

The EU and Non-Proliferation: Need for a Quantum Leap?

*by Roland Kobia**

The renewed interest in nuclear energy which is taking place within the wider framework of unabated growth in energy demand and consequential concerns with both security of supply and climate change, raises issues and calls for answers that go well beyond that context. Indeed, besides short and medium-term considerations and challenges, however important they indeed are, what is at stake might fundamentally be the peaceful future of international relations in the long-term.

In such a context, this paper will analyse the possibilities of a strategic and all-encompassing European policy that could constitute an efficient and structured system against proliferation. A full-fledged European “common policy” seems too ambitious at this stage, but a single overall framework could be set up for delivering European Union (EU) positions and actions. EU Member States and the EU institutions all agree on the basic fundamentals, i.e. that non-proliferation must be a priority and that proliferation constitutes a threat to the vital security interests of the EU. There is also wide consensus that answers do exist if political will exists. On the basis of these premises, one should endeavour to take a two-step approach: first, to gather all instruments, whatever their legal status under one single umbrella; secondly, to fill possible gaps to ensure an efficient non-proliferation policy under the same umbrella. There is a clear window of opportunity to set up a “non-proliferation culture” in the EU. It has the instruments to deal with two pillars of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), i.e. co-operation and non-proliferation.

This paper will concentrate on actions and developments at the level of the EU *sensu stricto*, i.e. where common actions under the EU umbrella are set up and contribute to the efforts in non-proliferation. It will not cover all measures and mechanisms under the “Nuclear Non-Proliferation Regime”,¹ the integrated and evolving network of unilateral, bilateral, regional and multilateral treaties

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1. The notion of “regime” is not a legal concept but normally refers to an orderly system of measures that regulate a particular action or actions or a well-defined situation. However, in the area of non-proliferation, the situation is neither orderly in the sense of building-blocks organising a thought-out scheme nor is there a single authority organising the system. It is thus used here for lack of a better generic term, and hopefully in anticipation of a future when non-proliferation will indeed constitute an organised “regime”.

and other standard-setting arrangements, which collectively provide a framework guiding the behaviour of states, international organisations, enterprises, associations and all non-state actors generally active in the nuclear sector.

For the purposes of this paper, the “utilitarian and teleological” prisms will be used. The *utilitarian*² perspective will aim at maximising the “net expectable utility for all parties affected by a decision or action”³ knowing that traditional utilitarianism favours the options that bring about the best consequences and aim at the “good”. The *teleological* approach will lie in an interpretation that favours the ultimate goals of any provision and action as well as their spirit, rather than accepting to remain in a more narrow exegetic interpretation that favours the strict letter thereof.

When it comes to non-proliferation, the EU occupies a particular place on the international chessboard and presents *sui generis* features:

- two nuclear-weapon states (NWSs);
- several Member States that could, technically speaking, become NWSs if they wished so;
- diverging opinions between Member States as to the use of civil nuclear energy altogether;
- Member States having multiple memberships in various bodies;⁴
- all Member States having an Additional Protocol with the IAEA;
- some Member States have deep-rooted traditions of neutrality and are committed to full disarmament;⁵
- Member States show different degrees of enthusiasm *vis-à-vis* their participation in NATO and their transatlantic vision;

and to add to the complexity

- increasingly varying socio-economic levels.⁶

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2. Utilitarianism is defined as “the way in which the major social institutions fit together into a single system, and how they assign fundamental rights and duties and shape the division of advantages that arise through social cooperation” by Rawls, R. (1978), “The Basic Structure as Subject”, in *Goldman AKJ Ed., Values & Morals*, Boston, Reidel, p. 47.
 3. Kay, C., “Notes on Utilitarianism”, January 1997, at <http://webs.wofford.edu/kaycd/ethics/util.htm>.
 4. Some Member States are also members of other bodies, such as the G8, G10 and NATO 7-Group, which makes co-ordination even more difficult as these bodies have different but also sometimes overlapping mandates.
 5. Sweden, Ireland and Austria have explicitly renounced nuclear weapons and participated in the “White Angels” group with other countries having a very strong attachment to non-proliferation (e.g. Australia, New Zealand, Canada). This group had a strong influence on the course of the Second NPT Review Conference.
 6. Particularly since the last two accession rounds of the former Central and Eastern European Countries.

The European Union is thus a “microcosm of the multilateral world: a community of countries with different attitudes to the nuclear question. Any solution achieved by the EU could therefore provide a useful benchmark for the international community as a whole”.⁷

One of the most striking points when analysing the regime of non-proliferation in the EU lies in the fact that the 1957 Treaty establishing the European Atomic Energy Community (hereafter referred to as “Euratom Treaty”) is still considered separately from other political initiatives, or even from non Euratom-based legislative developments in the area of non-proliferation. In many instances, even in official documents of the EU, that segregation can often be witnessed. The contribution of the Euratom Treaty to the European Union Strategy on Weapons of Mass Destruction and vice-versa does not seem to have been publicly analysed so far. The various pillars of the EU seem to lack bridges linking them, an obvious shortcoming when analysing almost any area of European Union law or policy.

It is even more surprising that nothing comprehensive has ever been written in the doctrine on such an overall approach to the subject of non-proliferation. Therefore, this paper enters into a *terra incognita*. The aim is thus to develop ways and means to reconcile all instruments and tools which the EU has at its disposal in order to contribute to non-proliferation in a more holistic way. That means that a full-fledged European policy is still to be set up, in spite of major steps forward in recent years, notably the adoption of the European Union Strategy on Weapons of Mass Destruction. The EU does not maximise the use of all the instruments in its toolbox; action is still hampered by institutional constraints and anxiously preserved national sovereignties, even in areas that should ideally be dealt with at supranational level and thus reasonably be seen in an international context. If the EU policy in non-proliferation is seen as embryonic by some actors, it is not for the lack of instruments, but rather because of the way these instruments are used, or not used. This paper shall strive to present innovative paths in this respect.

A. Non-proliferation and the European Union in a political and historical context

Over the last few decades, non-proliferation has gained increasing importance as a major global security issue. The renewed interest in nuclear energy around the world, particularly outside Europe, will add to the need to remain attentive to the potential implications of the proliferation of Weapons of Mass Destruction (WMD). Indeed, in certain cases, the underlying reasons to engage in nuclear energy go beyond strict energy and economic considerations and have geopolitical, strategic and political goals. The EU is too important and powerful a player to remain passive or even sub-optimally efficient on a subject of such significance. It will have to face calls to act, and to follow-up, by maximising the use of its existing instruments, which often remain under-utilised. Non-proliferation is not an area in which the EU has acted in a way commensurate with its intrinsic potential.

While it has a range of instruments across the pillars, namely the Euratom Treaty, the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESPD), a more important preliminary question is whether international actors and partners consider the European Union as a fully-fledged actor in non-proliferation. For many years, the EU kept a low profile and had little ambition in the realm of non-proliferation, and it has only recently shown that ambition more

7. Fischer, D. and Müller, H., “United Divided. The European and the NPT Extension Conference” in *PRIF Reports*, No. 40, November 1995, p. 46 cited by Trezza, C., “The EU between Non-Proliferation and Disarmament”, *ISPI Policy Brief, Global Watch*, Issue No. 51, April 2007, p. 1.

forcefully. However, the United States has stated, at the highest political level,⁸ that it considers the EU as an important player in non-proliferation. The International Atomic Energy Agency (IAEA) has also recognised the EU as an important player and as a partner in many instances. Many specialised international bodies expressly list the EU in their inventories of international and functional organisations active in that area.⁹

The international context has evolved rapidly over the last few years. It appears that since the United States has embarked on a slippery slope with its nuclear co-operation agreement with India, thereby questioning the very essence of the NPT, the EU could be considered as an emerging defender of the fundamental sense of non-proliferation. The terminology used in the European Council's Common Position¹⁰ relating to the Review Conference of the Parties to the NPT is a striking example, as on paper, the 27 Member States of the EU have sound credentials in terms of non-proliferation: they have all signed and ratified the 1968 NPT and the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT); they are members of the Nuclear Supplier Group (NSG) and the Zangger Committee and they all have an Additional Protocol with the IAEA in force. These are clear signs of legal and political commitments to non-proliferation and multilateralism. However, EU Member States have diverging views on nuclear altogether, be it for civilian or military purposes. If all European Union Member States agree that non-proliferation and disarmament are at the core of European Union policy,¹¹ opinions diverge as to how and when complete nuclear disarmament should be achieved.

