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Foreign Affairs Committee

Foreign Policy Aspects of the Lisbon Treaty

Third Report of Session 2007–08

Volume II

Oral and written evidence

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Foreign Affairs Committee

The Foreign Affairs Committee is appointed by the House of Commons to examine the administration, expenditure and policy of the Foreign and Commonwealth Office and its associated agencies.

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Witnesses

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Rt Hon Margaret Beckett MP, Secretary of State for Foreign and Commonwealth Affairs and Patrick Reilly, Head, Future of Europe Group, Foreign and Commonwealth Office and Anthony Smith, Director, European Union, Foreign and Commonwealth Office

Wednesday 12 September 2007

Mr Jim Murphy, Minister for Europe, Ms Shan Morgan, Director, European Union, and Ms Shelagh Brooks, Legal Adviser, Foreign and Commonwealth Office

Wednesday 10 October 2007

Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Ms Shan Morgan, Director, European Union, and Mr Mike Thomas, Legal Counsellor, Europe, Foreign and Commonwealth Office

Wednesday 21 November 2007

Mr Graham Avery, Senior Member, St Antony’s College, University of Oxford; Secretary General, Trans-European Policy Studies Association; Senior Advisor, European Policy Centre, Brussels; Honorary Director-General, European Commission; European Commission official 1973-2006; Professor Christopher Hill, Director of Centre of International Studies, University of Cambridge; formerly Chair, Department of International Relations, LSE and Richard G. Whitman, Professor of Politics, Department of European Studies and Modern Languages, University of Bath; formerly Head, European Programme, Chatham House

Wednesday 5 December 2007

Rt Hon the Lord Owen CH, MP for Plymouth Sutton 1966-74 and Plymouth Devonport 1974-92; Secretary of State for Foreign and Commonwealth Affairs 1977-79

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Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Paul Berman, Legal Adviser, Shan Morgan, Director, Europe, and Martin Shearman, Head of CFSP, Europe Directorate, Foreign and Commonwealth Office.

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PROSPECTS FOR THE EUROPEAN COUNCIL, BRUSSELS, 21–22 JUNE 2007

INTRODUCTION
1. We expect the June European Council to be dominated by discussion of institutional reform. Other issues will be secondary, but are likely to include JHA, climate change and the next stage of Single Market development.

INSTITUTIONAL REFORM
2. At the European Council, EU leaders will try to agree a way forward on institutional reform. The Presidency will present a report to the Council assessing the state of discussions on the Constitutional Treaty and exploring possible future developments. We expect this report to be circulated in draft on Thursday 14 June, ahead of the General Affairs and External Relations Council on 17–18 June. We do not expect to see Council conclusions on institutional reform until after the GAERC and very close to the European Council.

3. We recognise that some institutional reform is required, but believe that, as the Minister for Europe set out in his Written Ministerial Statement of 5 December 2006, the Government’s overall approach to discussions on the future of Europe should be guided by the following principles—pursuing British interests, a modern and effective EU, consensus among 27 Member States, emphasis on subsidiarity, making the best use of existing Treaties, and openness to global change.

4. As the Prime Minister has said, the Government wants to agree an amending treaty to replace the Constitutional Treaty. Any new treaty would have to be negotiated by an Intergovernmental Conference (IGC). The Presidency foresees an ambitious timetable, with EU institutional reforms agreed, ratified and implemented by mid-2009. However, there is no consensus yet among Member States on the way forward.

5. It is important to recognise that the EU is not in crisis. In fact it is working well. Examples of recent successes include the Spring European Council and agreement on climate change; liberalisation of air travel; and EU action on mobile “phone roaming charges”, which is helping to drive down prices and deliver more choice for consumers.

6. Without an agreement or a new Treaty, the EU would still carry on under its current arrangements, and have the same functions as today. It would not collapse. But failure to reform at all would hinder the institutional effectiveness of the EU, post-enlargement. This is why the Government will argue at the June Council in favour of reform, but by means of an amending treaty.

OTHER ISSUES
7. We also expect the Conclusions to record achievements on issues such as climate change (at the Spring European Council) and strengthening police co-operation (the Prum Treaty); and briefly to endorse strengthening of the European Neighbourhood Policy, by referring to the 18–19 May GAERC conclusions and the Presidency’s progress report on the issue.

8. There is likely to be positive language on the next stage of Single Market development and on liberalising postal services. The Conclusions will also record progress on the proposal for establishing a European Institute of Technology; in line with UK objectives, this proposal has evolved away from a physical institution, towards a network which aims to bring together business, researchers and academics in Knowledge and Innovation Communities.
9. The Presidency will look for endorsement of their Central Asia strategy, which we welcome. Other foreign policy issues may come up depending on events.

June 2007

Witnesses: Rt Hon Margaret Beckett, a Member of the House, Secretary of State for Foreign and Commonwealth Affairs, and Patrick Reilly, Head, Future of Europe Group, Foreign and Commonwealth Office, gave evidence. Anthony Smith, Director, European Union, Foreign and Commonwealth Office, was in attendance.

Q103 Chairman: Good afternoon, everybody. Before I begin I ask everybody, particularly members of the public, to switch off their mobile phones, put them on silent or take the batteries out if there is a problem. We do not want any interruptions. Thank you.

Foreign Secretary, I welcome you to this important session today. We know that you have been very busy—we have been reading about it in the newspapers—and we are conscious that the next few days will involve an intense period of negotiation. Perhaps you could begin by introducing your colleagues and then give us your take on where we are at the moment before the coming few days of negotiations. What is the current situation?

Margaret Beckett: Thank you, Mr Gapes. I think that Anthony Smith has appeared before the Committee on previous occasions, and Patrick Reilly is one of my more expert colleagues on the detail. We are hoping that between us we will be able to deal with your questions.

As to where we are at present, I would make a couple of points. First, the Committee is probably aware that this has been quite a long drawn-out process. At present, as is usual with such events, nothing will be agreed until everything is agreed. But two shifts that one can detect have taken place. On the one hand—it may surprise the Committee to learn that this has been relatively recent—there is now an acceptance and understanding that those member states that have had and lost a referendum are not in a position to, and will not, resubmit the constitutional treaty to their people to be voted on afresh. That understanding is not welcome to all the members that have ratified, and has caused concern, but I think that it is now accepted and understood. Also, there is some indication that there is a recognition that that may lead to an amending treaty in the conventional style, rather than to a constitutional treaty. Perhaps I should emphasise to the Committee at the outset that, for those that have ratified, the issue is genuinely politically difficult.

When such issues have been referenced or debated in Council, or if people have touched on them, there has been a tendency to talk about those member states that have a problem. I think that it is now realised that actually everybody has a problem—in particular those such as the Spanish Government, for example. They had not only a referendum, but a resounding yes result, and experience real difficulty in being asked to go back to their people and say, “I know that we told you that this was all great, but it may not actually happen in quite that way.” That is basically where we are.

With regard to anything more concrete on the content of an amending treaty, we are no further forward in terms of detail than we were. I presume that all Committee members know that there was a dinner of Foreign Ministers on Sunday night—it was a Council meeting, although a little more informal than usual such meetings. We talked about the constitutional treaty issues. We did not talk about them during the normal session of the General Affairs and External Relations Council on Monday, so the only discussion was on Sunday night. The presidency produced a report to facilitate that discussion—on Thursday, I think?

Patrick Reilly: Yes.

Margaret Beckett: The previous Thursday. The report was extremely short. The front page said that the issue was difficult and that it was important for the whole European Union to get it right and so on—that kind of thing. There were another almost two sides of A4, which, to summarise them a little cruelly, said, “Some member states have ratified. They like the constitutional treaty and want the changes that the constitutional treaty envisaged. There are other member states, some of which had a referendum and lost, and they have concerns about the contents of the constitutional treaty, so there remain considerable disparities of view.” That was about it, so it was on that basis that we had an exchange of the views of member states on Sunday night.

But I can only say to this Committee what I said to the European Scrutiny Committee about a week ago; I do not think that Mr Younger-Ross is here—[Interruption:] He is; I beg your pardon, Richard. I was expecting to see you somewhere else for some reason. I said to the European Scrutiny Committee that nothing that I would characterise as negotiation has taken place. If this Committee wants me to explain what I mean by that, I will.

Q104 Chairman: We shall come to the detail in a moment. You referred to the Spanish Government. Spanish sources are reportedly very surprised and shocked at the position being taken by our Government. Should they be?

Margaret Beckett: I set out that position in slightly more detail perhaps, on Sunday night, but only on the fact that in the United Kingdom we are adamantly of the view that an amending treaty is
required. We have been saying for a considerable period that that treaty should be very different from the overall constitutional treaty and should not have the characteristics of a constitution. That should not have come as a surprise, but, for some, it appears to have done so.

Q105 Sandra Osborne: Secretary of State, you have stated that there are quite different views within the European Community on the way forward for institutional change ranging from minimalist to maximalist positions. There seems to have been a range of discussions; there are those who would be happy with a sort of road-map look to the future with quite a relaxed time scale, as opposed to those who wish to see substantial agreement in the European Council with a view to putting into practice a new agreement by the time of the European elections. What is the chance of the Council agreeing to an intergovernmental conference that would open its doors in 2007?

Margaret Beckett: Actually, that is one of the things that I should have said, so thank you. Part of the proposal put by the German presidency, along with its report on its discussions with member states, was to identify its belief and proposal that there should be an IGC beginning and ending under the Portuguese presidency—in other words, a short IGC that can be terminated with agreement by December. It has indicated, and so has the Portuguese presidency—not surprisingly—that that would require a very detailed mandate. It would like to achieve a very clear understanding by all member states of what the IGC will consider and seek to agree, so that it can be done, and a mandate that is so defined as to not permit the reopening of a whole lot of other issues that were not agreed as part of the mandate of the Portuguese presidency. That is challenging.

Q106 Sandra Osborne: If it was not possible to reach agreement on that, what would the UK Government see as the way forward for the process for institutional reform?

Margaret Beckett: I think that an awful lot depends on the circumstances in which an agreement was not reached. If it appeared that we were very close to an agreement but that there were nuances of difference, that would be one set of circumstances. If it appeared that people were wide apart, we would have to think about where that left us.

At this point, I think that it is important to say to the Committee that, in the past, there have been comments from various quarters that if the European Union cannot get an agreement, there will be a huge crisis and that the EU will no longer be able to function. I think that the last few months have shown that that is not actually so. The EU is functioning and has, indeed, reached some quite far-reaching decisions, such as the decisions on energy policy and climate security and other decisions of real day-to-day benefit to European citizens. Another example is the decision on mobile phone roaming charges.

The EU is continuing to work, but, having said that, I do not dispute that if we could tidy up the rule book, it could be made to work more efficiently and effectively. However, it has not ground to a halt so far, and it is not the case that it would do so automatically.

Q107 Mr Keetch: Foreign Secretary, you mentioned the referendum in your introduction and you said—I am paraphrasing you—that those countries that had a referendum and lost did not want to go back with another referendum. You mentioned also that those countries that had a referendum and won also had difficulties with agreeing to something that was less than what they had.

The UK has not had a referendum on anything. Should I take it from what you have said that you would not come back to Britain after the summit and recommend anything that you do not believe would require a referendum?

Margaret Beckett: I am not sure whether we have got our negatives right there, but I know what you mean.

Q108 Mr Keetch: Okay, let me put it again. Are you saying that you will not agree to anything that you think would have to be put to the British people in a referendum?

Margaret Beckett: The Prime Minister has made very clear what our red lines are and said that we would not agree to breach those red lines. We believe that those red lines would indeed be below the threshold that would trigger a referendum. Can I correct or add to something that you said at the outset? I mentioned the other member states that had held referendums and lost; to be fair to them, they are not saying “We do not want to have another referendum,” although that may well be their view. What they are saying very clearly is “We will not put back to our people the treaty on which we have had a referendum, to be re-endorsed.” That is a slightly different approach. It may well be that they would prefer to avoid a referendum but what they are really saying is “We will not submit a second time a treaty that has once been rejected.”

Q109 Mr Keetch: But can I take it from what you have said that the red lines that you and the Prime Minister have drawn will mean that, when you come back from this summit, nothing that you come back with will warrant, in your opinion, a referendum, and that therefore we can rule out once and for all the British people having a referendum on whatever you come back with from the summit?

Margaret Beckett: I have not been prepared to say that, and I am not prepared to say it today. I simply say that we will come to a view on whether a treaty requires a referendum when we see what is in the treaty. That seems to me the only sane way to approach it.

