measures or, at the most, on selective multilateral measures, such as the Proliferation Security Initiative (PSI), announced in May 2003 by President Bush. PSI is an informal agreement to intercept ships, aircraft, and vehicles suspected of carrying nuclear and other WMD missiles and related technologies or materials to or from "countries of proliferation concern." It allows participating states to detain and search suspect shipments as soon as they enter their territory, territorial waters, or airspace.

Finally, major concerns arise concerning the enforcement of WMD obligations. As we have seen before, U.S. policy clearly endorses the unilateral use of force as a counter proliferation instrument. Such a use of force not only avoids any kind of collective control and breaks with the


53. "PSI is an activity, not an organization. ... Through PSI, we create the basis for action to ensure that we can stop proliferators in their tracks. ... PSI's foundation is our respective national legal systems and relevant international authorities." Bolton, supra note 19, at 400. Bolton's misunderstanding (one of them) is to say that the PSI reflects the reality that proliferators are circumventing existing rules against proliferation. If it is, PSI proves the necessity of international enforcement mechanisms and the role of international cooperation in order to apply international norms already in force.

customary requirements of self-defense but, in addition, abrogates a U.S. traditional security assurance: not to use nuclear forces against non-nuclear countries. On the other hand, the E.U. Strategy is not clear on either the role of coercion - especially military force - against proliferation threats, or on the position of the Security Council. The E.U. envisions the adoption of coercive measures (under Chapter VII of the Charter and other measures under international law) but is not clear about what such measures might actually entail or whether they are an exclusive Security Council matter. It mainly states that that body "should play a central role," not the primary competence as stipulated in article 24 of the UN Charter. In this way, the E.U. Strategy leaves open the door for the possibility of coercive measures of a military nature without the explicit authorization from the Security Council. E.U. ambiguity contributes to diminish the credibility of the nonproliferation regime. This credibility rests on three main pillars: the network of commitments between nuclear and non-nuclear states; the prohibition of chemical and biological weapons (with a different scope under conventional and customary rules); and the proper functioning of verification mechanisms in order to guarantee the compliance of states with these obligations. The UN Security Council is uniquely empowered with the right to declare a state proliferation program to be a threat to international peace and security and to determine proper sanctions against such a state. Unilateral statements about willingness to violate international legal rules (although rhetorical) are usually at the root of proliferation programs and may well be the source of the fears causing unpredictable arms races. In addition, the threat or use of force has proven ineffective in avoiding or eliminating a proliferation program: Iraq's proliferation program ended with the UN inspection action in 1991-1998, as the subsequent U.S. occupation of Iraq has demonstrated. 55

V. FINAL REMARKS

Are we witnessing the misuse and decline of international legal instruments or beholding the birth of new complementary measures in the WMD international regime? The answer to this question exceeds the scope and purpose of this article. However, comparison of the U.S. and the E.U. policies to combat WMD - and the scope of their agreements and disagreements - permits U.S. to address two consequences. First, the role of international organizations and verification mechanisms in the application of international rules concerning WMD is being downplayed. Instead, this application relies principally upon the internal structure and

capabilities of states, while some states attribute to themselves the right to enforce certain WMD obligations. Second, the prevailing approach to fighting the proliferation of WMD is through selective and informal international cooperation: selective because there is a preference for international cooperation between like-minded countries; informal since the preference is for non-legally binding agreements.

Should these consequences consolidate in time, changes might appear in the principle of equal sovereignty between states and in the nature of international cooperation. Whether this is a necessary evolution, a conjuncture period, or a step back in the international legal system, only history - and further research - will be able to clarify.

Cambridge MA, September 23, 2005