The legal and policy bases for non-proliferation have existed since the early days of the European Communities, through the 1957 Euratom Treaty which primarily aims at fostering the development of nuclear energy but also contains a relatively advanced system of safeguards and export controls. However, conscious European Union action in the field of non-proliferation can only be dated to the 1980s,¹² when a working group on non-proliferation met under the European Political Cooperation in 1981, and the foreign ministers of the then ten Member States issued an agreement on guidelines for nuclear export policy. The 1980s were the period some authors describe as that in which the “European Non-Proliferation *acquis*”¹³ and the “accumulated body of experience”¹⁴ relating to

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8. Statement of the President of the United States of America, Bill Clinton, to the Congress transmitting the Euratom-United States of America Nuclear Energy Cooperation Agreement, 29 November 1995, where he stated “that the European Union has...*impeccable non-proliferation credentials*...” (emphasis added).
 9. See for instance Nuclear Threat Initiative (www.nti.org), the Centre for Non-Proliferation Studies at the Monterey Institute of International Studies (<http://cns.miis.edu>) and the Arms Control Association (ACA) on their website at www.world-nuclear.org.
 10. Common position of the European Union Council n° 2005/329/PESC of 25 April 2005, OJEC L106/32 of 27 April 2005.
 11. See for instance the declaration by the European Union Presidency, then Portugal, on the occasion of the 30th anniversary of the entry into force of the NPT, 5 March 2000, on www.portugal.ue-2000.pt.
 12. Before the 1980s, non-proliferation and disarmament had not been the objective of any concerted or organised European policy; rather, it mainly comprised bilateral initiatives and negotiations (Strategic Arms Limitation Talks, Strategic Arms Reduction Talks, FNI). The first common declaration adopted by the European Union was in 1987, at the occasion of the UN Conference on the peaceful use of nuclear energy, then in 1989 at the 33rd General Assembly of the IAEA (see CEA, *Note d'information*, n° 4, 1989, pp. 5-6).
 13. Grand, C., “The European Union and the Non-Proliferation of Nuclear Weapons”, Western European Union Institute for Security Studies, in *Chaillot Papers*, n° 37, January 2000, p. 6.
 14. Feaks, D., “The Emerging European Disarmament and Non-Proliferation Agenda on Chemical and Biological Weapons”, *The Acronym Institute, Disarmament Policy*, Issue No. 65, July-August 2002, p. 1.

nuclear non-proliferation started. Non-proliferation was then “established as a goal for EPC”.¹⁵ The modest profile which the EU had shown beforehand was just a sad confirmation of the famous way Mark Eyskens, a former Belgian Foreign Minister, had described the EU in 1991: “Europe is an economic giant, a political dwarf and a military worm”. It took time for that condemnation to lead to a quantum change. Indeed, apart from some exceptions¹⁶ and even through most of the 1990s, the EU continued on the path of its “soft security” approach, not managing to gather enough political consensus amongst its Member States to engage in issues such as non-proliferation, disarmament or the prevention of biological and chemical warfare. For almost ten years after the success of the NPT Review Conference, between 1994 and 2003, the EU launched no major initiative in the area of non-proliferation. It even seemed to step back,¹⁷ accepting to be lead by the smallest common denominator between Member States.

Apart from some common positions and declarations from the Presidencies, that period of nuclear selfishness only saw two important initiatives: a common action in 1995 on the participation of the EU in the Korean Peninsula Energy Development Organization (KEDO) on the basis of Euratom¹⁸ and a common action in 1997 on the promotion of transparency in export controls in the nuclear field.¹⁹ The latter was politically more important and aimed at increasing the legitimacy and perennial character of export control regimes, a trust-building element between countries providing and countries buying nuclear technologies. In 1998, faced with an open crisis between India and Pakistan, the EU reacted weakly as Member States were divided, leaving the United States at the diplomatic forefront. In sum, progress towards common norms and joint actions having a real impact have been limited, uneven, and “given the collective diplomatic and economic weight of the EU States, the results of the policies have been limited”.²⁰ However, the KEDO initiative should not be underestimated, at least at the level of principles (the merits of the case being less relevant as it ended in a dead end). It was an unusual exercise for the EU as it involved the European Commission, the European Council and the European Parliament working together and streamlining their positions on a topic of real importance. It should be used as a precedent to enable a more active participation of the EU in non-proliferation issues around the globe.

Fortunately, compared to this dull past, things gradually changed for the better, politically and legally. That can be explained by endogenous as well as by exogenous factors. Internally, since the

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15. Fischer, D. and Müller, H., “Non-Proliferation Beyond the 1985 Review”, in *Centre for European Policy Studies (CEPS) Papers*, Brussels, n° 26, 1985, p. 34.
 16. For example, the success reached on the basis of the joint action of the European Union under the Common Foreign and Security Policy, taken in view of the preparation of the Review and Extension Conference on the Non-Proliferation of Nuclear Weapons, in 1995.
 17. The resumption of nuclear tests was announced by France in 1995 and triggered an internal crisis in the European Union.
 18. The European Union participation in KEDO is basically financial. The interesting political aspect of KEDO lies in the fact that it shows the interest of the European Union in acting globally. A very recent common position of the European Council was adopted on 14 November 2007 which basically provides for the position of the European Union in the orderly winding up of KEDO and the termination of the light water reactor project. To that end, Euratom will remain a formal member of KEDO, but only to defend its financial and legal interests. See Council of the European Union, 14 November 2007, 14864/07/PESC.
 19. Common action of 29 April 1997, <http://ue.eu.int/pesc>.
 20. Anthony, I. (2001), “European Union approaches to arms control, Non-Proliferation and disarmament”, in *SIPRI Yearbook 2001: Armaments, Disarmament and International Security*, Oxford University Press, 2001, p. 614.

mid-1980s, the EU has engaged in an almost continuous series of changes to its founding treaties. This quasi-permanent evolutionary mood led to structural changes, to increased common ambitions and above all, to a new political will in order to finally evolve into a recognised actor on the international scene. An obvious “quest for visibility” combined with a willingness to gain, in political terms, the influence the EU had in economic and commercial terms, clearly constituted strong drivers for change. The main “constitutional developments” and their links to non-proliferation are as follows:

1. *The 1986 Single European Act (SEA)*

It was the first major revision of the 1957 Treaty of Rome and, apart from its major goal of formally establishing the Single European Market by 1992,²¹ it integrated for the first time in the treaty a reference to the previously informal European Political Cooperation. Since 1969, security issues, notably non-proliferation and disarmament, were increasingly on the political agenda but were tackled by initiatives under the European Political Cooperation, which itself was based on weak legal grounds, being merely a political and purely inter-governmental area. In formally introducing the concept of the European Political Cooperation into the treaty, it became the forerunner of the EU’s later Common Foreign and Security Policy (CFSP).

2. *The 1992 Treaty of Maastricht*

Building on the European Political Cooperation, this treaty formally established the CFSP as the second pillar of the European Union, maintaining its intergovernmental character. The April 1990 Dublin European Council had decided to examine the need to amend the Treaty establishing the European Community (EC Treaty) so as to move towards European integration, thereby accelerating the political construction of Europe. The Dublin Declaration established the principle, taken up later by the United Nations Security Council, that proliferation was “a threat to global and regional security”. The objectives of the Maastricht Treaty clearly went beyond the original economic objective and its political ambitions came to the fore.²² The CFSP covers “all areas of foreign and security policy” and includes “all questions relating to the security of the Union”, which provides a legal basis and a political ground to embrace non-proliferation and disarmament firmly within the scope of the EU. The entry into force of the Maastricht Treaty coincided with the accession of France to the NPT, five years after Spain, which opened new opportunities to agree on consensual policies. This resulted in a “major achievement of European diplomacy”,²³ i.e. the fact that from 1994 to 1995 one of the first “joint actions” by the EU in the framework of CFSP was on non-proliferation of nuclear weapons, a success that was followed by Member States playing a determining role in the 1995 NPT Review Conference, together with the United States of America, to ensure the indefinite extension of the NPT.

21. Although the European Community had been in existence for nearly 30 years, it had not achieved its aim of a genuine common market.

22. The Treaty of Maastricht responds to five key goals: to strengthen the democratic legitimacy of the institutions, improve the effectiveness of the institutions, establish economic and monetary union, develop the Community social dimension and to establish a common foreign and security policy.

23. Grand, C., *op.cit.*, p. ix.

3. *The 1997 Treaty of Amsterdam*

It aimed at creating the political and institutional conditions to enable the EU to meet the challenges of the future, such as the fight against terrorism, international crime and drug trafficking. The chapter on an “effective and coherent external policy” sets out the improvements made by the Treaty of Amsterdam to enable the EU to defend its interests more effectively on the international stage. The section on the CFSP promotes certain reforms,²⁴ which are instrumental in enhancing the efficiency of the actions of the EU in the field of non-proliferation, notably in toning down the distinctions between the different “pillars” of the European Union.