Q110 Ms Stuart: May I follow up on this? Back in 2004 the reason that the Prime Minister agreed to a referendum had nothing to do with constitutional
arrangements or red lines. He said, “The treaty does not and will not alter the fundamental nature of the relationship between member states and the European Union . . . Parliament should debate it in detail and decide upon it. Then, let the people have the final say.” His reason for a referendum then was neither constitutional nor linked with breaching any red lines or anything else. It was a fundamental principle that the people should decide. Why is that not the case also with an amending treaty?

Margaret Beckett: First of all, a great many things have been said about what happened in 2004. The Prime Minister himself said, if I recall correctly, that it was because he accepted, perhaps a little reluctantly, that the constitutional treaty would substantially change the relationship between Britain and the European Union that he felt that it was right to have a referendum. If a treaty would not substantially change that basis, the argument would fall.

Chairman: Let me bring in Andrew Mackinlay and questions about process, involvement in debate in this country and about how we have approached the run-up to this weekend.

Q111 Andrew Mackinlay: I understood that the Prime Minister appointed two—I think they were referred to as “focal points”.

Margaret Beckett: A bizarre term, I agree.

Q112 Andrew Mackinlay: Yes, but I shall not argue with the Prime Minister about it.

Margaret Beckett: It was not his term; it was a German description.

Q113 Andrew Mackinlay: Yes. They were Shan Morgan and Kim Darroch and I understand that they have been talking to their opposite numbers. I do not say this critically, but the last time the Government formally reported to Parliament was back in January and I guess that your argument would be that there was nothing much to report. Is that right; it is only now that it has all come to a head? Yet those two officials have been talking all the time, have not they?

Margaret Beckett: I should have said that the “focal points” are meeting as we speak, but slightly to my surprise—I shall not disguise that from the Committee—there has not been a sustained series of exchanges between the “focal points”. There have been two actual meetings, but a couple or so conversations bilaterally between the German representatives and those of the United Kingdom—and others, but I meant on their own. There have been only two meetings. One was on 2 May, the second was on 15 May, and the third will take place today, at which we believe that a draft mandate may well be put before them to communicate to their Governments.

Q114 Andrew Mackinlay: The fear of parliamentarians and members of the public is that, if that is so, and if so much is coming to a crescendo this weekend, it has all the elements of being bounced. It does not matter how skilful or resolute you or the Prime Minister are, there is a danger that, as of this moment in time, with discussions going on and nothing much having emerged, this weekend we could find that there is agreement on a treaty and/or constitution, and by Monday we could well be arguing about what it is and whether it meets your threshold. That is not a comfortable way in which to make decisions of such gravity, is it?

Margaret Beckett: I did describe it as challenging.

Q115 Andrew Mackinlay: May I ask you about these good folk—the entourage who will go with you and the Prime Minister this weekend? Do they include the two people I have referred to—Shan Morgan and Nicola Brewer?

Margaret Beckett: Yes.

Q116 Andrew Mackinlay: Why on earth is the Minister for Europe not going? I find that absolutely amazing.

Margaret Beckett: I do not know whether he is going or not.

Andrew Mackinlay: I asked him this morning, and he said no. It begs a question. He is elected and he is Minister for Europe, and I would have thought that this would be core business for him from January to now. It is breathtaking that he is not going, because presumably he knows all about this.

Chairman: Foreign Secretary, before you answer, I think that Mr Mackinlay’s impression was that the Minister for Europe was not going, but I think what the Minister said was that he had not yet made up his mind whether he was going or not.

Q117 Andrew Mackinlay: That was after he gulped after he had said that he was not going. He saw everyone’s reaction and then he said that. Is he going or is he not?

Margaret Beckett: I actually do not know as a matter of fact. He does not normally attend the European Council.

Q118 Andrew Mackinlay: You see my point; I am not being sarcastic. Senior officials have been doing this work to the best of their ability—that much has emerged. Below Cabinet level, we have a Minister for Europe—

Mr Keetch: Who sits in on the Cabinet.

Andrew Mackinlay: Apparently. We have a massive thing this weekend and no one knows whether the Minister for Europe is going. I find that breathtaking and amazing.

Margaret Beckett: I think perhaps there is a bit of a misunderstanding here, and it goes back to the point that I made—at least, I think that I made it—about whether there has been what I would call negotiation. Yes, of course he is steeped in the detail in the sense that he has had extensive conversations with other Ministers for Europe in which he has set out the position of the United
Kingdom, much as we have all set it out in any conversations that we have had or in any dialogue, as I would put it, with other colleagues.

Q119 Andrew Mackinlay: But Foreign Secretary, that is rather my point. Your responsibilities are right across the waterfront, are they not? He exists but might not even be there to whisper in your or the Prime Minister’s ear.
Margaret Beckett: Well, that is exactly what happened when the constitutional treaty was negotiated. If I may remind you, it is the Foreign Secretary who negotiates. Can I also say that the Minister has had extensive conversations with other Ministers for Europe, but we all have a broad idea of where other member states stand and of their general approach. However, because there has not been a process that I would characterise as negotiation, there is no mass of hidden detail for Mr Hoon to know that is not known to all the rest of us, including the “focal points”.

Q120 Andrew Mackinlay: Okay. You have indicated that nothing much has been going on. I have seen quotes from some stage in which you have said that nothing has been going on, but we have heard what you have said on that.
Margaret Beckett: A bit more has gone on since then.

Q121 Andrew Mackinlay: Sure, but the statement in the President’s report to the European Council says that there have been “very extensive consultations” on the treaty reform process and possible ways forward. They are bragging that there have been “very extensive consultations”.
Margaret Beckett: They are free to call them consultations, and they are consultations in the sense that they have had people in and said, “What’s your general approach?” I guess that most people have done what we have done, which is indicate our general approach and our concern that this should be an amending treaty. What the Prime Minister said to the Liaison Committee on whatever day it was is the closest that we have come to spelling out some of the detail on our red lines. We have been keeping our negotiating powder dry and so has everybody else.

Q122 Chairman: Before I bring in Richard Younger-Ross, can you clarify the role in the preparation process of the Berlin declaration, on which there were negotiations in March? Has that played any role?
Margaret Beckett: I do not think that the Berlin declaration was ever intended to play a role. By the way, the process of preparing the Berlin declaration was quite similar to the process we are having now in that, as Mr Mackinlay called it, there was a process of consultation. Everybody was asked for their opinion and lots of people gave their opinions, but we did not see a draft until 23 March and it was published on 25 March. It was published, of course, as a three-presidency statement—the presidency of the European Parliament, the presidency of the Council, and the presidency of the Commission. It was published as a presidency statement, not as an agreed Council statement.

Q123 Chairman: Was there a change? Was the original intention that it should be a Council statement?
Margaret Beckett: I think that perhaps there was a hope that it might be a Council statement, but during the process of consultation there were quite differing views as to how the Berlin declaration should be approached. There were some who felt that there ought to be an intergovernmental conference and that a declaration on behalf of the whole of the European Union could not be produced through a relatively informal process. There were some people who would have liked it to have been a very extensive document, but the great majority of member states wanted something short, succinct and, hopefully, somewhat visionary. The only way that the declaration touched on this process is that there was a reference in it—I cannot remember the exact words, although no doubt somebody has got them—to a common desire to achieve reform in the European Union, which some people read as meaning that we will go ahead with the constitutional treaty unchanged. I do not think that that was what it was intended to say, but that is how some people read it, so there was a degree of sensitivity about that wording. That is the nearest it got to being related to this matter.

Q124 Richard Younger-Ross: I wonder whether you could explain the logic behind your negotiating stance on this, Foreign Secretary. It strikes me that the Government have either been complacent or incompetent. Quite clearly there have been negotiations going on among other countries to prepare the ground for the summit and the IGC ahead of us. Why have the Government taken the stance that they will keep their powder dry? Why have they not engaged in the process, so that we would have some influence over what the German’s will tell us tomorrow, rather than having to stamp our feet like a petulant child and say, “No, we’re not going to do that.”?
Margaret Beckett: I am afraid that the description that you give, Mr Younger-Ross, is not an accurate description of what has happened. First of all, in so far as the opportunity has been offered, we have engaged with the German Government. We have set out very plainly our approach and that we believe the treaty that is required is one that has a different approach from the constitutional treaty. Whenever the opportunity has been offered, we have engaged in dialogue.
You say that there have been negotiations among other countries, but I do not believe that that is so. I think that what has happened is a version of what I described to Mr Mackinlay as a dialogue. We have had discussions with other member states in which we have said, “Broadly speaking, we are here. This is our approach; we need an amending
treaty. There are areas where we have concerns.” We have all had those discussions, but they are not negotiations.

Perhaps it would be helpful if I explain what I mean. To my mind the process of actual negotiation begins when you are invited to set out your core demands to a partner with whom you are negotiating, who also has a set of core demands. The exchange perhaps then begins by them saying, “You cannot possibly have that, but perhaps we could give ground on this or help you with that bit there.” You may then say, “This is completely unsatisfactory and, what is more, we cannot accept that under any circumstances.” That is a process that then goes on. It is a detailed process of assessment and, if you like, trading. To the best of my knowledge and understanding—and I have talked and, more to the point, listened to all my Foreign Minister colleagues over the months—no such process has taken place.

Let me give you an example involving a statement that was made the other day. President Sarkozy is clearly anxious to build good relationships with his new partners and with as many member states as he can. He has undertaken a process of discussion with our Prime Minister and has said that we have reached common ground on the fact that we both think, from our different points of view, that there should be an amending treaty. He has had other discussions with the Spanish Government, whereby they have clearly identified areas of common ground. Part of the reason why I say this process is challenging is that, as far as I can see, probably no one member state is in exactly the same position as, and has a negotiated agreement with, any other member state.

Q125 Richard Younger-Ross: Really?
Margaret Beckett: I may be exaggerating, but only very slightly.

Q126 Richard Younger-Ross: You have used the word “discussion”, and I fear that you might have misled the European Scrutiny Committee in your evidence on 7 June.
Margaret Beckett: Very unlikely, if I may say so.

Q127 Richard Younger-Ross: I asked you specifically then, “Can you confirm whether there have been discussions about these matters, although they might not be negotiations?” You did not expand at that time to say that there had been meetings with the Germans or that there had been discussions and dialogue with our Prime Minister.
Margaret Beckett: Again, I think that we are at cross-purposes. I am trying to remember what you asked me. If I recall it correctly, you asked whether there had been specific discussions about treaty content. There had not been in the way that I consider to form part of a negotiating preparation and a discussion leading up to that. As I said to you in the European Scrutiny Committee, it was very much the case that that was so. By the way, I was also talking about collective discussion round the Council table.

Q128 Richard Younger-Ross: That was not the question that I put to you. I shall again put to you the full question: “The Foreign Secretary very carefully used the words ‘meaningful negotiations’. I am wondering if you used the words twice whether negotiations preclude discussions”—that is, did you mean negotiate and not discussions? I continued: “Can you confirm whether there have been discussions about these matters, although they might not be negotiations?” You did not answer that there had been any discussions or dialogue.
Margaret Beckett: Perhaps we were at cross-purposes then, because I meant that there had not been—indeed, you could probably say that there still have not been—discussions in Council, around the Council table, about the approach on the treaty or its content. No such discussions have taken place.

Q129 Chairman: May I ask you about the process that we are engaged in within our own role here? This negotiation comes at an interesting time, because there is to be a change of Prime Minister. How closely has the Prime Minister-elect been involved in this discussion? We know that he will not be there at the weekend either, but if this process leads to an IGC under the Portuguese presidency, clearly it will be for the new Prime Minister to take that forward.
Margaret Beckett: Indeed.

Q130 Chairman: If it does not lead to that, he will have to deal with the mess that comes out of the weekend. Could you give us an insight into how this has been co-ordinated?
Margaret Beckett: I would simply say that, as I think the Committee would expect, once it became clear that the Chancellor would become the Prime Minister—if there had been a contest, that would have been at least nominally in question and a slightly different constitutional situation would have been created—a greater exchange of dialogue and discussion took place, which has been an ongoing process.

Q131 Andrew Mackinlay: Can you tell us more? We are entitled to know about the machinery of government.
Margaret Beckett: There is nothing exciting about this in terms of the machinery of government. This is just not an area that he has been engaged in, and he has now received the kind of briefings that we have had.