4. *The 2001 Treaty of Nice*

The institutional reform achieved in Nice has been described as “technical” and “limited”. The Treaty of Amsterdam allowed for the possibility of closer co-operation within the single institutional framework, to enable certain Member States to work together in the interests of the Union, when not all of the Member States wanted to or could do so at that point. The mechanism, however, was hedged with strict conditions that limited the practical scope for its application. In order to make the mechanism more workable, the Treaty of Nice removed the right of each Member State to veto the launch of enhanced co-operation, currently provided for in the treaty. It requires a minimum of eight Member States for establishing enhanced co-operation and provides for the possibility of enhanced co-operation in the field of CFSP, with the exception of defence. It ensures that enhanced co-operation occurs within the framework of the European Union, respects the role of the institutions and allows the Member States that do not participate immediately to join in whenever they wish.

5. *The 2007 Lisbon Treaty*

On 13 December 2007, the new Reform Treaty was signed by Heads of State and Government in Lisbon. It needs to be ratified by all countries according to their national procedures before entering into force. Assuming it enters into force on 1 January 2009, its provisions may enhance the capacity of the EU to act more efficiently in the non-proliferation area. The Lisbon Treaty will indeed give the EU tools that can enable it to perform better on the international scene. Institutionally, some important changes will help ensure more coherence and possibly help to gradually “speak with one voice”. This will be the case through the creation of a President of the European Union appointed for two and a half years and the strengthening of the role of the High Representative who will also be a Vice-President of the Commission in charge of all external relations. This should enhance the EU’s capacity to combine political and financial powers to maximise leverage and political dividends.

Finally, it must be highlighted that the 1957 Euratom Treaty has never been substantially amended. It was only revised in the margins to take account of institutional changes in the EU, notably accession rounds and internal institutions, but its substantive provisions have never been changed. The

24. Notably the common strategy improved decision making thanks to greater use of qualified majority voting in the Council, the creation of the post of a High Representative for the Common Foreign and Security Policy to give it greater prominence and coherence, the establishment of a policy planning and early warning unit to encourage joint analysis of international developments and their consequences, the incorporation of the 1992 “*Petersberg tasks*” (humanitarian actions, evacuations, peace-keeping and civil crisis management) into the CFSP, to demonstrate the Member States’ common desire to safeguard security in Europe through operations to provide humanitarian aid and restore peace, the simplification of the procedures for funding the CFSP.

Lisbon Treaty will not affect the Euratom Treaty, which will remain in force even if some adaptations will be made in a Protocol modifying it to ensure its compatibility with the new institutional set up.

External factors – such as the fall of the Berlin Wall and the German reunification, the collapse of communism in Eastern Europe, the first Gulf War in 1991 – led to a need, an opportunity and a commitment to reinforce the Community's international position. Later on, the events of 11 September 2001 and further terrorist attacks²⁵ led to an increasing awareness of the potential and actual effects of terrorism and thereafter to increased diplomatic and legislative activities.²⁶ It is particularly since the end of the Cold War that the EU has started to be more successful in the fields of non-proliferation and disarmament with notable operations promoting nuclear security in Russia and in the New Independent States, Ukraine, Belarus and Uzbekistan. Member States of the EU have also realised that international, regional or national terrorism are not threats that concern only specific Member States, or even only the United States of America. Several EU Member States²⁷ have been the target of terrorist attacks, thereby dramatically raising awareness of the potential for a more massive threat through WMD.

The signing of a privileged co-operation agreement by the United States and India on civilian nuclear co-operation on 2 March 2006²⁸ constitutes yet another event raising a particular concern. Analysts see it somewhere between a setback and the epitaph of the NPT.²⁹ Indeed, as the United States and the EU have been the most prominent defenders of the NPT, the fact that the United States acted in a way that “rewards a state that chose not to sign the NPT... and even further weakens the normative power of the NPT by lowering the incentive to stick to one's commitments”,³⁰ raises doubts about the United States' current commitment to the NPT. It also weakens the latter in a period in which it is already going through a crisis of credibility and legitimacy. Even if it is composed of a series of commitments by both parties, the US-India agreement on civil nuclear co-operation marks a fundamental change in three decades of American policy on trade in nuclear equipment and applied technology which allowed no exceptions. This new situation might place the EU in a shrinking circle of unequivocal guardians of that treaty.

B. Instruments of the European Union in the context of non-proliferation

A renewed interest in nuclear energy – some call it a nuclear “renaissance” even if most of the time declarations and ambitions still need to be translated into facts – will inevitably increase the risks

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25. The rise of fundamentalism and political Islam, the terrorists activities of some sects like Aum Shinrikyo in Japan, the anthrax letters episode, the Botox and Ricin experiments in Afghanistan, to mention but a few.
 26. See for instance the initiative on the “implications of the terrorist threat on the non-proliferation, disarmament and arms control policy of the European Union”, launched in the Council of the EU, conclusions of the 2397th meeting of the General Affairs Council, 15078/1, Brussels, 10 December 2001.
 27. Spain on 11 March 2004 and the United Kingdom on 7 July 2005 notably.
 28. This agreement was approved by the House of Representatives by a very large majority (369 against 68 votes).
 29. For a balanced view, see du Preez, J., “Half Full or Half Empty? Realizing the Promise of the Nuclear Non-Proliferation Treaty”, in *Arms Control Association*, December 2006, at www.armscontrol.org/; see also Michel, Q. (2007), Critical Reflections on the Treaty on the Non-Proliferation of Nuclear Weapons, in *Nuclear Law Bulletin* No. 80, p. 21.
 30. Pelopidas, B., “Non-Proliferation through International Norms: a European Preference?”, in *Cahiers Européens*, Centre d'études européennes, n° 02/2006, p. 18.

associated with that technology, notably the proliferation aspects. Even if the possession of nuclear energy for electricity generation does not entail an automatic proliferation risk *per se*, more nuclear installations, more transport of nuclear materials, more people involved in all sorts of nuclear activities will be synonymous with increased risks (security, safety, double standards, dual use and technical capacities). Many countries inside³¹ and outside³² the EU have declared that they want to engage in nuclear energy or reinforce their capabilities, and many have already taken concrete steps in that direction. Unless there is an accident, which could trigger the fear of “an accident anywhere is an accident everywhere”, the nuclear market is bound to grow over the next years.³³ This could impact the non-proliferation system and may even jeopardize it if the right actions are not taken, particularly if more countries decide to engage in enrichment and reprocessing activities. This will also inevitably increase the need for close scrutiny by the EU and the IAEA through safeguards and safety and security instruments. There are indeed many steps of “latent proliferation”³⁴ in the nuclear ladder, ranging from no nuclear capability to the possession of nuclear weapons.

It has been shown in the previous chapter that the EU has gradually developed instruments capable of enabling it to play a greater role in the area of non-proliferation on the international scene. The toolbox is varied, but not yet organised into a coherent system where clear bridges exist, and institutional considerations do still, at times, prevail over effectiveness. This chapter reviews the most important instruments that can be used directly or indirectly in the fight against the proliferation of nuclear materials, equipment and technologies.

1. European Atomic Energy Community

The European Atomic Energy Community (Euratom) was created in 1957 “to establish the conditions for the development of nuclear energy in Europe by sharing resources (funds, knowledge, materials, experts etc.), protecting the general public and associating other countries and international organizations in this work”.³⁵ Even if some words in the preamble to the treaty indicate that non-proliferation was an issue which its founding fathers had in mind,³⁶ and a number of provisions clearly have consequences on non-proliferation, the Euratom Treaty is often seen as a treaty that had “no

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31. Countries as Poland, Romania, Bulgaria, Lithuania, Slovak Republic, France, the United Kingdom or Finland want to start or further their civilian nuclear capacity.
 32. Many countries from the Middle East, North Africa, Asia, Latin America and Gulf have declared, sometimes at the highest political level, their willingness to engage in nuclear energy for peaceful purposes. Just to name but a few: Egypt, Morocco, Algeria, Tunisia, Libya, Saudi Arabia, Jordan, Vietnam, Argentina, Chile. Some have already concretely approached the IAEA and the European Union. On the reasons why some countries want to engage on the nuclear path and the relationship between armament and development, see the special Volume “Désarmement et Développement” (1986), in *Désarmement*, UN ed. Vol. IX, No. 1. Even dating back to the 1980s, the articles therein explain the fundamental problem and dialectics in a very real way.
 33. This is particularly the case in the context of the current international agenda on climate change and skyrocketing oil and gas prices.
 34. Müller, H. (1984), “Nuclear Proliferation: Facing Reality”, Centre for European Policy Studies (CEPS) Papers, Brussels, No. 14/15, p. 16. The author identifies 13 different steps in the nuclear ladder.
 35. Communication from the Commission to the Council and the European Parliament, “50 years of the Euratom Treaty”, COM (2007) 124 final, SEC (2007), 347, adopted on 20 March 2007.
 36. The preamble mentions “The peaceful development of atomic energy”.

explicit Non-Proliferation goals”.³⁷ The treaty more directly aimed at promoting the pooling of all resources, at regulating the development of a then new technology, at establishing a European Free Zone for nuclear fuel and at controlling the fuel cycle in the six founding states. However, it was only some years after the entry into force of the Euratom Treaty that the military aspects emerged with the French nuclear tests in Reggane in 1960. After 50 years of experience, it can be said that analysts understood from the very beginning that the Euratom Treaty had primary goals in the fields of nuclear energy and non-proliferation, but that it was ultimately a political endeavour.³⁸ Euratom was yet another example of an approach, using sectoral solidarities, to try and reunite a divided Europe mentally and physically wounded by two World Wars. It has shown “utmost flexibility in providing a common legal framework for NWSs and NNWSs alike”.³⁹ Today, the Euratom Treaty has, to a certain extent, lost its promotional significance, particularly after the 1986 Chernobyl and 1979 Three Mile Island events, which heralded a strong decrease in interest in nuclear, but many of its provisions remain highly relevant in terms of non-proliferation.

In general terms, the fundamental political objective underlying the Euratom Treaty was to prevent proliferation – mainly by Germany – which was still suspected of building a nuclear capacity in secret. Notably the Commission “opinions” on new investments in the sector (Chapter IV) and the Community ownership of nuclear materials (Chapter VI) were designed so that some Member States (France in particular which was already a nuclear power at that time) could keep a close eye on what Germany especially was doing on the nuclear front. The safeguards chapter was simply a logical instrument to verify that the reported data/information was true, and an important tool to prevent proliferation.

Now that the Treaty establishing the European Coal and Steel Community (ECSC Treaty) has expired, the Euratom Treaty is the only remaining *lex specialis* at the level of primary law. Where its provisions are in conflict with those of the *lex generalis*, the EC Treaty, the former prevail over the latter. The Euratom Treaty has its own language, its own techniques, procedures and concepts (which have inspired some of the developments in the EC Treaty) and also its own philosophy. In a way, Euratom is more similar to the Statute of the IAEA than to its “fellow” Treaty of Rome and the late ECSC Treaty. This may be logical in a functional and sectoral perspective, but it also stems from political considerations as both the IAEA Statute and the Euratom Treaty were largely influenced by the United States of America in their early drafting stages.

At international level, the Euratom Community, on the basis of Chapter X (External Relations) has the capacity to enter into international agreements or conventions with states, international organisations or nationals of a third state. It has done so with its major suppliers (Canada, Australia, USA and more recently Kazakhstan) and with customers (e.g. Japan). However, the existence of a formal agreement is not legally compulsory as trade with Russia⁴⁰ shows. The European Union is a

37. Goldschmidt, P. (1987), “Proliferation and Non Proliferation in Europe”, in Müller, H. (ed.), *A European Non Proliferation Policy, Prospects and Problems*, New York, Oxford University Press, p. 9.

38. See for instance one of the earliest articles on Euratom by Hahn, H.J. (1958), “Euratom: the Conception of an International Personality”, in *Harvard Law Review*, Vol. 71, Issue 6, Cambridge (Mass.), pp. 1001-1056. More recently, see Fischer, D., “History of the International Atomic Energy Agency. The First Forty Years”, IAEA publication, September 1997, pp. 435-438.

39. Grunwald, J., “Euratom Treaty History and the Way Forward”, speech at the Nuclear Inter Jura Congress, October 2007.

40. Russia is not party to the World Trade Organization, neither part of the Energy Charter; trade between Russia and the European Union would gain in being framed at least by a new Partnership and Co-operation Agreement (PCA), which has been discussed for some time.

world leader in nuclear technology and masters the whole nuclear fuel cycle, notably enrichment, which is why its international relations bear important consequences on non-proliferation. In concluding these agreements, the EU ensures that non-proliferation aspects are covered (safeguards, additional protocols, respect of NSG guidelines, membership in IAEA conventions...). Likewise, bilateral agreements should be concluded with all countries willing to engage in nuclear activities with the EU, in addition to their compliance with the NPT and other IAEA Conventions.

1.1 Nuclear safeguards

Nuclear safeguards are laid down in Chapter VII of Title II (Articles 77 to 85) of the Euratom Treaty, which establishes a comparatively innovative system of nuclear material control and assigns to the European Commission regulatory and wide (unmatched at international level) enforcement powers. It was indeed given the task and exclusive responsibility of ensuring that fissile materials are not diverted from their intended and official use as declared by the users, whoever they are. At the time, the safeguards system in the European Community “reflected the United States of America bilateral requirements, but gave Euratom direct responsibility for fulfilling security demands”.⁴¹ The European Union safeguards system is a supranational system in which sovereign rights have been transferred from Member States to the European Commission,⁴² which has to perform conformity and finality controls. Broadly speaking, as safeguards provisions are described in a minimalist way, as is often the case in primary law instruments, safeguards cover “three functions: accountancy, containment and surveillance and inspection”.⁴³ But in the EU system, the provisions on nuclear safeguards also have a further objective, which is to guarantee that the Community complies with its international obligations concerning the supply and use of nuclear materials. Thus, nuclear safeguards notably take the form of inspections⁴⁴ and related nuclear material accountancy. Safeguards constitute the frontline in the fight against non-proliferation as they aim at ensuring that there is no diversion of nuclear materials from declared activities to non-peaceful purposes, such as illicit trafficking or making a nuclear explosive device. They are thereby a key factor for the more general concept and objective of nuclear security, which also includes physical protection.

The Commission revised its approach to safeguards in 2007 to emphasise the role of the nuclear operator bearing prime responsibility for material control within its installation. The Commission now wants to intervene as an oversight body, through appropriate control and direct legal action when required. Fulfilment of this primary responsibility of the operator will be assessed through independent verification of nuclear material flows and inventories and of installation characteristics, along with audits of the systems of nuclear material accounting and control (NMAC) of the nuclear operator. The Commission services will seek assurance that nuclear operators implement a nuclear material

41. Patel, B. and Chare, P. (2007), “Fifty years of safeguards under the Euratom treaty – a regulatory view”, in *ESARDA Bulletin*, No. 36, p. 4.

42. In this sense see Carchon, R. (2006), “La Non-Prolifération d’armes nucléaires et les contrôles internationaux”, updated by van der Meer, K., in *Centre d’étude de l’énergie nucléaire (CEN.SK)*, Boeretang, p. 28.

43. Stoiber, C., Baer, A., Pelzer, N., Tonhauser, W. (2003), “Handbook on Nuclear Law”, IAEA, p. 121.

44. European Union nuclear inspectors – a body of around 180 individuals – have wide-ranging powers to apply nuclear safeguards. They must be granted free access at all times to nuclear material in all civil nuclear installations. The Commission may impose penalties on people and undertakings failing to meet their obligations under the safeguards regime. Sanctions can go up to the withdrawal of nuclear material from installations. This system of inspections has been at the origin of and has created a precedent for other areas of European Union law (competition notably), which inspired themselves from that Euratom “supranational” system.

accounting and control system that is credible, effective and using data based on measurements conforming to the latest international standards. This system has to be able to provide an accurate and timely account of the location and quantity of nuclear materials under its control and therefore be able to detect with high assurance in a timely fashion any losses or apparent losses. This system imposes responsibility on operators and can thus create yet another line of defence against non-proliferation.

When analysing the European contribution to non-proliferation, one should remember that the EU safeguards were the first full-scope safeguards. Without the need for additional instruments, they cover all nuclear material within the EU and thus most of the nuclear material used in the nuclear fuel cycle is subject to safeguards. Given that the EU has the largest enrichment and reprocessing plants (Urenco, Areva/Eurodif and GB2) within its borders, such plants are under a strict EU safeguard system, which leaves room for IAEA controls under the IAEA/Euratom co-operation agreement.⁴⁵ Thus Euratom acts as a primary safeguards authority and transmits reports to Vienna. The only other case where commercial-scale enrichment and reprocessing plants need to be safeguarded outside Euratom in a NNWS is in Japan, where some material losses have raised concern.