Q132 Ms Stuart: I know how painful the negotiations are and I still occasionally break out in a cold sweat when I think back to the days when I was involved, but the problem with negotiations as you describe them is that the typical scenario, in my experience, is that the others have a list of things they want and we have a list of things we do not want. So far as all these negotiations are concerned, the only time we ever really wanted something was when we wanted the European President—the creation of that post. Can I have
just one nugget of concrete information? As that was at one stage our key priority, do we still think that it is something that we should be fighting for and still want?

Margaret Beckett: We certainly think that that is a rule change that would substantially improve the efficiency of the way the European Union works, but I would say that our main negotiating goal in this particular process, which is of course quite different—uncertainly sympathise with the ordeal that those of you who were involved in the treaty negotiations went through—has been to get acceptance that the treaty that is put forward should be an amending treaty and should have the characteristics and the likely content of an amending treaty. It remains to be seen, but I would anticipate it may well be that the position of President will be there.

Q133 Ms Stuart: With the indulgence of the Chair, may I ask another question? If it is an amending treaty, would an amending treaty, according to your definition, be the appropriate vehicle for something such as giving the European Union a single legal personality, and are we for or against that?

Margaret Beckett: If I recall correctly—Patrick will kick me or correct me if I am wrong—there was an extension of the use of single legal personality in the Treaty of Amsterdam.

Patrick Reilly: Not exactly, Foreign Secretary.

Margaret Beckett: No, partly. Remind me.

Patrick Reilly: We have had legal personality in the European Community since 1957.

Margaret Beckett: I am well aware of that, but there was some extension to the European Union at some point—in an amending treaty anyway if it is not Amsterdam. As Patrick points out to the Committee, the European Community had a single legal personality from 1957, and there has been some sort of functional exercise of that kind of personality in the European Union, exercised normally, I think I am right in saying, by the Presidents of the Council of the day, so it may sound a big deal, but as this kind of thing has been dealt with in the past in an amending treaty, it no doubt could be dealt with in an amending treaty on this occasion.

Q134 Ms Stuart: It is a big deal. The fully fledged single personality is one of the main things most European integrationists seek, and by that I mean the full single legal personality that will allow the EU to enter into treaty negotiations across the whole range, not just where it has sole competence. That is what was in the original document. Is that something that we think is acceptable, and is acceptable for an amending treaty?

Margaret Beckett: I can only repeat that we will have to see what is put forward, but the fact that the European Community has had a single legal personality from the beginning and had it before there was a European Union puts it in a somewhat different context. I accept your point entirely that there are people with particular ambitions for the development of the European Union who would choose to construe such a step in a particular way. That is quite another matter from saying that it is an inevitable consequence.

Q135 Sir John Stanley: The Chancellor of the Exchequer, as he will be for another week or so, said this morning that he would hold a referendum if it was necessary. You, in answer to an earlier question from the Committee this afternoon, very carefully did not rule out the possibility of a referendum. The question, therefore, is that I put to you is this: what are the circumstances in which the Government would judge it right and appropriate to hold a referendum?

Margaret Beckett: First of all, I am afraid I did not hear what the Chancellor said this morning, but I accept what you say, Sir John, and as you say, not only today but at all times I have been careful not to say—in fact, I do not think that any of us have said—there will not be a referendum. What we have always said is it would depend on the content of any treaty that was agreed whether or not the Government judged that that was something that required a referendum. Of course, other people will have their views, and I shall be astonished if there are not large numbers of people who demand a referendum no matter what is in the treaty.

Q136 Sir John Stanley: Are you saying that there will be a considerable period before the Government are able to tell the Committee and the House whether they accept that there should be a referendum, or not, or are you saying that by the end of the summit process this weekend, you will be in a position to tell the House next week whether you believe there should be a referendum or not?

Margaret Beckett: One must not prejudge the matter, but if there is agreement on a mandate this weekend, I would have thought that it would be possible to say then whether or not, in the Government’s judgment, it was sufficient to require a referendum. That is my expectation, Sir John. I cannot, of course, give an assurance that that will be so, but that is my expectation.

Q137 Sir John Stanley: So we can expect that by next Monday the Government will have been able to form a judgment on whether the mandate is such that they believe that there should be a referendum or not.

Margaret Beckett: Yes. I certainly hope so.

Q138 Mr Horan: May we return to a statement you made a few moments ago? You said that your main aim in the discussions was to achieve something that had the characteristics of an amending treaty. Is that a fair summary of your objective?

Margaret Beckett: Yes—one that lacks the characteristics of a constitution.

Q139 Mr Horan: May we drill down on that a little? When you refer to the characteristics of an amending treaty, what would be the content of
that? As I understand it—I am focusing on what has been said in the past few weeks—we would be prepared to accept as characteristics of an amending treaty, first, a single Foreign Secretary for the European Union, secondly, a presidency that lasted three years rather than six months, and, thirdly, changes to the voting weights in the Council to reflect greater power for the major countries. Would that be a reasonable discussion?

Margaret Beckett: No, I am not saying that, and I shall explain why. I have never said that this and this would be characteristics of an amending treaty. We approach the issue from the opposite direction. There are things that would give a treaty the characteristics of a constitution, and we have set our face against having a treaty with the characteristics of a constitution. If it is not a constitution, to my mind it is an amending treaty, which is what we are seeking, and there will then be discussion about the content of that. If the content of a proposed treaty included something that we believed gave it the characteristics of a constitution, that would make it something of a constitutional treaty rather than an amending treaty.

Q140 Mr Horam: Therefore, may I ask you to define what you mean by the constitutional aspects of a treaty? For example, are you saying that a significant transfer of power from a nation state, such as the UK, to the European Union would constitute a constitutional change, as opposed to changes that might increase the efficiency of the working of the European Union?

Margaret Beckett: Those are terms that one would have to define. I simply say that—

Q141 Mr Horam: I am trying to define them. Margaret Beckett: A treaty that substituted or replaced existing treaties, was explicitly defined as a constitution, and contained symbolic things such as the flag, the anthem and so on, would clearly be and would have been intended to be a constitution to replace existing treaties and roll them into one document. That is not something that we envisage.

Q142 Mr Horam: But we must get away from general statements to content at some stage and, as I understand it, the sort of things that the UK would be prepared to accept would be measures that improved the efficiency of the working of the European Union—for example, not having two Foreign Secretaries, which is what it has at the moment in practice. Do you agree?

Margaret Beckett: I certainly understand the criticism of having that duplication of roles—an External Affairs Commissioner and a high representative.

Q143 Mr Horam: Right, and returning to the point that Gisela Stuart made, can you separate things that are concerned with the efficiency of working of the European Union, such as having one Foreign Secretary rather than two, from, for example, having a single legal personality and the ability to make treaties? Are they separable?

Margaret Beckett: Yes, I would have thought they probably are, but we shall see what set of proposals the German Government put forward.

Q144 Mr Heathcoat-Amory: The Prime Minister yesterday set out four red lines—that is, issues that he will not accept under any circumstances. But the total European constitution—I have a copy here—runs to 511 pages. If we generously suppose that the red lines take up about 11 pages, that still leaves 500 pages of the constitution. Are you willing to accept those remaining 500 pages?

Margaret Beckett: I should be astonished, Mr Heathcoat-Amory, if any treaty proposal that emerges from this weekend’s discussion runs to anywhere near 500 pages. We have made it very clear that we do not accept that the constitutional treaty should be placed before the British people any more than the French and the Dutch Governments accept that it should be placed a fresh before their peoples.

Q145 Mr Heathcoat-Amory: Can you then tell us what in the 500 pages, apart from the four red lines, you wish to see come out or think will come out? There are some very controversial measures in there that the British Government did not want in the constitution—I know that, because I was on the Convention at the time. They include, for instance, the collapse of the intergovernmental pillars, the creation of a single legal personality that can operate as a state on the world stage, the energy chapter, which would give the EU new powers over the energy market and the supply of energy, and the co-ordination of economic and employment policies by the Union. The Prime Minister is, by implication, accepting all that, and is saying that he simply wants to set out his four red lines. Is that your position?

Margaret Beckett: I do not think that the Prime Minister would accept that by setting out the red lines he is accepting all the other 400 and however many pages there are of the constitutional treaty.

Q146 Mr Heathcoat-Amory: Well, tell us what you are seeking to take out.

Margaret Beckett: I am not conducting the negotiations here, I am afraid, Mr Heathcoat-Amory.

Q147 Mr Heathcoat-Amory: You are not negotiating with me, but you might share with us your other concerns about the constitutional treaty.

Margaret Beckett: I simply say that what we are looking for is an amending treaty, which we believe could usefully clarify and tighten up the rule book of the European Union, to help it work more effectively in a community of 27.

Q148 Mr Heathcoat-Amory: Can I press you on something else specific? One of the red lines is about the move to qualified majority voting. The
Prime Minister said that he would not accept it for tax and the benefits system, but there are at least 42 areas where we have a veto that are switched to majority voting in the European constitution. Again, are you accepting that in those 38 areas you will accept that switch to majority voting? That would of course be a very big extension of the powers of European Union and would restrict the ability of a British Government or Parliament to object to future legal measures from the EU.

Mr Heathcoat-Amory: I would say two things about that. First, it is true that in the package that was published in September 2003, before the last intergovernmental conference, there were seven areas on which the Government would “insist” — the paper uses that term — that unanimity should remain. Only two of them are tax and social security. So you are now saying that you will accept a switch to qualified majority voting in the other areas where we previously insisted that there was no question of doing so, so there has been, as usual, an enormous —

Q149 Mr Heathcoat-Amory: But there has been a massive retreat in your position. I have with me a copy of the White Paper that the Government published in September 2003, before the last intergovernmental conference. In it, there were seven areas on which the Government would “insist” — the paper uses that term — that unanimity should remain. Only two of them are tax and social security, so you are now saying that you will accept a switch to qualified majority voting in the other areas where you previously insisted that there was no question of doing so, so there has been, as usual, an enormous —

Margaret Beckett: I am not saying —

Q150 Mr Heathcoat-Amory: May I finish the question? As usual, there has been an enormous change. I specifically want to ask you about criminal justice matters.

Margaret Beckett: I would call your comments an assertion, not a question.
to accept that the French and Dutch referendums meant that that constitutional treaty will not return.

Q154 Ms Stuart: Foreign Secretary, I am slightly puzzled, because when I attended the negotiations in Germany a few weeks ago, it was quite clear that, for most of the mainland Europeans, the question was how to protect as much as possible of the constitutional treaty, and what they needed to slice off to make it acceptable—in essence, slice off the wallpaper. I think that we both know that whether Europe has a flag and an anthem legally makes not the blindest bit of difference. We seem to be saying, “It’s not the same beast,” whereas the rest of them are quite clear and open that it is a question of, “How much do we need to take off to make it acceptable to the Brits?” They are looking at it so differently, and there are 26 of them and only one of us.

Margaret Beckett: I am sorry; broadly speaking there is something in what you say but the notion that there are 26 of them and that is what they all want, and we are the only people who do not, is, I fear, not correct. There is indeed a large core group of member states, particularly those that have ratified the treaty, that perfectly understandably and sensibly do not really want to have to go back to their Parliaments, or in the case of the Spanish and Luxembourg Governments to their electorates, and say, “Actually, maybe we’re not going to do this any more in quite this way.” It is perfectly understandable that that is their view and that their approach has been, “This is really what we wanted to do, so can we save as much of it as possible?” It is perfectly sensible that that is their approach.

Equally the French, the Dutch, we and other member states have been saying that the constitutional treaty is not going to return. We are not starting from the same place. We are starting by suggesting that, given that we are no longer going to have a constitutional treaty, we should consider an amending treaty. We start from a different place. You are absolutely right that there has been a reluctance to start from that place, which is why, as the German presidency report said at the end last week, the case remains that a lot of member states would like to carry on as much of the treaty as possible whereas other member states do not share that view. That remains exactly where we are.

Q155 Mr Illsley: On the document to which my colleague just alluded, the completed constitution, is the case not that had the UK envisaged that it would be given so much more importance by other countries, we would have opposed it much more strenuously during its formative period? Is it not a fact that a lot of countries have given far more weight to the document as a constitution than we ever did? I seem to recall some of us using the phrase “a tidying-up exercise” to describe the document’s bringing together all the separate treaties. Is not part of the problem the idea that has been given that it was an over-arching constitution that we never wanted?

Margaret Beckett: That is a very strong and valid point. UK negotiators had not envisaged, when the negotiations and then the discussions commenced, such iconic status being placed on the document as has been placed on it by a number of member state colleagues. But hindsight is a wonderful thing.

Q156 Mr Keetch: The problem with Mr Illsley’s suggestion is that the actual command document placed before Parliament describes it as a “treaty establishing a constitution for Europe”. It might have started out as a tidying-up exercise, but it ended up as a constitution. It is a bit like a duck, isn’t it? If it quacks like a duck, walks like a duck and has feathers, it is probably a duck. We are trying to understand whether you are going to come back with a constitution or an amending treaty.

You are saying that you will not cross the Prime Minister’s four red lines, and we will therefore not have a referendum. In answer to Sir John, you said that you do not envisage there being a circumstance in which you would come back with something that required a referendum, but you are not ruling a referendum out. I will ask you a very simple question: if one other nation state comes back from Brussels at the weekend and feels that what it has, whether it is called an amending treaty, a constitution or a duck, should be put to its people in a referendum, will you allow the British people to have that same say?

Margaret Beckett: I can answer that question readily, Mr Keetch. One member state is bound to come back and say that it will have a referendum, because the Irish have a constitutional requirement.

Q157 Mr Keetch: And the Portuguese?

Margaret Beckett: So no matter what happens, the Irish will have a referendum. The Portuguese have not given an indication. They believe that they may—

Richard Younger-Ross: They have, Foreign Secretary.

Q158 Chairman: May I ask you to clarify something? You have talked about the four red lines, but other areas that do not appear on the lists of red lines are reported to have caused a tough exchange at your meeting on Sunday. Are there other areas, such as external affairs work and the so-called ambassadors of the European Union—our Committee was critical of that concept, last year—that are red lines, but are not listed as such?

Margaret Beckett: With the red lines, we have the phraseology and we will insist on maintaining our ability to conduct our own independent foreign and defence policy. Obviously, foreign and defence policy is an area for discussion. May I say, do not believe everything that you read in the papers about a frosty atmosphere.
Q159 Chairman: I never do, but some things are interesting. Margaret Beckett: Certainly, that area—what is now in the proposals for the common foreign and security policy—is something that we want to look at.

Q160 Chairman: In other words, you have a real problem with what the majority—the 18 countries who have endorsed the treaty, plus three or four others who might do so—said that there are no sherpas. Margaret Beckett: Let us be quite clear about this. The 18 countries who have endorsed the treaty have accepted all the constitutional treaty, and they now have to consider where they stand. I think that some of them have held the view that all they have to do is not look and it will not go away.

Q161 Mr Heathcoat-Amory: We know that what comes out of the negotiations will not be called a constitution. That is about the only thing that can be agreed. In deference to our sensitivities, it will be called a treaty, but that is why we have to look at the substance. We are having difficulty with the EU trying to assess the substance and what new powers will be in the final document. You mentioned that the reason why a referendum was granted before was because it would have altered the relationship between the UK and the EU, but we have discussed many examples, in this brief sitting, of areas where there clearly will be a change, even if the Prime Minister gets all his red lines taken out, as all the other qualified majority voting advances. You mentioned the Single European Act, but there were only 12 in that; there are 42 in the constitution, and we now know that the Prime Minister objects to only two of them.

We have discussed having a single legal personality for the European Union and collapsing the intergovernmental pillars, as well as a permanent, full-time President in Brussels, who clearly would have more powers, and a European Foreign Minister. He would not be called a Minister, again out of deference to our concerns about presentation, but he would have many powers to conduct foreign policy on behalf of all the member states. Does not all that add up to a change in the relationship between the existing Union and the member states that justifies a referendum on exactly the same grounds as those on which the Prime Minister gave way last time, in 2005, when he suddenly announced one? Margaret Beckett: Mr Heathcoat-Amory, you keep asserting what will be in the treaty, but there are not yet even any proposals from the German Government as to what they envisage being in the mandate of the treaty, let alone any reaction from the British Government to those proposals, or any negotiated agreement. So, I am afraid that all of that is theoretical.

Q162 Mr Heathcoat-Amory: So, you can tell us nothing? You are sitting here, two days before the negotiations start, and you do not know whether the Minister for Europe is going. Presumably, you are going; can you not tell us something about it? There have been feverish negotiations in Europe about this.

Mr Keetch: Discussions, not negotiations.

Mr Heathcoat-Amory: Discussions, as you delicately put it. Margaret Beckett: I am sorry, but this is a total misunderstanding. There have not been feverish negotiations and discussions in Europe; I wish that there had, but there have not. To put it bluntly, most of our colleagues have been in denial and have been saying things like, “Oh, well, people signed up to this in 2004, so therefore you must all agree with it now.” That is not a basis for negotiation or discussion if we are not going to have a constitutional treaty. So it is no good to keep going on about how there have been all these negotiations. There have not. It might be a great pity, but there have not.

I understand completely; I am sure that the Committee imagined, as did we probably, that we would have had a draft document weeks ago, and that there would have been a lot of discussion and argy-bargy and all those kinds of things. You as a Committee did not want to be left out of it. I understand and sympathise. I have not seen the draft document either—nobody has. It has not been produced—well, until five minutes ago perhaps.

Q163 Mr Heathcoat-Amory: Well, Foreign Secretary, what have the sherpas been doing? Margaret Beckett: There are no sherpas.

Q164 Mr Heathcoat-Amory: May I ask you the question, please? In January, in a parliamentary answer to the House, the Prime Minister said that he had appointed Kim Darroch and Nicola Brewer to prepare the ground for these very important negotiations, which I remind you are about not just a constitution for Europe, but for this country. We do not have a written constitution, so it would affect the powers of this House, which is why we are all so interested. Do you mean to say that those two very senior officials have been doing nothing since January and have not been reporting back? Are you saying that the letter that was sent around—that questionnaire—from Mrs. Merkel, suggesting that it all go through except for changing a few of the presentational titles, is now mouldering away in the bottom drawer in the Foreign Office? We are not all innocent here. We have all been engaged in some way in foreign affairs in the past and know perfectly well that much discussion has been taking place. We want you to tell us what the British position might be because it is all going to happen this week.

Margaret Beckett: I am sure that this is all particularly familiar to Mr Younger-Ross, because it is very much what the European Scrutiny Committee said. I was nit-picking perhaps when I said that there are no sherpas. There are no people called sherpas—the people whom normally you would call sherpas are called focal points. Don’t ask me why. As I explained, the focal points have
Q165 Chairman: We had better move on to some other areas in a moment, but before we move away from the constitutional treaty, I would like to ask one more question. Would an agreement on Sunday involve a formal statement that the constitutional treaty is withdrawn, is dead, and is no more—to coin a phrase? Otherwise we will be in a situation in which 18 countries have ratified, but in which also we will be about to have an IGC under the Portuguese presidency with some ambiguity about the basis of that conference.

Margaret Beckett: No discussion of that has taken place. I do not know. No one knows the answer to your question. If you are asking me for my political judgment, I think that it would be very reluctant to make such a statement, because there are a number of member states that have ratified and remain very attached to the content of the treaty because it is a matter of some sensitivity in their countries and with their electorate. However, given that the constitutional treaty has been rejected by the electorates of two member states, it cannot come back in its current form unless those member states, along with others, are prepared to bring it back in its previous form. But I see no prospect of that happening.

Q166 Andrew Mackinlay: The Chairman’s view, and ours, is that, on Monday, states that are enthusiasts for the constitution—we have them in mind—will deem that they have ratified what emerges on Monday. In other words, it will fit in with their concept of the constitution. That would be abhorrent—not to me—but it would be inconsistent with the Prime Minister’s view. If Ireland, for instance, said, “Well, what has emerged from Monday are points 3, 4, 5 and 7 of the constitution, so we have already had them endorsed by our electorate, and so we do not need to go to them again.” In other words, by stealth you have the constitution.

Margaret Beckett: The Irish Government made it very plain that they have to have a referendum.

Q167 Andrew Mackinlay: I used the term earlier about being bounced, but the Prime Minister and you can go along this weekend and say, “We have heard this, but we are simply not prepared to sign up to it.” The view is that everything has to be done. The record of the EEC is that there has hardly ever been a breakdown—there have been one or two. However, if you give evidence to the Committee saying, “As Foreign Secretary, I am so frustrated that there have been no discussions,” and something is published as you are speaking, surely in any organisation, whether the Scouts or the European Union, you have to say, “I am not prepared to put up with this; you will have to come back another day.” Why do we have to agree all this over this weekend? There is no logical reason. The world will not collapse if it is deferred and kicked into touch. It would discipline the European Union if the United Kingdom takes that stance this weekend and on Monday.

Margaret Beckett: It remains to be seen what will happen this weekend. The one thing on which we have not touched that it would be worth bearing in mind goes back, in a sense, to the Hampton Court summit. There is a recognition, which is perhaps slightly grudging on the part of some, that the citizens of the European Union are not as excited as some people think that they should be about such technical discussions and concentration on legislative documents and things of that kind. A lot of people—maybe everybody—will feel that if the matter can be dealt with this weekend, and followed by a short and effective IGC to develop the treaty, and if we can put it behind us so that the European Union can continue to concentrate on the matters that are of much more day-to-day relevance to the citizens of the European Union, everybody would think that that was a good thing. Whether it can be done is another matter.

Q168 Sandra Osborne: One of the main aims of the constitution was to bring the EU closer to the people. Do you agree that if a referendum had been held in the UK, it is highly unlikely that the British people would have said yes? I would go further than what you have just said and say that many of the public are not only not enamoured with the process, but they are not particularly enamoured with the European Union—they are certainly no closer to it than they were before. How are they to be brought closer to the EU, and do you not think, given that there might be a lack of trust in any amended treaty that comes forward, that the Government will have to have a referendum to bring people along with the idea rather than thinking that you can just put it behind you and move on to the day-to-day issues, as you say? Is there not a public credibility issue?

Margaret Beckett: There are two or three things wrapped up in that. First, I utterly reject the notion that because we now have a Labour Government we should be required to have referendums in circumstances where previous Conservative Governments had no intention of holding them and never did hold them. The only national referendum we have ever had was in 1975, when we joined the European Union. I refuse to accept that...
I reject the notion that somehow we have to be judged by a different standard. My Italian colleague assures me that the constitution is extremely popular with the people of Italy and that it is one of the things that makes them feel closer to the European Union. But I accept your judgment, Ms Osborne, that that might not be the case in the United Kingdom.

You say that people will think that there is more in this than the Government accept or admit, but that is because they have been assiduously told that for months and they will continue to be told that. We all know that, but I remain of the view that it is wiser to make the judgment when we see the proposed content of the treaty. Then we can come to a judgment.

Chairman: Let us move on to some other areas, please. [Interruption] One final question on this area, and then we are going to move on.

Q169 Mr Heathcoat-Amory: Foreign Secretary, you said that no meaningful discussions have been taking place at Foreign Office level. But they have clearly been taking place at prime ministerial level, because we have the report of a meeting that took place between the Prime Minister and the Dutch Prime Minister on 16 April. Clearly, negotiations have been taking place somewhere else. Both of them make the point that a Europe of 27 needs different rules from a Europe of 15, but do you agree that there has been no slowdown in the volume of legislation coming out of Brussels in recent years after the successive enlargements? Do you see a case for majority voting to speed up the decision-making process, when it is not clear—to me anyway—that what Europe really lacks is legislation and regulation?

Margaret Beckett: Well, it depends on the circumstances. One area in which the European Union is popular, even with the people of the United Kingdom, is environmental policy. There are many people who feel that moving forward on standards is not only always desirable in itself, but that—this was certainly the basis of the decision made at the March Council—if we do so, there could be a real competitive advantage to the European Union as a whole if we make ourselves the first low carbon economy. I do not accept that there are no areas where there might not be benefit in moving forward, or that there might not be benefit in moving forward on the issue of qualified majority voting.

You have to forgive me, I have completely forgotten the beginning of your question.

Q170 Mr Heathcoat-Amory: I just made the point that negotiations have been taking place, but clearly not with you.

Margaret Beckett: I am sorry, but I do not accept the characterisation that they are negotiations. The Dutch Prime Minister is not in a position to deliver agreement to our Prime Minister on what should be in the treaty. All they can do is exchange ideas about his main concerns, our main concerns, and whether we might be in the same place. As I said to the Committee before, however, as far as I can make out, no one member state is in the identical place to any other member state at this moment in time.

Chairman: We must move on. Paul Keetch, on enlargement.

Q171 Mr Keetch: The chairman is encouraging us to move on, so I will accept his encouragement. May I talk about enlargement, Foreign Secretary? I appreciate that it is not a huge issue of the German presidency, but it is important that we look at a number of areas. I shall start with Serbia.