The Euratom experience could therefore be useful in enhancing other systems and practices. This, nevertheless, requires an “umbrella system” which ensures mutual confidence in delocalised systems as regional systems are nothing more than “self-inspection”⁴⁶ by states that share enough mutual interests to engage in regional dynamics and could thereby trigger suspicion from other parts of the world. The development of a network of regional systems⁴⁷ should thus be promoted, but only under the overall control of the IAEA, which should be allowed to cross-check the monitoring done at regional or national (Japan) levels and be granted the widest inspection possibilities. Since the accession of all EU Member States to the NPT and since the conclusion of the IAEA/Euratom agreement, the two systems have increasingly converged.⁴⁸ The EU system, because of its maturity, could be “exported” and used by other regional organisations, and some of its more integrated features could be taken over by the IAEA if political hurdles can be overcome. The EU system indeed still differs from IAEA safeguards on a number of points:

- Euratom safeguards do not need additional instruments to ensure a full-scope system as they directly stem from treaty provisions;
- Euratom safeguards are based on a legal obligation stemming from an instrument of primary law while the NPT for instance only has a contractual character;
- Euratom covers uranium ore, at least in principle while the IAEA covers further processed materials; and

45. INFCIRC/193. The IAEA/Euratom relationship is notably based on the model agreement INFCIRC/153.

46. Wilmschurst, M.J. (1984), “The Development of Current Non Proliferation Policies”, in *The International Nuclear Non-Proliferation System. Challenges and Choices*, Simpson, J. and McGrew, A. ed., Macmillan, p. 41.

47. The Tlatelolco, Rarotonga, Bangkok and Pelindaba Treaties are examples of laudable attempts to tackle proliferation on a regional or continental basis. There are also examples of smaller scale such as the 1990 agreement between Argentina and Brazil creating a bilateral inspectorate to apply full scope safeguards in both states.

48. For example, previously, Euratom safeguards did not formally prohibit the military from non-peaceful uses of nuclear plants and material but simply verified that the material was used in conformity with the purpose stated by the user or with agreed supply conditions; that accommodated France at the time as a NWS in the making.

- in some instances EU nuclear inspectors can serve in the state of their nationality, which is not a practice in the IAEA apart from isolated exceptions.

With regard to experience, the EU system of safeguards has a very good track record. The system has existed since 1957, which gives the European Union an experience hardly matched. Not only do the safeguards function at a European Union level, they have contributed to a wider international system of control under the auspices of the IAEA since 1970. The IAEA also has a remarkable safeguards record, even if some particular cases⁴⁹ have shown the limits of safeguards, notably of safeguard methods (material accountancy, use and performance of containment and equipment surveillance) and of certain safeguards procedures.⁵⁰ But the strain on the nuclear safeguards system has increased over the years and is likely to increase even more if the renewed interest for nuclear energy is confirmed.

A heightened collaboration between the IAEA and actual or future regional organisations performing safeguards, notably the EU, is therefore needed more than ever. To foster the entry into force of the strengthened safeguards system, the EU and Member States have signed additional protocols with the IAEA that foresee a wider range of controls to ensure that there is no undeclared material or in nuclear or non nuclear facilities suspected of being used in potentially proliferation-prone activities. Also, with the Safeguards Agreement⁵¹ between Euratom, the European Union NNWSs and the IAEA, the Commission collects all nuclear material accountancy information from European Union installations and submits them in a consolidated way to the IAEA. However, there is still room for improvement. Some issues remain unsettled in the relations between the IAEA and Euratom, such as the issue of unannounced IAEA inspections according to the standards of the Additional Protocol; but if some outstanding points still need to be overcome, in general the *modus vivendi* between the two actors is on the right track.

Recently, the relationship between IAEA and Euratom has improved significantly in terms of good co-operation and constructive spirit, and both parties now recognise that the period of past tensions is behind them. The IAEA/Euratom Joint Statement on “Reinforcing Cooperation between Euratom and the IAEA”, which was signed on 7 May 2008, is a concrete sign thereof. The division of labour and the need to avoid duplication of work should ensure optimised use of scarce qualified workforce and is all the more necessary as the EU grows in the number of its Member States.⁵² Economies of scale in safeguarding activities become an unavoidable necessity to ensure cost-effectiveness and efficiency in a potentially increasing nuclear world. The IAEA itself would welcome a stronger involvement of the EU in the Iranian case, exploiting technical tools for political purposes, thereby helping to dissolve the current crisis.

Nuclear safeguards in the EU are an important tool, which has proved its utility, but they are not a panacea. They are a necessary but insufficient instrument to prevent diversion of nuclear material, both in relative and absolute terms. In relative terms, safeguards are only one pawn on the wider non-proliferation chessboard but more importantly, nuclear safeguards in the European Union could be

49. Iran, Iraq, Libya, Democratic People’s Republic of Korea.

50. On that subject, see Fischer, D. and Szasz, P. (1985) “Safeguarding the Atom. A Critical Appraisal”, in *Stockholm International Peace Research Institute (SIPRI)*, Taylor and Francis ed., London and Philadelphia, pp. 47-66.

51. INFCIRC/193.

52. For an analysis of the interaction between Euratom and the IAEA, see Thorstensen, S. and Chitumbo, K., “Safeguards in the European Union: the New Partnership Approach”, *IAEA Bulletin*, Volume 37, No. 1, online at <http://f40.iaea.org/worldatom/Periodicals/Bulletin/Bull371/chitumbo.html>.

stepped up in absolute terms. Indeed, the provisions of the Euratom Treaty that lay its legal basis could be interpreted in a way that would give Chapter VII enhanced utility. The safeguards system, essentially *a posteriori*, could develop some *a priori* mechanisms for the most sensitive cases.

Finally, it is worth noting that nuclear safeguards should not be confused with physical protection, nuclear safety or even radiological protection, as these are distinct concepts even if some overlapping and complementarities do exist.⁵³

1.2 Physical protection of nuclear facilities

The Convention on the Physical Protection of Nuclear Material⁵⁴ (CPPNM) is the reference international legislation and the first international treaty to establish standards on physical protection of nuclear materials.

The need for physical protection exists for nuclear material in storage, use or transit. European Union Member States as parties to the CPPNM apply the convention in using the recommendations of the IAEA. Modalities reflecting the structures and internal organisations of Member States may vary from one Member State to another, but the core principles have to be abided by. The Commission and European Union Member States are proceeding with the ratification of the revised convention. Euratom's accession to the CPPNM was approved by the European Council on 10 July 2007 and Commission Decision on 19 December 2007 concerning the deposit of the instrument of accession with the Director General of the IAEA.⁵⁵ The Council will co-ordinate the simultaneous deposit of instruments of accession of Euratom and its Member States to the amended CPPNM, in accordance with the procedures established in Article 102 of the Euratom Treaty.

Many proposals and ideas have been flagged over the years as to how to increase physical protection. The idea of creating international plutonium storage facilities is not a new one, but is certainly attractive in terms of non-proliferation. Both the Statute of IAEA and the Euratom Treaty contain provisions that could allow respective authorities to establish these facilities for the deposit and common control of fissile material. The issue is more political than technical. The safeguards system would have to be adapted, at least at IAEA level.

At this point, the importance of safety as a non-proliferation instrument should be pointed out. There are very tight links between safeguards and safety and between safety and security in general. The absence of expertise, of skilled workforce, of a relevant legal framework and of a sufficient safety culture in most of the countries that envisage embracing nuclear power will not only increase safety and security risks, but will also increase the burden on countries that will have to provide material equipment and technology. This will, in turn, lead to a rise in safety⁵⁶ and radiological risks. The

53. See Jankowitsch-Prevor, O., speaking about the “three S concept of safety, security and safeguards” in “New frontiers of nuclear law: is there an emerging international legal regime on nuclear terrorism”, speech at Nuclear Inter Jura Congress on 3 October 2007, p. 1.

54. INFCIRC/274/Rev.1, IAEA, Vienna, 1980.

55. Council Decision 2007/513/Euratom of 10 July 2007 and Commission Decision of 19 December 2007 concerning the accession of the European Atomic Energy Community to the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities (2008/99/EC, Euratom).

56. The Convention on Nuclear Safety will be essential in this regard. For an analysis of the convention, see Jankowitsch-Prevor, O., “The Convention on Nuclear Safety”, *op.cit.*, p. 156.

European Union has an effective Nuclear Safety Cooperation Instrument⁵⁷ for this purpose. Under this new tool, EUR 525 million (2007 to 2013) will be available to improve safety, protection against ionising radiation, waste management and safeguards in a wider geographical scope than its predecessor as it now has a global geographical scope.

1.3 Control of exports of nuclear materials

Very few states are, or can objectively be, self-sufficient in the development and use of nuclear material and technology. This situation is likely to be more apparent in the future if the development of nuclear technology is put into action. Therefore, the need for transfers between providers of material and technology and buyers thereof will increase. In a context of non-proliferation, that calls for an enhanced system of control and monitoring of cross-border movements, in other words of a “policy of denial”.⁵⁸ The NPT contains obligations in this regards (Article I, II and III notably). The Euratom Treaty and its secondary legislation also address the import and export of nuclear materials as export and import controls concern virtually all states, whether they are exporting, importing or transit states.

Uncoordinated action in controlling exports and imports has shown its limits in the past. With the creation of the Zangger Committee and the London Club in the mid-1970s, the foundations of a co-ordinated approach emerged. That came as a complement to the NPT, the provisions of which could not guarantee that entirely.

The EU plays its part in ensuring that nuclear export controls are as robust as possible. The Council Regulation on dual-use items⁵⁹ sets up a legally-binding Community regime for the control of dual-use items and technology, which may be exported outside the EU only after a valid authorisation has been granted. This regulation even provides for derogations to the normal principle of free movement of goods inside the European Union.⁶⁰ The EU also assists third states in enhancing their export controls. Export control is also linked to safeguards; “safeguards and ... export controls must be compatible with each other and provide for consistent organizational arrangements”.⁶¹

The so called Shipment Directive⁶² provides for prior notification and compulsory approval of all shipments of radioactive wastes and spent fuel between Member States and in case of imports or exports outside the EU. This directive has just been amended and its scope enlarged; the amended directive will enter into force on 25 December 2008. Also linked thereto, the Euratom Directive on sealed sources requires Member States to control the movement of high activity sealed radioactive sources,⁶³ the purpose of which is to prevent exposure to ionising radiation arising from inadequate controls and to harmonise requirements at European Union level. By virtue of the system of prior

57. Council Regulation (Euratom) 300/2007 of 19 February 2007, OJEC L81 of 22 March 2007, pp. 1-10. This instrument replaces, the previous TACIS Nuclear Safety Programme, which allocated no less than EUR 1.3 billion to New Independent States between 1991 and 2006.

58. Sanders, B. (1998), “A Short History of Nuclear Non-Proliferation”, *Nuclear Law Bulletin*, No. 62, p. 16.

59. Council Regulation 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, as amended.

60. Annex IV of Council Regulation 1504/2004 provides for the list of items for which there are exceptions.

61. Stoiber, C., Baer, A., Pelzer, N., Tonhauser, W. (2003), *Handbook on Nuclear Law*, IAEA, p. 135.

62. Council Directive on the shipment of radioactive waste and spent fuel, 92/3/Euratom.

63. Council Directive 2003/122/Euratom, adopted on 22 December 2003 on the control of high-activity sealed sources and orphan sources.

authorisation for any practice involving high activity sources, together with the tracking, identification and marking of sources (specific provisions are made for orphan sources also), this instrument is an important preventive complement to non-proliferation instruments.

1.4 Joint Research Centre of the European Commission

The European Commission's Joint Research Centre (JRC), set up under Article 8 of the Euratom Treaty (Title II, Chapter 1), could further the EU's contribution to non-proliferation, by for instance working on the dialectics between current ideas that try to prevent proliferation and expected future technological developments. There is a real question as to whether the latter is going to outpace some non-proliferation initiatives currently under discussion. Future generation reactors such as the Generation IV nuclear energy systems will most probably be more proliferation-resistant (e.g. with sealed fuel cores) than current ones and if spent fuel, reprocessing and security issues are reduced or largely solved by future technologies, this would decrease the necessity of initiatives like multilateral fuel supply assurances (e.g. GNEP⁶⁴), multinational fuel-cycle centres, stronger export guidelines and enhanced self-restrictions by nuclear fuel suppliers.

1.5 Euratom Supply Agency

The Euratom Supply Agency (ESA) was set up in 1960 on the basis of the Euratom Treaty which aimed at establishing a common European policy of supply by granting the ESA a specific status and *sui generis* powers (*inter alia* right of option, exclusive right to conclude contracts, its own legal personality, financial autonomy). Chapter VI of Title II of the Euratom Treaty provides that the Community is responsible for ensuring that all users in the EU receive equitable and regular supplies of ores and nuclear fuels, and the monitoring of supplies is entrusted to the ESA, which is to guarantee a balanced supply and demand in the EU. The activities of the ESA are closely linked to nuclear safeguards.

The ESA's major difficulty lies in the gap between its powers and objectives on paper and the way it has worked over time. Member States have, since the very outset, been rather reluctant to see this supranational agency using all the powers it has been given. Many of its provisions have either never been used or have been used in a 'soft' way with simplified mechanisms basically depriving ESA of its real potential leverage. The problem might stem from the fact that management and regulation can bring conflicts of interest. Indeed, "the mixture of roles has not worked well... and the ownership of nuclear fuel by Euratom... has remained purely nominal".⁶⁵ Blurring property ownership rights and (self) safeguards can indeed bring difficulties. But, in view of the fact that "compared to previous years, the outlook for demand shows more potential for increase",⁶⁶ ESA's scope is bound to become more important.

Today, ESA's contribution to non-proliferation is essentially centred around the verification of supply contracts to ensure that they are concluded for peaceful purposes and that they contain a safeguard clause to initiate the Commission's export authorisation procedure (for nuclear materials produced in the EU), and to check the validity of supply contracts when nuclear materials are physically imported into the EU or exported from there. These are important tasks in non-proliferation,

64. Global Nuclear Energy Partnership (GNEP) is a comprehensive strategy to, *inter alia*, increase US and global energy security and reduce the risk of nuclear proliferation.

65. Müller, H., "Short-term steps on the multilateral fuel cycle arrangements: screening through the proposals", paper presented at the IAEA General Conference, 25 September 2006, p. 3.

66. Euratom Supply Agency Annual Report 2006, Publication of the European Communities, 2007, p. 11.

but ESA could a more important non-proliferation actor. Concretely, if the Japanese multilateral fuel cycle proposal,⁶⁷ or something along these lines, was to become a reality requesting IAEA to step up its work as an international market monitoring agency, then the ESA could provide expertise and experience to the IAEA with modalities of co-operation to be determined. Also, in cases of contracts concluded for the supply and/or return of nuclear fuel, a quadrilateral approach (between the importer, the exporter, the IAEA and Euratom/ESA) to these contracts could enhance effectiveness.

2. European Union strategy on weapons of mass destruction

In the wake of a more general “European Security Strategy”, the European Council at the Thessaloniki Summit adopted its “European Union Strategy Against the Proliferation of Weapons of Mass Destruction” (hereafter the “Strategy”) on 12 December 2003.⁶⁸ It is important to note that this Strategy has been adopted at the level of the European Council, the highest political level of the EU gathering Heads of State and Government. Thus, while non legally-binding, it bears a very high political commitment. The EU has formally entered a field that would previously have been regarded as a *chasse gardée* of NATO, and is thereby bold as to the transatlantic significance.

This Strategy is linked to the post-September 11 fight against terrorism and to the various international obligations stemming from different instruments. It is a pragmatic document which is completed by a concrete action plan that tries to improve a situation in which the EU was ill-equipped. It puts emphasis on the fact that non-proliferation, disarmament and arms control policy can make an essential contribution to the global fight against terrorism by reducing the risk of non-state actors gaining access to WMD, radioactive materials and all means of delivery. Apart from its international commitments, the EU has its own endogenous reasons to give greater political attention to non-proliferation. Indeed, on top of the renewed willingness of the EU to emerge as a global player (see *supra*), it has realised that terrorism and the threat that WMD pose also concerns Europe.⁶⁹

The cornerstone of the Strategy is multilateralism and confirms once more the commitment of the EU to an international treaty system that provides the legal and normative basis for all non-proliferation efforts. The EU continues to play a very active role⁷⁰ in multilateral non-proliferation and disarmament fora, such as its positions on the NPT, IAEA safeguards agreements and additional protocols, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention. The Strategy also contains other guiding principles, such as the mainstreaming of non-proliferation in all policies and agreements,⁷¹ support to multilateral institutions, the commitment to co-operate with

67. Proposal presented in 2006 (INFCIRC/683), which involves supplier states regularly informing the IAEA of the capacities of all their front-end production capacities, i.e. enrichment, conversion, fuel fabrication.

68. The strategy also recalls the conclusions of the 10 December 2001 European Council on the implications of the terrorist threat on Non-Proliferation, disarmament and arms control policy of the European Union.

69. Beyond the events of 11 September 2001, several European Union Member States have been the victims of terrorist acts over the last years (UK, Spain, France).