Are there any indications that the EU process might be so sufficient as to persuade Belgrade to support the Ahtisaari plan for Kosovo? Are we moving down that line? Has it been successful, and is Belgrade now delivering on some of the issues that we would like it to deliver on, so that we can move forward on enlargement towards that country?

Margaret Beckett: The test that you have set is not a test that can be met. It is common ground among colleagues that probably no Serbian politician could say, “Yes, I accept the Ahtisaari plan.” However, what did and does concern the European Union is whether there are things that Serbia can do to show that they are moving forward and, for example, arresting some of the prisoners. There has been, as you probably know, strong resistance in the General Affairs Council to opening negotiations with Serbia about the stabilisation and association agreement lacking such movement. However, Serbia has now moved. We welcome that very much, which is why Commissioner Rehn announced a few days ago that the negotiations can recommence. He has also made it plain—he said this explicitly at the Council yesterday—that such negotiations cannot be concluded until Serbia has fulfilled its obligations towards the International Criminal Tribunal for the Former Yugoslavia.

We all welcome the moves that Serbia has made. We are all deeply relieved that they have meant that we can begin to open the negotiations, because there is common ground on the fact that everybody wants to “hold open to Serbia the prospect of membership of the European Union. We want to hold open that door. It was difficult to do so without any moves on the side of the European Union, yet there was strong resistance in the Council, of which we were part, to moving towards those negotiations if Serbia was not prepared to make any moves to co-operate with the international court. We have seen some encouraging steps in the right direction, so those negotiations will commence. I welcome that, as I think everybody does.

Q172 Mr Illsley: As you are aware, there have recently been significant political conflicts in Turkey, which have shown the fragility of the Turkish democracy of the moment. Do you consider that the problems in Turkey are a reason for the UK to step up its commitment towards
Turkey’s EU membership or to take a step backwards from that commitment and proceed with a certain amount of caution?

Margaret Beckett: I certainly do not take the view that we should now take a step backwards, because although I accept that Turkey has not made as much progress as people would like and that recent events have caused some anxiety, it is our judgment and understanding that it is primarily the prospect—in the longer term, of course—of membership of the European Union that has stimulated the reforms that have taken place in Turkey. If we were now to step back, we would put a dampener on the process of reform. Part of what lies behind your question is the wish to see a greater process of reform, and we would not be likely to get that by stepping back. As to whether we can step up our engagement, we are already pretty heavily engaged, to be honest.

Q173 Mr Illsley: How do you see the election of President Sarkozy playing on this issue? I know that he has said that he will leave the issue of Turkey aside for the moment, but he has obviously stated his opposition to its membership. Do you see that bringing him into conflict with ourselves? Do you see his election again putting a brake on Turkey’s accession?

Margaret Beckett: He has indicated that he does not intend to obstruct the continuing process of negotiation and discussion, which, as we all know, is likely to go on for a substantial period of years—that is what happens with accession negotiations. Obviously, he has concerns, which he has expressed strongly in the past, but I hope that, over time, in discussion with other European Union colleagues, he will appreciate the exact point that I put to you about the potential advantages for Turkey. I cannot recall whether I have said this to this Committee before, and if I have done so, I apologise for repeating myself. We take the view that right across the Muslim world people are looking to see whether we treat Turkey as fairly as we treat any other applicant to the European Union. In addition, a large number of people in the Muslim world are potential reformers, or they would like to be reformers in their own country. Such people are looking to see whether there is anything that they can learn from the way in which Turkey is reforming, from the difficulties that it is experiencing and from the benefits, advantages and so on. This could be really important in bringing about the kind of change that we would like to see happening a lot more widely than merely in Turkey. I suspect that that is an argument with which President Sarkozy has not been engaged.

Q175 Mr Hamilton: May I just pick up on something that Mr Illsley said? I agree with everything that you have just said, Foreign Secretary, about the need for Turkey to be part of the European Union. Many of us strongly support the Government’s policy on this. However, we have a problem, do we not, because, essential as I and many of us believe it is that Turkey should join the European Union and make the progress towards accession, we have a block. That block is the promise that former President Chirac made on a referendum in France and the fact that the Austrians—we have just returned from Vienna—are implacably opposed to Turkey becoming part of Europe, as we know they have been for 100s of years, and are going to hold a referendum. We cannot tell what is going to happen in five or 10 years, but the likely outcome now is that both those countries will oppose Turkey’s accession to the European Union. How are we going to get round that one and tell the Turks that it is worth carrying on with the negotiations?

Margaret Beckett: I am well aware that the Government of Austria have strong reservations about this, but they had strong reservations about continuing the negotiations with Turkey. They had anxieties and concerns, but in the end they were swayed by the kind of views that I have just expressed to Mr Illsley and by the view of the Council as a whole. Of course I accept that there are concerns, but as I said a moment ago, we are really quite a long way from the point of decision on this, and a lot of things can happen.

Q176 Mr Hamilton: May I move us on to the policies of the European Union outside the Union? I want to draw attention to an area that is causing a great deal of anxiety, not just for us, but for the European Union and its critical role, namely the Middle East. We now have effectively two Palestinian Governments. Hamas always said, “Well, we were democratically elected”, yet by force, and with the most dreadful brutality, it has taken the whole of Gaza. We now have a temporary Government under the leadership of Prime Minister Salam Fayyad, who is someone whom the west trusts a great deal, whom President Abbas has just appointed.

Yet in spite of what has happened in Gaza and the dreadful split, there are two points that I want to make. First, there are many ordinary people crammed into the Gaza strip who are starving, and have no energy and no water supply. What are we going to do to ensure that there is not a humanitarian crisis? The EU has to do something about that. I know that we have the temporary international mechanism and that we are trying to support the democratic side of the Palestinian Authority, but there is a dreadful crisis looming. I hope that we are going to do something. Can you reassure us that the European Union has an emergency plan?

Margaret Beckett: Obviously we discussed this yesterday, and I am sure that the Committee will be interested to see the conclusions that the Council
reached, among which is a very clear statement that the EU will do its utmost to ensure the provision of emergency and humanitarian assistance to the population of Gaza, whom it will not abandon. Unimpeded access to humanitarian aid deliveries must be guaranteed. Not only did we have that discussion, in which there was unanimous concern about the potential humanitarian crisis in Gaza—perhaps not even potential—but, as it happens, we had already agreed to have discussions with the Israeli Foreign Minister, who also expressed concern about the humanitarian situation. We will of course be looking to restore direct links, funding and so on to the new Palestinian Government as speedily as that can be achieved. However, we are also very mindful of the situation in Gaza. Again, that is a shared concern. We shall be doing everything that we can to consider how we address it—to a certain extent through the TIM, but also more widely. We have also urged the Israeli Government to release revenues, which as you know they have been withholding.

Q177 Mr Hamilton: You have said that we have urged them to release those revenues, but are we putting further pressure on the Israeli Government? It seems to me that they will be quite concerned, to say the least, about the fact that Gaza is now effectively in the control of the military wing of Hamas and about the effect that that is likely to have on Israeli security. Clearly there is going to be a problem, so has the EU put enough pressure on the Israeli Government, at the same time as reassuring them that we are concerned about Israel's security?

Margaret Beckett: Yes we have, and indeed in the past we have. Yesterday, we were prepared to put pressure on, but actually the strong indication was that there was no need.

Q178 Mr Hamilton: Good. I have a further question on that. One of the problems with such a situation, which has involved the most dreadful interminable fighting we have seen among Palestinians for a long time and a terrible loss of life, is that, inevitably, certain nations in the area will just blame Israel. I turned the radio on the other day and I think someone in Damascus was saying, “Actually, this is all Israel’s fault.” Are the European Union or the British Government going to do anything to tell the Arab world that although we must solve the problem of the conflict in the Middle East between Israel and the Palestinians—the wider conflict and the issue of recognition—what has happened cannot be laid at the door of Israel directly? It would be tragic if it became the general view that the fact that Palestinians are killing each other, which is a terrible tragedy, is all Israel's fault. It is not Israel’s fault, but Israel can do a lot to help.

Margaret Beckett: There will undoubtedly be people who take that view and who it suits to continue to proclaim that. If we can make progress on some of the concrete steps that now need to be taken—release of revenues, tackling the humanitarian crisis and things of that kind—for those who are prepared to entertain an answer other than just this is all Israel’s fault, an atmosphere will be created in which it is possible to judge that more players are actually involved than simply the Government of Israel. Although I share your view that the conflict in Palestine was tragic, I also take the view that it was not necessary.

Q179 Mr Hamilton: Finally, the EU is one of the Quartet. Is the road map dead?

Margaret Beckett: No, not necessarily.

Q180 Richard Younger-Ross: There is a real danger that, with Hamas now in effective control of Gaza, there will be an increased number of rocket attacks on Israel, which we would all unreservedly condemn. There is also the danger of Israel's response. Could you say, Foreign Secretary, that, on this occasion, we will make it very clear to Israel that any response that it does make has to be proportionate and that we will not go back to what happened in the Lebanon when the response was clearly disproportionate?

Margaret Beckett: Without getting involved in discussions about events of the past, there are certainly two things that your question raises. One is that there have continued to be rocket attacks on Israel, both from Gaza and, indeed, over the last couple of days, from Lebanon—although I understand that they were carried out by Palestinians in Lebanon. We have—everybody has—urged restraint upon Israel, which you will have observed it has shown to a substantial and quite remarkable degree.

The issue of the rocket attacks is also a challenge to Hamas because its case was that it had decided to take the political road. In most democracies, the political road does not include throwing people off roofs. Hamas has also made the case that it felt that it had to take control of the security and military situation in Gaza because it was not, as it judged, under control. If in circumstances in which Hamas has clear military control, rockets continue to be fired, that will clearly cast considerable doubt on the good faith it has shown in saying that it will take the political road. That is a serious question for Hamas to consider.

Q181 Ms Stuart: We started off dealing with Iran with three Foreign Ministers—French, German and British—going to Tehran and the troika, which was quite a significant step. That has now moved on to what I think the German presidency calls the twin-track approach to Iran. The EU is quite united through the work of Solana who is our high representative. I have two questions that I would like to put to you. In our attempts to restrain Iran from developing its nuclear programme, do you envisage, for example, a return to the troika? Do you envisage a return to the high representative and the old-fashioned foreign policy of three large member states speaking on behalf of the Union?
Secondly, what is your assessment of how united the various Foreign Secretaries of EU member states are, and at what point will the EU reach a position of saying that it can no longer negotiate with Iran? How politically united are EU member states?

Margaret Beckett: First, you asked me if we would return to the troika, but we have not left it. The E3 plus three continues to be the negotiating body, and Javier is acting as a negotiator—this is a huge compliment to him and richly deserved—not on behalf of the EU, but on behalf of all six of us: the United States, Russia and China, as well as the EU. That remains the position, and when there are discussions about, for example, whether we should consider further moves in the Security Council, they are held at the six level. Javier is obviously an important player; he has an important input, and is our voice with the Iranians, because that is thought to be the appropriate level. There could come a stage when the appropriate level was thought to be Foreign Minister, and so far it has always been envisaged that it would be the group of Foreign Ministers. However, whether we ever get to that stage, given the way in which the Iranians are conducting the negotiations, is another matter.

Member states have been absolutely united. Just after I had been appointed and after the meeting in Vienna about 10 days in, which I chaired and when we agreed the package to put to the Iranian Government, there was a tremendous welcome from all our EU colleagues when we reported back to other member states on the progress of the discussions. To be honest, I had wondered whether some would be a little resentful, but no. Some colleagues said how proud they were of the role that the European Union had been able to play in working with others to put such a dramatic set of proposals before the Iranian Government. That has continued to be the case.

The time could come when, for one reason or another, there is disagreement about how to go forward, but Javier keeps the Council well informed about the process of the discussions, negotiations and so on, and there is consensus and common ground, I am happy to say.

Q182 Ms Stuart: All that without a European Union Foreign Minister.

Margaret Beckett: There is one thing to be said for having someone called a high representative, because they can be anything. They can be an official who talks to someone like Larijani, or they can ask to see a Prime Minister or a President. No one says to a high representative, “You are a Foreign Minister, so you will see the Foreign Minister.”

Q183 Sir John Stanley: After President Sarkozy apparently took everyone by surprise at the G8 by proposing a six-month delay in putting the Ahtisaari proposals to a new United Nations Security Council resolution to enable further negotiations to take place between Serbia and the Kosovo Albanians, is the French President now back on board?