70. For a recent updated summary, see the last “Sixth-monthly report on the implementation of the European Union Strategy against the proliferation of Weapons of Mass Destruction”, Council of the European Union, 2007/II, 11 December 2007, No. 16411/07.

71. The European Council of 17 November 2003 decided to include WMD provisions in all future agreements with third countries. The clause requests full compliance with multilateral obligations and fosters steps for future adherence to other relevant multilateral instruments. Such “Weapons of Mass Destruction” clauses have already been included in the agreements between the European Union and

like-minded partners, and the recognition that increased efforts are necessary. However, being part of a multilateral system has *per se* little relevance. What is needed is a multilateral system that is efficient and reaches its goals. For the future, the European Union therefore intends to do more, notably to reinforce compliance.⁷²

Under the new 2007 “Instrument for Stability”⁷³ the EU will have resources to continue and strengthen work to enhance security against nuclear proliferation threats. This will enable the Commission to go beyond the present scope of the G8 Global Partnership co-operation with countries in the area of the Former Soviet Union. In areas such as export control and illicit trafficking in nuclear and radiological materials, the Commission will be able to support the European Union WMD Strategy at the global level. Under the Instrument for Stability, in the period 2007 to 2013, over EUR 260 million will be available for risk reduction activity on WMD including in the nuclear area. Amongst others, it will allow for border security improvements in regions with proliferation concerns and strengthening third country export controls.

With and within the Strategy, the EU could work with other partners on the feasibility, development and eventual political promotion of other initiatives to reduce the risk of diversion of nuclear material, to facilitate the implementation of safeguards and to reduce the need for international transport of nuclear materials. The idea of nuclear fuel assurances is widely seen as one “whose time has come”,⁷⁴ even if consensus does not yet exist and if many points still need to be clarified. The EU has a system and a legal regime of its own when it comes to fuel supply under Articles 52 to 76 of the Euratom Treaty which is complemented by the safeguards provisions (Articles 77 to 85). The Community indeed has the property of all special fissile materials produced in the territory of the EU, or imported thereto. The IAEA has recently proposed a possible “new framework for the utilisation of nuclear energy: options for assurance of supply of nuclear fuel”,⁷⁵ which shows the maturity at least of the idea. This issue will surely be high on the agenda for months and years to come. The European Union needs to be present.

There are, however, other initiatives and proposals to reduce non-proliferation risks, which they are often complementary rather than exclusive. Hereafter are some of the most discussed ideas to avoid the unnecessary spread of enrichment technologies and facilities and to the benefit of non-proliferation more generally:

- to create an international centre for enrichment under international supervision;⁷⁶

Albania, Tajikistan, Syria, ACP countries, Gulf Countries and negotiations are going on with several other countries.

72. On the European Union’s implementation of the Weapons of Mass Destruction Strategy, see Council of European Union, report 10527/06 of 14 June 2006.

73. Regulation (EC) No. 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, OJEC L 327 of 4 November 2006, p. 1-11.

74. Stratford, R., “New framework for the utilisation of nuclear energy in the 21st century: assurances of supply and Non-Proliferation”, conference at IAEA special event at the General Conference 2006, 19 to 21 September 2006, p. 1.

75. Report by the Director General of IAEA, GOV/INF/2007/11 of 13 June 2007.

76. This has been concretely proposed for the first time Solana, J., the European Union High Representative for Foreign Policy, not later than early December 2007; see *Le Monde* of 5 December 2007.

- to create a network of regional centres,⁷⁷ and notably to “Europeanise” the nuclear fuel cycle for all Member States;
- to store plutonium under international supervision (IAEA and/or a group of states);
- to create international fuel-cycle projects and the co-location of facilities that would operate under some form of international authority;
- to set up an internationally supervised agreement on the cut-off of the production of nuclear materials for weapons purposes, the Fissile Material Cut-Off Treaty (which had already been mentioned in the 1995 NPT Extension Conference);
- to improve cross-border enforcement of the law on non-proliferation;
- to strengthen border security and management;
- to support the activities taking place in the Proliferation Security Initiative (PSI).⁷⁸

The EU, having a leadership position worldwide in enrichment and reprocessing activities, the most sensitive issues for proliferation, can naturally make an important contribution to mitigate efforts and international co-operation in this field. To concretely contribute to progress in these areas, the EU should adopt a “functional approach... (and) states should think about how to develop a EU-wide toolbox”.⁷⁹ There is scope anyhow for different and co-existing tools to multilateralisation. The EU could without difficulty set up an EU regional enrichment centre, which could benefit from the Euratom overall framework. Precedents for such regional set ups do exist, e.g. the Russian-Kazakh enrichment centre. The EU is already very active in Russia, notably in the area of safety, through its TACIS programme. This greatly enhances the fight against proliferation in a particularly sensitive part of the world.

Finally, the development of Internal and Justice Affairs at European Union level, the actual third pillar of the European Union temple, gives the European Union a better framework for sound co-operation between states and will thus lead to co-ordinated and efficient policing actions against traffickers of nuclear materials.

3. Maximising the European Union’s political role and influence

In addition to its legal and political instruments, the European Union has other opportunities to exert leverage, influence and promote non-proliferation in important fora.

3.1 United Nations Security Council

With France and the United Kingdom, the European Union has two Member States that are permanent members of the United Nations Security Council. Both countries are NWSs, with all the political,

77. Proposals by several countries have already been made in this regard, e.g. by Russia and Saudi Arabia.

78. The European Union has issued statements supporting the activities of the PSI.

79. Finaud, M. and Anthony, I. “The role of the European Union in international Non-Proliferation and disarmament assistance”, *Genève Centre for Security Policy*, Occasional papers series, No. 50, April 2006, p. 20.

strategic and deterrent effects that this brings about. For issues of such importance, legally-binding resolutions adopted on the basis of Chapter VII of the UN Charter have been and should continue to be used, even if – read literally – the UN Charter does not appear to present an immediate legal or political basis for the fight against nuclear proliferation.⁸⁰ But more importantly, these resolutions should be enforced. In the absence of effective enforcement instruments (sanctions are usually relatively inefficient, in making the sanctioned country abide by its obligations in the short-term), there is need for a subtle combination of factors, notably political influence and a “carrot and stick” approach that could do the trick. The EU, because of its presence in the UN Security Council through permanent and non permanent rotating members, and resulting networks and links with certain countries, has the possibility of playing a more important role in this sort of approach as it can also offer financial compensatory packages and access to technologies. The EU, notably through the Commission, is a major provider of assistance for international non-proliferation efforts.

A strategic and diplomatic European identity could thus rather easily be developed on the issue of non-proliferation, as positions converge on the most fundamental points of the subject.

The EU is also bound by the 2004 United Nations Security Council Resolution 1540. It has to develop approaches to tackle the issues contained in that resolution, both at the level of Member States and at that of the European Union. The European Union has launched joint actions, notably awareness-raising and capacity-building, in Asia-Pacific, Africa and Latin-America and Caribbean.⁸¹ The European Union Strategy on WMD, which puts emphasis on the need to reinforce the role of the United Nations Security Council, is seen as progress, but some authors still show perplexity as to its real clarity.⁸² The creation of a post of Personal Representative of the European Union High Representative for CFSP is an attempt to create synergy.

3.2 *Non-Proliferation Treaty Review Conferences*

There is a clear window of opportunity for the EU to inject political will, if not a visionary leadership, into the preparations for the next 2010 NPT Review Conference. It has the legitimacy and credibility to do so, particularly in a context in which the United States has compromised since entering into the agreement with India. The last conference⁸³ is widely considered as a failure. This negative momentum, now reinforced by current cases on the international agenda (Iran, India), should be broken in order to avoid further jeopardy of the NPT.

The EU should use the combined weight of its institutions and its Member States, as well as its own internal experience as a deal-broker to achieve a set of objectives. To give new impetus, and possibly a quantum leap forward, to the NPT, this paper advocates a “new deal”. The plea would be to:

80. Some authors have advocated in favour of a stronger implication of the United Nations Security Council in Non-Proliferation, see Labbe, M.-H. (1992), “La prolifération nucléaire en 50 questions”, Jacques Bertoin éditions, p. 204.

81. See lastly the Council Joint Action 2006/419/CFSP of 12 June 2006 in “support of the implementation of the United Nations Security Council Resolution 1540/2004 and in the framework of the implementation of the European Union strategy against the Proliferation of Weapons of Mass Destruction”.

82. Portela, C., “The Role of the European Union in Non-Proliferation of Weapons of Mass Destruction. The Way to Thessaloniki and Beyond”, *PRIF Report*, No. 65, Peace Research Institute Frankfurt, 2003, p. 27; also Pelopidas, B., *op. cit.*, p. 3 footnote 6.

83. Held from 2 to 27 May 2005 at the United Nations Headquarters in New York.

- reaffirm its support for the NPT, emphasise the good track record it has and the positive role it has played, in spite of the recent setbacks and of the international context;⁸⁴
- engage in a diplomatic confidence-building exercise with all actors. This could be done through initiatives on nuclear disarmament and vertical proliferation to get buy-in from states who still emphasise the unbalanced character of the NPT between NNWSs and NWSs;
- confirm and strengthen the *acquis* and the core objectives of the NPT;
- propose ambitious but realistic objectives;
- call for universal adherence to the NPT through bilateral demarches to Israel, India and Pakistan (and as the case may be others such as the DPRK);
- get more involved in and propose diplomatic assistance in the Iranian case;
- reaffirm support for the recently acquired unlimited validity of the NPT;
- pinpoint the NPT's weaknesses so as to propose initiatives to overcome them.

All these elements are currently being worked on at European Union level, and there is keen awareness of their importance to ensure sound delivery at the next Review Conference.

3.3 *Some specialised groups*

The participation of the EU in the London Club and in the Zangger Committee, two voluntary inter-state agreements, gives the EU leverage for influence and control over export controls. The European Commission is a permanent observer in both bodies. The European Commission is also a member of the Missile Technology Control Regime and the Wassenaar Arrangement for the broader arms non-proliferation aspects where it participates in the EU Presidency Delegation; it is a full member of the Australia Group,⁸⁵ and it participates in the EU Presidency Delegation in the Missile Technology Control Regime.

The G8 is also an important forum in which non-proliferation can be discussed at the highest level. Initiatives such as the “G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction” are a concrete example thereof. The EU has actively participated in the mid-term review of the Global Partnership, to which the EU also remains an important financial contributor. One important example is the one billion Euros that has been pledged⁸⁶ by the EU for assistance in the

84. It is interesting to read literature indicting that, decades ago, most analysts thought that the number of countries that would have or be able to have a nuclear weapon would be much higher than it is actually the case today. See for instance, Courteix, S. (1978), “Exportations nucléaires et non-prolifération”, in *Economica*, Paris, p. 2.

85. The Australia Group is an informal forum of countries which, through the harmonisation of export controls, seeks to ensure that exports do not contribute to the development of chemical or biological weapons. Co-ordination of national export control measures assists Australia Group participants to fulfil their obligations under the Chemical Weapons Convention and the Biological and Toxin Weapons Convention to the fullest extent possible.

86. In 2002, at the Kananaskis (Canada) G8 Summit.

former Soviet Union. At this point, almost EUR 800 million have been committed and over EUR 400 million spent. This should help in combining efficiency and getting higher political returns.

Conclusion

A European Union composed of 27 Member States sharing the same fundamental views, principles and commitments on non-proliferation constitutes a sound basis to ensure co-ordinated or, better, common positions and actions. All EU Member States are indeed members of the NPT, of the CTBT and have signed additional safeguards agreements with the IAEA. This is a sign of strong support for multilateral governance in important issues that concern not only Europe but the world. It is recognised that global challenges can only be addressed on the basis of a shared assessment and co-ordinated action.

The EU has demonstrated clear credentials in non-proliferation. There are not many today who could reasonably regard any Euratom Member State as posing a real proliferation risk. What the European Union now needs are real vectors for change: political will, enhanced co-ordination and the setting up of a unified single framework to deal with non-proliferation. The European Union cannot afford to continue in what too often resembles a “prisoner’s dilemma”, in which every party needs to take a position without knowing what the other party will actually say, with obvious sub-optimal consequences in most cases. This framework could be organised according to the already proven systems of concentric circles or of variable geometry if some Member States want to go further and faster than others. But it needs to go beyond the actual variegated structure and be result-driven in order to ensure that bottlenecks are overcome. It is necessary for the European Union to go beyond a policy of the smallest common denominator.

The founding treaties of the EU, their secondary legislation instruments and political initiatives do lay the groundwork for a single European Union policy on non-proliferation issues provided the political will exists to go beyond institutional rivalries. That needs a utilitarian and teleological interpretation of the instruments and needs to spill over on the EU political will. Entry points do exist, notably with the Euratom Treaty and the 2003 European Union Strategy on WMD. The EU is making efforts to complete its legal and political frameworks: the Commission Communication “An Energy Policy for Europe”⁸⁷ adopted in January 2007 as a milestone in the creation of an EU energy policy mentioned non-proliferation as one of the key priorities to be pursued in the context of an effective external EU energy policy. The EU has also started an “evolutionary action plan”,⁸⁸ it is working on communications from the Commission on nuclear safety and on the contribution of Euratom to non-proliferation, which should be adopted in the coming months. These are important first steps, but they do not constitute the quantum leap which is required. To achieve the latter there must notably be more synergy between the various institutional levels in the EU and amongst the different committees of the same institutions.

The current political and strategic equation is simple: new alliances and strategic co-operation are developing regionally and globally in a multi-polar world in which certain policies and ideologies that some saw as dominating are now being questioned. A coalition might be in the making against the West.⁸⁹ There is a declared interest of many new countries to engage in nuclear energy, amongst which are those where guarantees for security may be a concern. These factors will lead to an inescapable

87. COM (2007) 1 final, 10 January 2007.

88. Report of the Inter-parliamentary Assembly for security and defence of the Western European Union, 52nd Session, 21 June 2006, document A/1938, p. 23.

89. By e.g. countries such as Venezuela, Iran, Cuba, DPRK.

increase of proliferation risks and to a world in which instability will never have been so relevant, even in the darkest periods of the Cold War. The Iranian case today should not be seen as an isolated one; rather it may foreshadow what could happen on a much larger scale in the future. As a result, either sound solutions are found to avoid increased proliferation, essentially in the form of regionally or internationally managed and monitored centres for the most sensitive parts of the nuclear cycle, or one accepts that a nuclear Pandora's box will soon be opened with little or very long-term prospects to close it again.

An international approach is the only option for all parties to build trust and consensus and bypass the criticisms of developed countries eager to maintain the current "unbalanced balance". It will be difficult, even if desirable, to limit the access of developing countries to nuclear energy; proliferation is a reason to ensure tight controls, not a reason to prevent new countries benefiting from that source of energy. A different approach would reinforce the discrimination charges that the nuclear sector already faces. The NPT has long been criticised in that respect, so a degree of self-limitation by the NWSs and real efforts in vertical proliferation, as a first step to ultimate full disarmament, is a difficult but essential path towards peace. Counter-proliferation will have to be accompanied by "de-proliferation". The EU has it all: both political leverage and financial means to maximise a "carrot and stick" approach, if need be by using conditionality in linking economic aid or technology transfers to the fulfilment of strict non-proliferation conditions by the recipient state. Also, the convergence between Euratom and the IAEA, which both share an irreplaceable experience and expertise will be needed in the future more than ever.

Faced with such a situation, a "business-as-usual" scenario aimed at buying time is no longer an option. The EU has been in listening mode for too long. The 2010 NPT Review Conference might be one of the most important ones since the NPT entered into force. A failure of the Conference, particularly when the NPT is going through a serious credibility crisis, could lead the world into highly troubled waters.

Beyond the analysis carried out in this paper and beyond the sustainability and viability of the ideas that have been presented, one fundamental thesis should at least emerge: a *new deal* in nuclear non-proliferation is needed. If the EU wants to play a role and develop an *effet utile*, it needs to use its entire toolbox, technical and political, but in a coherent rather than in a kaleidoscopic way. The EU cannot segregate any longer the instruments it has at its disposal, to promote non-proliferation. A partial approach will lead to sub-optimal outputs and lower political dividends. This is for the first time formally recognised in Chapter II of the European Union Strategy against the proliferation of WMD, even if the potential of the Euratom Treaty remains under-valued. Looking for or even proposing an overall single framework in a matter that concerns the future of mankind may seem idealistic, but one should go beyond short-term scepticism: Non-proliferation cannot afford to be trapped in a Sisyphean effort.

From urgent needs to brave deeds, there is one important step called political will. For the sake of global peace, can we thus reasonably aim at a "Common EU Non-Proliferation Policy" or an "*integrated EU nuclear security programme*"⁹⁰ as a contribution to a universally accepted nuclear security culture in the near future?

90. Bremer Maerli, M., Fedchenko, V. and Anthony, I., "Nuclear Security: Reinforcing EU Cooperative Threat Reduction Programmes", in *Stockholm International Peace Research Programme*, Background paper 2 to the Conference on "Strengthening European Action on WM Non-Proliferation and Disarmament: how can community instruments contribute?" Brussels, December 2005, p. 1.