Margaret Beckett: If I may say so, I do not recognise the way in which you describe that. There was a certain amount of discussion—at the G8 there are of course people with rather different views about Kosovo—but there is widespread acceptance, and the European Union believes, that the Ahtisaari plan is the best way forward. Then there is the question of how to achieve the Ahtisaari plan. I think the idea that a delay might contribute might have been floated, but there was no suggestion that there was some sort of agreement at the G8 that that would happen.

Q184 Sir John Stanley: When do you expect the new United Nations Security Council resolution on Kosovo to be presented to the Security Council?

Margaret Beckett: Discussions are going on now, and all the time. It depends on whether people identify that sufficient common ground has been reached. It is no secret that the European Union would like the issue to make progress, because we recognise that there are dangers in delay.

Q185 Sir John Stanley: Yes, there most certainly are, and they are highlighted repeatedly. What timetable are the British Government working towards to try to get the issue agreed at the United Nations Security Council?

Margaret Beckett: The British Government would like it to have been agreed the week before yesterday, but we are continuing to work with all our colleagues and partners to see whether we can get an agreement on the way forward. To be completely fair, immediately after the discussion that I chaired in April during our presidency of the Security Council, there was an agreement that members of the Council would go to Serbia and Kosovo to have discussions for themselves and ascertain what they felt the situation was. That, I think, has helped to clarify the position for a number of them.

Q186 Sir John Stanley: It seems likely that, if the United Nations Security Council cannot agree a new resolution on Kosovo and on the implementation of the Ahtisaari plan, the US Administration are likely to proceed unilaterally down the independence for Kosovo road. In that case, would the US Government be supported by the British Government?

Margaret Beckett: That is a hypothetical question. I read constantly that the United States might consider unilateral recognition. It has not done so; if it does, we will have to consider with our European partners how we will respond. We are focused—as is the United States—on trying to get an agreed Security Council resolution.

Q187 Sir John Stanley: I suggest, Foreign Secretary, that what is not hypothetical is the British Government’s position if a United Nations resolution is not obtained. Do we have any view
at all on whether Kosovo will remain effectively in limbo, dependent solely on a United Nations Security Council resolution?

Margaret Beckett: That territory is sufficiently delicate for me not to want to venture into it. Our goal is to get a Security Council resolution and to implement the Ahtisaari plan—we do not see a more viable way forward—and to do that as early as possible. I do not want to encourage those who are less than enthusiastic about such a course of action by speculating on what might happen if that does not succeed. We are focused on trying to achieve that success.

Q188 Chairman: Foreign Secretary, a number of European Union countries are rather apprehensive about this development. It is possible that the EU could split over the question of Kosovo, as was seen, for example, in the unfortunate events in respect of the premature recognition of Croatia in the previous decade. Are we in a situation in which there is an absolute determination that there will be only one EU position on Kosovo?

Margaret Beckett: After Martti Ahtisaari came to the Council in May, part of the agreement that the EU made was that we would adopt a united position, that we would remain united and that that would very much be our approach. That has continued to be our approach. Those who would prefer not to have the Ahtisaari plan or not to have a Security Council resolution are constantly asserting that the EU is not really united and that this, that or the other country has this, that or the other view—in many cases, to my personal knowledge, entirely incorrectly. So, yes, we are united. We are determined to remain so because we recognise that unity is a vital component of trying to get agreement. Indeed, yesterday we carried a further set of conclusions—a united set of conclusions—which are possibly slightly stronger than the ones that we carried last time.

Q189 Chairman: So even if there is no agreement but the United States recognises a unilateral declaration of independence by the Kosovars, the EU will maintain a common position. Are you saying that no EU countries will follow the US?

Margaret Beckett: No, I am afraid that I repeat what I said to Sir John. I am extremely reluctant to enter into hypothetical discussions about what might happen if there is no resolution and other people take other steps. The EU is united in its approach that the Ahtisaari plan should be followed, that there should be a resolution as soon as possible, and that that will be in the interests of the EU, not least because of the responsibilities that are then likely to fall on the EU. We are all working hard to get that resolution, and to get it as soon as possible. That is the focus of what we are doing.

Chairman: The Committee has just been in Russia. I would like to bring Malcolm Moss in now with some questions about Russia. As you can appreciate, Kosovo was one of the issues that was raised with us by the Russians.

Q190 Mr Moss: Foreign Secretary, you said to this Committee in December that it would not be correct to speak of Russian hostility to the EU. At a remove of more than six months, what would your considered opinion be of EU-Russia relations?

Margaret Beckett: There are certainly some areas of particular sensitivity, of which Kosovo is one, and there have been more areas where Russia has expressed stronger disagreement than was the case six months ago, but, no, I do not judge that its basic attitude towards the EU is hostile, not least perhaps because we are, after all, its largest export market.

Q191 Mr Moss: If that is the case, why was the EU-Russia summit in May not more successful?

Margaret Beckett: Because there are strains and areas of difficulty, but I would not characterise that summit as a failure. Not as much progress was made as we would have liked, but that is quite often the case with such summits.

Q192 Mr Moss: How would you categorise the prospects for opening up talks with Russia on the post-partnership and co-operation agreement?

Margaret Beckett: That was something that we thought might be settled at the summit. It was not, but no doubt the Portuguese will return to it when they take over the presidency.

Q193 Mr Moss: Given the strong bilateral relationships between Russia and some EU member countries, is it in the United Kingdom’s interest to pursue relationships under the EU umbrella, or should we have a more unilateral relationship with Russia?

Margaret Beckett: Every member state has its own bilateral relationships as well as the relationships that it has under the umbrella of the EU. Yes, I believe that it is in our interests to continue to work with the Russians on issues where we can work with them.

Q194 Andrew Mackinlay: If I may return to the issue of Kosovo—it relates to our relations with Russia—Russia argues that it has adhered to the Helsinki Final Act of the late 1970s. For Russia, the very important part of it is that there should be no unilateral variation of the boundaries of European states. Russia says that if there is a concession for Kosovo, we will then say that there is a powerful case in respect of the Russian enclave of Transnistria and the enclaves in Georgia and Armenia. Russia has a point, does it not?

Margaret Beckett: Russia always has a point, but I would say that that one is a discussion point. We in the UK and the EU take the view that the position of Kosovo is sui generis. There have of course been, as everywhere, difficult episodes in the history of the areas to which you referred, but there
is nothing that matches the Kosovo-Serbian experience, which has indeed, as Martti Ahtisaari concluded, been tragically unique. That means that an outcome that one might have envisaged in other circumstances or other territories does not have any prospects. We have certainly always taken the view, and I have always said to the Russians, that what happens with Kosovo does not have a read-across anywhere else.

Q195 Andrew Mackinlay: The Security Council—you might be able to help me on this—dispatched some of its number to Kosovo. They have come back and taken a view that is somewhat less supportive than Ahtisaari's. Is that not correct?
Margaret Beckett: I do not think so, no.

Q196 Andrew Mackinlay: Is their report in the public domain?
Margaret Beckett: I am not sure whether they made a formal report. I do not know exactly who went in the end, but my impression was that people, who nurtured the illusion that there must be some easy way through that an intelligent person could find, thought that if they went to Serbia and Kosovo themselves, they might be able to spot something that Ahtisaari had missed. My impression is that they came back thinking that perhaps they had not spotted it.

Q197 Andrew Mackinlay: The final point was called “Hong Kong-plus.” It was suggested that Kosovo should get a status short of being a legal international personality with a seat at the United Nations, but that it should have a relationship with Serbia similar to Hong Kong’s with the People’s Republic of China, which is de jure one nation, two systems. That would not be acceptable to Kosovo but it would be tolerable, and it would help the Serbian politicians and people to whom you referred earlier. You were correct to say that even the most moderate Serbian politician can never concede the loss of Kosovo. Is that not a formula that should be followed? It would vary from Ahtisaari only in one important respect—the international recognition of a sovereign, independent state.
Margaret Beckett: At the moment we are hanging our hat on Ahtisaari. If there is common ground about some minor variation on Ahtisaari, it will find acceptance. I do not think that anybody rules out considering anything. I have not heard it characterised in the terms that you use, but we are looking for a way through to get an agreed Security Council resolution.
Chairman: We have just a few minutes left. John Horam.

Q198 Mr Horam: As the Chairman said, the Committee has recently been in Russia and Azerbaijan. We have been looking to some extent at the whole area of the former Soviet Union—what Russia calls the “near abroad” as well as Russia itself. There are very important energy considerations and a strong feeling that, if the European Union does not act together, countries in the region may be picked on one by one. I accept your point that we will always have bilateral relations with Russia and those countries, but do you think that there is an important strategic role for the European Union in dealing with that area, which is so important from the point of view of not only foreign policy but energy security?
Margaret Beckett: That is a valid point. Another thing that we agreed yesterday was a strong statement. The Committee probably recalls that the German presidency had as one of its goals the strengthening of the European neighbourhood policy, which we support as long as it is not seen as an alternative to membership.

Q199 Mr Horam: Or a step towards membership.
Margaret Beckett: Well, no, it could facilitate that perhaps. We agreed yesterday a development of the European neighbourhood policy, in which we specifically invited Armenia, Georgia and Azerbaijan to move closer to the European Union on a case-by-case basis and perhaps align themselves with our declarations, démarches or positions on common foreign and security policy issues. We are looking at encouraging steps towards better governance—perhaps investment and things of that kind. On a case-by-case basis, we are looking at that wider neighbourhood and how we can encourage the process that I was describing in the case of Turkey—encouraging reform and development along the lines that we in the European Union would very much like to see—and Azerbaijan is very much in that category.

Q200 Mr Horam: So you would see the European Union playing a strategic role in this area?
Margaret Beckett: I do not know whether I would say we play a strategic role, but certainly we encourage reform and development and we recognise, as you said in your question at the outset, that there is an interest for the European Union in this in a variety of ways.

Q201 Mr Horam: As you know, the European Union has played a role in Uzbekistan on human rights issues.
Margaret Beckett: Indeed.

Q202 Mr Horam: Would that be typical of the sort of role that we are talking about—that balance between human rights on one hand and foreign policy, energy-type issues on the other?
Margaret Beckett: That is very much part of the approach to the neighbourhood policy—to try to balance these different issues and to make it clear that this is all a matter of concern to the European Union.

Q203 Chairman: Is there any immediate prospect of enhancing the European Union’s representation in Azerbaijan?
Margaret Beckett: The European Union’s representation?
Q204 Chairman: Yes. That issue was raised with us. Apparently, there is a problem about lack of consistent engagement.

Margaret Beckett: It is new to me, I must admit.

Q205 Chairman: Perhaps we can have a note.

Margaret Beckett: I am not aware of that concern.

Ms Stuart: May I leave you with a positive comment? This is something that we picked up in both Russia and Azerbaijan. I am referring to the work that the UK Government are doing in governance building. We heard very positive comments about the work of the Westminster Foundation for Democracy and the exchanges there. I just wanted to put that on the record.

Andrew Mackinlay: Who is in charge of that?

Chairman: I used to chair the board and Gisela Stuart—

Ms Stuart: I am still a governor.

Chairman: She is declaring an interest. Can we have one final quick question?

Q206 Mr Keetch: I endorse entirely what Ms Stuart and the Chairman said about Azerbaijan, where there is extensive British involvement, both commercial and diplomatic and very successful, but on climate change, in March 2007, the European Council set a number of targets: a 20% reduction in greenhouse gas emissions by 2020 and a 20% target for renewables, to include 10% biofuels. I accept it is very early days, but how is progress towards those targets going and, interestingly, how will we ensure—the UK has been at the forefront of this—that our colleagues attempt to meet those targets along with us?

Margaret Beckett: It is indeed extremely early days. The answer is a bit like what we hear at Leader of the House questions—not next week. Obviously, we have asked the Commission to look at this and draw up proposals. I think some parts of the conclusions will be easier to achieve than others, but certainly one of the things that we took considerable encouragement from was the fact that, as we had hoped, the basis of the agreement at the spring Council was a springboard for getting agreement at the G8 on a process that envisages something to follow the Kyoto protocol when it expires in 2012.

I was talking the other day to our colleague, Elliot Morley, who was my junior Minister on this issue for some time, and he and I agreed that if you had asked us two years ago, at the time of the Gleneagles summit, when we were trying to get agreement to move forward, whether we could possibly envisage an agreement of that kind by 2007, we would definitely have said no, and particularly in relation to the agreement that the proper negotiations will be in the framework of the UN framework convention. So although it is a bit early to say exactly how the European Union will deliver on the concrete goals about carbon capture and storage for power stations and so on—a lot of work needs to be done there—certainly we have already had quite an achievement building on that, in terms of getting some momentum behind the Bali negotiations.

Mr Keetch: I dare say our constituents wish you good luck on that. If it is not the case for constitutions or treaties, certainly all our constituents want to see some effect on climate change.

Chairman: Foreign Secretary, we are very grateful. You have given us a very wide-ranging series of answers and we know that this week in particular you are very busy. We will no doubt be able to ask more questions in the debate tomorrow and make more points, but we hope that you come out of the weekend with something that we as a Committee can be happy with and we certainly look forward to asking further questions on the outcome. We thank your colleagues as well.

Letter to the Clerk of the Committee from the Parliamentary Relations and Devolution Team, Foreign and Commonwealth Office

EU COMMISSION REPRESENTATION IN AZERBAIJAN

During the former Foreign Secretary’s evidence session on developments in the EU/Pre European Summit with the Committee on 19 June, Mrs Beckett was asked about the situation with regard to EU Commission representation in Azerbaijan. She promised a written response.

Our understanding is that a Commission Delegation Office is expected to open in Baku by the end of 2007. The full Delegation, which will include project work staff, is expected to be in place by mid-2008. A Head of Delegation has yet to be appointed, but one is expected in place by December 2007.

We had made a number of representations underlining the need for a Delegation Office since the South Caucasus were included in the European Neighbourhood Policy in 2004. In early 2006, the Commission proposed making the office a sub-office of that in Tbilisi, Georgia. This proposal was not supported by the local EU missions and proved unacceptable to the Azeri authorities. In response to this the Commission decided to open a full Delegation office.

Richard Cooke
Parliamentary Relations Team

2 July 2007
Letter to the Clerk of the Committee from the Parliamentary Relations and Devolution Team, Foreign and Commonwealth Office

Thank you for your letter of 26 July in which you asked a number of questions regarding the future of the Common Foreign and Security Policy (CFSP), specifically on the status of the Declarations on CFSP and the use of Qualified Majority Voting (QMV).

DEclarations on CFSP

The Declarations contained in the Intergovernmental Conference (IGC) mandate will be included in the Declarations to be made by the Member States at the IGC and published in the Final Act alongside the European Reform Treaty. Such Declarations represent a solemn political commitment on the part of the Contracting Parties and will be taken into account in the interpretation and application of the Treaty itself.

The Treaty’s provisions on the CFSP will not be subject to the jurisdiction of the European Court of Justice (ECJ), except in certain very limited circumstances. The interpretation and application of these provisions, in the light of the Declaration, will therefore be determined in the course of decision-making on the CFSP.

QualifIed Majesty Voting

You also ask about decisions by QMV and the role of the High Representative in implementing the CFSP. Under the current Treaties, QM votes can be taken on CFSP decisions to implement policies and actions already agreed by unanimity and to appoint EU Special Representatives.

This principle of allowing QMV only for implementing measures will be maintained under the EU Reform Treaty, where subject to final agreement in the IGC, we expect the use of QMV to be restricted to:

- actions to implement decisions of the European Council (agreed by unanimity) relating to the Union’s strategic interests and objectives, or a previous decision (agreed by unanimity) of the Council of Ministers;
- decisions on proposals which the High Representative has presented at the specific and unanimous request of the European Council; and
— decisions to appoint a Special Representative.

As now, the use of QMV will not extend to decisions with military or defence implications. Moreover, where a Member State opposes the adoption of a European decision to be adopted by QMV for vital and stated reasons of national policy, it will continue to be the case that a vote shall not be taken and the issue will instead be referred to the European Council for decision by unanimity.

Richard Cooke
Head, Parliamentary Relations Team

5 September 2007

Witnesses: Mr Jim Murphy MP, Minister for Europe, Ms Shan Morgan, Director, European Union, and Ms Shelagh Brooks, Legal Adviser, Foreign and Commonwealth Office, gave evidence.

Q207 Chairman: Before we begin, I ask all members of the public to switch off their mobile phones. Good afternoon, Mr Murphy and colleagues. We are very pleased that you have accepted our invitation to come here this afternoon. We are meeting in the recess, and as far as I am aware, we are the only Select Committee so to do—as we did last year. The reason why we are meeting is that we clearly believe it is important that proper parliamentary consideration is given to what is going on with the European negotiations and the reform treaty. This is the first opportunity for parliamentary scrutiny since the draft reform treaty was published, so we are very grateful to you and your colleagues for being here this afternoon. Will you introduce them to us and then we shall begin?

Mr Murphy: I will allow them to introduce themselves.

Ms Morgan: I am Shan Morgan, EU Director at the FCO.

Ms Brooks: I am Shelagh Brooks, Legal Adviser at the FCO.

Q208 Chairman: Thank you. Let us begin with the process and how it is unfolding. The Foreign Ministers met on 7 and 8 September. I should be grateful if you would give us your take on where things are following that meeting and say how the remainder of the intergovernmental conference process is likely to develop. I was at a conference in Poland last week, and the Polish political crisis means that an election will be called on 21 October. Do you envisage that that in any way will affect the timetable for the IGC, and what might happen in the rest of this year?

Mr Murphy: First, thank you for your warm welcome, Mr Gapes. When I first appeared before the Committee prior to recess, I said that I would be happy to give evidence during recess. Without wishing to get off on a discordant note, it is my understanding that I have accepted one other invitation, to appear before the European Scrutiny Committee during the recess. I do not wish to steal the Foreign Affairs Committee’s thunder, but I am appearing before both.

Chairman: It is after us.

Mr Murphy: You are right—you are the first in the recess.

You were right about Poland. It is a matter of public record that there will be an election on 21 October. In a political sense, the two main parties have signed up to the broad thrust of the mandate. Some of the issues that were outstanding for the Poles were resolved in the discussions in June. It is certainly my understanding that the Polish are represented in these forums through the President, and the presidential elections are not due until 2010, although these things are not always 100% predictable. There is a political continuity of a bipartisan approach to the major issues. Then there is also the fact that the President has represented Poland, and the fact that Poland signed up to the mandate in June.

In terms of the further timetable, a General Affairs Council will meet on 15 October, which will be attended by the Foreign Secretary. On 18 October, there will be an informal meeting of the European Council, and it is at that point that there will be agreement in the heads of the text. Then the jurists-linguists will become deeply involved to ensure that the texts of the treaty reflect in exact detail the processes that have taken place up until now. With the proposal from the Portuguese presidency for a December agreement at the EU summit, the proposal is for the Prime Minister to attend that. That is the timetable between now and then. I assume that there will be an opportunity for this Committee and others to keep abreast of the issue and continue to probe and investigate, not least because the Foreign Secretary is appearing before you on 10 October.

Chairman: That is right.

Mr Murphy: And I have accepted other invitations to other Select Committees, so when we receive invitations we will continue to find ways to remain connected to the UK parliamentary process.

Chairman: Thank you for that. May I bring in Mr Mackinlay?

Q209 Andrew Mackinlay: Our impression was buttressed by an article in The Times today, which says that, even as we speak, legal experts are involved in checking the draft treaty, and that the Prime Minister himself has asked to be reassured—or there is some doubt—that there could not be European Court of Justice oversight of our foreign and security policy.

I put that to you for a variety of reasons. It would seem that we are still putting the rivets in the ship as it goes down the slipway. Can you amplify the particular example that I gave, because it seems to me that it is pretty fundamental. It would suggest that the late Prime Minister and/or officials were asleep when they should have been clarifying the point, which we are now told is having to be clarified.
Finally, although you have said that you of course will be available through the parliamentary process, and the Foreign Secretary is meeting us, there needs to be a stage in which we have a definitive final document and a time to digest and scrutinise it. At this stage, we are doing it while the thing is still being constructed. What do you say to that?

Mr Murphy: Thank you, Mr Mackinlay, for raising that issue. It is an opportunity to deal with one of the issues that have appeared in today’s media—the issue of ECJ jurisdiction on the common foreign and security policy. The treaty is pretty clear. I have looked at it, and it says that the Court of Justice of the EU shall not have jurisdiction with respect to CFSP. That is pretty clear.

Q210 Andrew Mackinlay: So what’s the beef? Why is it being pursued this afternoon? Somebody somewhere must have some doubts.

Mr Murphy: I cannot speculate on why the issue has emerged in today’s edition of The Times, but the position is clear. We have said throughout the process that we negotiated a mandate with which we are content, and we do not wish to reopen that mandate. That is what I have said in all the deliberations throughout the process. To extend ECJ competence into CFSP would reopen the mandate. We are confident that the text will reflect the position that the UK negotiated and that was agreed by all 27 member states.

Q211 Andrew Mackinlay: When the process is complete, how much time will we as parliamentarians here at Westminster have to digest the text and scrutinise yourselves about the final version, before it is confirmed or ratified at a European Council? Such things have a habit of falling in parliamentary recesses. That is demonstrably not a problem for us—we are here—but most of our good friends the press are very absent. Other people go to sleep and stay away, but some of us want to be on the ball. We want to have no difficulty in getting at you. Once everyone is lined up and all the skittles are in place, what time will we have to examine the text and probe it?

Mr Murphy: In the 10 years in which I have been in Parliament, I have never considered you to have any difficulty in getting at me or anyone else. The timeline for that opportunity would be between the October informal Council and the December summit—that would be the time of most opportune investigation and reflection on a text. Quite likely, however, that would not be the end of it. The Government intend thereafter to seek parliamentary approval—in both the Commons and the Lords. Every parliamentarian, and the relevant Select Committees, will play an active part.

Q212 Andrew Mackinlay: Don’t pull that one on me. You know that that legislation is to enact a treaty; it is not an opportunity to scrutinise. I welcome legislation, but legislation is after the event. The treaty is confirmed or ratified at a European Council? Such a document and a time to digest and scrutinise it. At this stage, we are doing it while the thing is still being constructed. What do you say to that?

Mr Murphy: A formal negotiation process is not going on; the UK negotiated its deal in June. What I was alluding to was that, when a text is available in October to December, the Committee will have an opportunity to be involved in that conversation. As you know, Mr Mackinlay, I would never try to pull anything over or at you. I spent some of the summer reading some of the Hansard reports of some of the treaty debates. Parliament quite rightly does not just debate the relatively short Bill before it but debates the issues in the treaty as well as issues that quite often are nowhere near the treaty. It is Parliament’s right to do so, of course.

Q213 Sir John Stanley: Minister, the answer that you gave to Mr Mackinlay’s first question does not seem to me, as I heard it, to be consistent with the memorandum that you submitted to the Committee on 5 September. The memorandum is EU34 in our numbering. In it, you said, “The Treaty’s provisions on the CFSP will not be subject to the jurisdiction of the European Court of Justice (ECJ), except in certain very limited circumstances.” In your own memorandum, therefore, you acknowledged that in some undefined, very limited circumstances, the provisions on CFSP will be subject to the jurisdiction of the ECJ. Will you tell us what are those certain very limited circumstances that have been referred to?

Mr Murphy: It is certainly my understanding, Sir John, that there are currently two circumstances where ECJ jurisdiction applies—I look for guidance, of course, from one of my colleagues, but my understanding is certainly that the treaty, in and of itself, does not extend the list of competences in terms of CFSP. One relates to the issue of sanctions, and my understanding is that it already exists, although I cannot recall which treaty it emanates from—I think that it is in the treaty establishing the Union. The second area of CFSP competence for the ECJ [Interruption.] So one is in respect of sanctions, and the other one, it says here, in the relevant articles, relates to “the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences”. So the existing competence is about the areas of Union competences and also about sanctions against individuals on CFSP. The example that I have used in conversations I have had with colleagues on this issue, Sir John, is of a sanction on an individual—say, for example, Mugabe. The collective of the European Union may wish, as a matter of foreign policy, to exercise a sanction on such an individual, and that power already exists, so the treaty in itself does not extend it, and the mandate is clear about that.

Q214 Sir John Stanley: Yes, but your very next sentence, Minister, reads as follows: “The interpretation and application of these provisions, in the light of the Declaration, will therefore be determined in the course of decision-making on the CFSP”. As I read that, it suggests that how far these very limited circumstances go will be dependent on the further negotiations on the terms of the treaty, which are still to be concluded. That would suggest to
me, and possibly many others, that there is still a quite wide and as yet undefined area of foreign policy that might fall within the jurisdiction of the European Court of Justice.

**Mr Murphy:** With respect, Sir John, that is not the case. There is not a process of negotiation ongoing. There is a mandate, there is an arrangement and there is an agreement with all 27 member states. We expect that mandate to be respected. There is not a process of negotiation ongoing about ECIJ competence and CFSP—there is no such process ongoing today and there will not be as part of this process. We are very clear: we have an arrangement, we are content with it and we will not be shifting from the arrangement that we agreed to as part of the process, and the treaty does not change that.

**Q215 Sir John Stanley:** Well, I only refer you to your wording and I take it very seriously. You say that “The interpretation and application of these provisions...” will therefore be determined in the course of decision-making on the CFSF”, which to me suggests that there is still a wide potential area of jurisdiction for the ECIJ, which could include scrutiny of European foreign and security policy. Anything that is interpretive is, by definition almost, likely to create an unknown degree of competence of jurisdiction as far as the ECIJ is concerned.

**Mr Murphy:** The CFSP has been kept in a separate treaty. It remains intergovernmental, and unanimity is the rule, with those two exceptions—the exception of the sanctions and the second one about adding more detail. They are about an existing power to monitor the boundary between CFSP and other EU policies, plus new jurisdiction to review, judicially, sanctions measures affecting people. Those are the two exceptions at the moment, and it is certainly my understanding that they already apply. The Government will not be signing up to a treaty that extends things beyond those two.

**Q216 Sir John Stanley:** I should just like to add that this is an absolutely crucial area for this Committee, so Minister, if, when you have looked at the transcript of this exchange, there is anything further that you wish to add to your evidence, I am sure that the Committee would appreciate it.

**Q217 Ms Stuart:** Minister, I wondered whether you wished to correct yourself when you said that CFSP will remain a separate treaty. Surely you meant to say “separate article”—we do not need a separate treaty for this.

**Mr Murphy:** By the end of this, we will have two treaties as part of this process, as you know. The treaty on the European Union will amend existing provisions on European security and defence policy, CFSP and EU institutions. In that sense, it is intergovernmental, and unanimity—that is the point I am making, of course. The first treaty is on the function of the union.

**Q218 Ms Stuart:** Can I come back to the question of where negotiations are taking place? The previous Foreign Secretary told us that no negotiations were taking place. There was an exchange of letters, which they replied to, but there were no negotiations. There is then the intergovernmental conference mandate, which appeared from platform 12½ in “Harry Potter”, by the sound of it, because there were no negotiations. You now tell us that the negotiations have come to a conclusion because you are happy with the mandate. Again, no negotiations are taking place. When, within the last nine months and in the six months ahead, are negotiations taking place? They must be somewhere.

**Mr Murphy:** You accept, Ms Stuart, the point I made earlier about two separate treaties and amending two treaties? But on this specific point about negotiations: those took place around us at the meeting in June under the German presidency. That was when the process was brought to a head, in terms of the content of the mandate and a deal that all 27 member states could sign up to. We are now involved in the well-established process of legal experts from all the member states coming together to create legal detail around the specific content of the political commitment and the mandate. There is not a process of detailed negotiation going on at the moment. The UK intends to make sure that the precise wording reflects the mandate that we signed up to, and that is what is ongoing.

**Q219 Ms Stuart:** If, as you say, the only time that negotiations take place is, as it was then, at the IGC meeting, do you need to take some parliamentarians with you to the next Council meeting, so that there will be parliamentary representation in negotiations, if that is the only way Parliament can have any input in any of them?

**Mr Murphy:** No, I do not think that that is necessary. As I said, the point at which negotiations took place was in June. I read, of course, the transcript of previous hearings on this matter with the previous Foreign Secretary, and I was asked about these issues in negotiation at the European Scrutiny Committee, as has been asked about.

The negotiations were in June, we got a deal that we are comfortable with, and it is now about us ensuring that the detail is reflected. The relevant parliamentary Select Committees will want to make sure that we have achieved the detail of our mandate, and that is entirely right and proper, but there are now no negotiations.

**Q220 Ms Stuart:** So no input from Parliament? The only thing that you concede is that, after you have finished negotiations, Parliament may or may not satisfy itself that you had a good deal?

**Mr Murphy:** Ms Stuart, I am not sure that I am conceding that—I am celebrating the fact that Parliament must, rightly, be satisfied that the treaty and its content are in the national interest of the United Kingdom. We have been very clear about that from the beginning.

**Q221 Mr Keetch:** I want to pursue this by following up what Gisela Stuart said, and also what Andrew Mackinlay said. The idea that Parliament will scrutinise the treaty is balderdash. The reality is that
Parliament will either enact a Bill to put that treaty into UK law or not. Presumably if Parliament decided not to enact that treaty into UK law, it would mean a brake on the process, rather like the French or the Dutch referendums were. Then the whole lot would have to go back into the sausage machine for renegotiation. The reality is that Parliament will not discuss the treaty; all Parliament will do is enact a Bill to ratify the Government’s decision to sign the treaty. Is that what you fear?  

Mr Murphy: The point is that Parliament will not negotiate the treaty. It will discuss and decide whether to ratify the treaty. A reading of Hansard from the previous treaty ratification process—which I alluded to in an earlier answer—makes it clear that it is the detail of the treaties that is discussed. For the treaty to have effect in the EU, every one of the 27 member states will have to ratify it.

Q222 Mr Keetch: But it is a yes or no decision. Parliament will not scrutinise that treaty—effectively, it will say, “Yes, we agree to that,” or, “No, we don’t.”

Mr Murphy: What will happen with this treaty is similar to what happened with previous treaties. Parliament will come to a view on the treaty, through the vehicle of a Bill, as with the Single European Act, the treaties of Maastricht, Amsterdam and Nice. That is the established way in a parliamentary democracy and how we do this in the United Kingdom. All other 26 member states will decide for themselves what is the best way of going about their process of ratification, but I note in passing that the vast majority of member states intend to do so through parliamentary ratification, with only our good friends in Ireland opting for an alternative process.

Q223 Mr Keetch: I want to come on to that point. Mr Murphy. I do not in any way say that what you have said is incorrect, but the idea that Parliament would have scrutiny over the treaty is a bit of a red herring because, effectively, all that Parliament has is a yes or no decision. Presumably, if we said no, the treaty would have to go back into the sausage machine. You mentioned on BBC Radio 5 Live on 5 September that only Ireland would be holding a referendum. Do you still stand by that? Do not you think that other countries might hold referendums?

Mr Murphy: I cannot second-guess every other member state in the EU; it is, of course, a matter for them. At the moment, the only country that has declared its intention to have a referendum is our friends in Ireland. Yesterday, I spoke to Dick Roche, Ireland’s European Minister, and it is clear from our conversation, yet again, that he acknowledges that Ireland has an entirely different democratic architecture from the UK’s. He emphasised yesterday—he is happy for me to share this with the Committee as he has already said it publicly—that the UK has a system of parliamentary sovereignty, which we all know and celebrate. But in the Republic of Ireland there is no such process. In fact, he explained to me—Mr Mackinlay will know much of the detail because he is an historian of Irish parliamentary process—that the TDs are messengers to the Dáil. That is a clear and important distinction. There is no concept in the Irish constitution of parliamentary supremacy and, therefore, they have to ratify treaties by means of a referendum, as they have chosen to do so.

Q224 Mr Keetch: Are you saying that you stand by your statement of 5 September that only Ireland will require a referendum?

Mr Murphy: I do not have the transcript of the Radio 5 Live programme, but I will say that no other member state currently intends to have a referendum. As I have said, only our good friends in Ireland intend to have a referendum.

Q225 Mr Keetch: I have just two more quick questions. Can you guarantee that the decision of Parliament will be held after the Irish referendum? It seems to me that it will be a bit of a waste of parliamentary time if we go through that process and the Irish then reject the treaty in a referendum. I am sure that there are lots of other things that we could do that would be valued by our constituents. Can you guarantee that any Bill put before Parliament would come only after an Irish referendum or any other?

Mr Murphy: First, I should have mentioned that, with this treaty, we intend to use the same process that three previous Prime Ministers have used with five different treaties—a process of detailed parliamentary scrutiny whereby the House of Commons and the House of Lords give their consent, if they so wish, to a reform treaty. That is the correct way in a parliamentary democracy, separate, of course, from the Irish system. With regard to the point about whether the House of Commons should organise its business around the detail of when Ireland intends to have a referendum, I am not sure that that is something that we would ever be attracted to.

Q226 Mr Keetch: It seems a waste of our time to have that whole process if the Irish then effectively veto the treaty. My constituents will say to me, “Why are you having a process of ratifying a treaty if there is any possibility that the people of Ireland can reject it?” It seems to me that we should get through the process of Ireland saying either yes or no—and, indeed, Poland, the Czech Republic, Portugal and Denmark, which might also want referendums.

Mr Murphy: Mr Keetch, with respect, I think that that is an entirely unworkable suggestion and, upon a moment of reflection, you will accept it to be so. The flipside of the argument is that a member of the Dáil might say, “We should not hold our referendum until the British have ratified the treaty. What is the point of going through a massive referendum campaign if Britain, the Czech Republic, France or Germany do not ratify it?” That would not be a coherent way for the mother of Parliaments to organise its business, around the ill-defined timing of an Irish referendum. The Irish do not know when they are having their referendum.
Q227 Mr Keetch: Let me give one other small point that could enable the mother of Parliaments to allow the process to go forward. I do not know what the final treaty will say, which is why I think that it is wrong at this stage to say that we either do or do not need a referendum. However, in the final Bill that is presented to Parliament, would you allow Parliament to make the final decision on whether there should be a referendum in the UK?

Mr Murphy: The UK Parliament will decide what is in the UK’s interest, and the Irish referendum will decide what is best for Ireland. We cannot timetable our procedures here in the House of Commons around what is going to happen in Ireland or elsewhere. Parliament will have the final say on the treaty and on whether it chooses to ratify it—[Interruption.]

Chairman: Through the Chair, please. People on the list are patiently waiting, and I will not have people jumping in—[Interruption.] No, Mr Mackinlay, you will put your hand up and I will call you in due course as I will everyone else. Mr Eric Illsley is next.

Q228 Mr Illsley: I should like to clarify one or two points because we are getting really bogged down in all this. Can you confirm, Minister, that no other country will be able to amend the treaty either, because it was agreed in June by all 27 countries? They are all in the same position as we are; the question is simply whether they ratify by a referendum or through their Parliament, as we will. We are not doing anything different from what any other country is doing, and we are not being denied an opportunity of taking this mandate or the text apart because we are not having a referendum. No other country can either. Is that right?

Mr Murphy: That is right.

Mr Illsley: Thank you.

Mr Murphy: All 27 member states signed up to a mandate in June. I suspect that there will be domestic pressure in some other member states to tweak aspects of the mandate. However, it is not our intention to reopen the mandate. From my conversations with other Europe Ministers in the past few weeks, I can say that there is no intention to reopen the mandate. Of course, there are press speculation and press coverage and comments on the side. However, we do not intend to reopen the mandate, and we are very clear about that. All 27 member states seem to be in a similar position.

Q229 Sandra Osborne: May I ask the Minister about a wee bit of the substance in relation to the treaty? One of the main ideas of the constitution was to fulfil the declared aim of bringing the EU closer to the people, but there will not now be a single treaty. Has the EU abandoned the whole idea of making it clear to ordinary Europeans exactly what it is up to?

Mr Murphy: There is an awful lot in that question. I start from the premise that the solution to the disconnect between Europe as a political concept and its institutions, and the people of the member states, does not rely on institutional tweaking or rearrangements. That is a false premise based on a false analysis that says, “The problem is that the people do not feel close enough to the structures.” For me, the only way in which Europe can properly connect and gain a degree of affection is when it actually delivers on the things that matter to real people rather than the things that matter to politicians. We must have, for example, conversations about how we deliver better on things such as the environment, national security and economic dynamism. I have reflected before on the issue of jobs: there are 92 million economically inactive people in the European Union. How do we deal with that? That is the type of conversation that would reconnect people to the idea of Europe. Small successes such as lower mobile phone charges, easy movement across borders for holidaymakers and cleaner beaches are the solution to that disconnect at a political level. To think that the solution to the disconnect is structural is to use a false premise. However, you are right to say that we have absolutely abandoned the constitutional concept. I do not think that Europe will have a constitution in our lifetimes, Ms Osborne.

Chairman: I shall take two more interventions on this issue—first, Greg Pope, then Andrew Mackinlay. We will then move on to Richard in the next section.

Q230 Mr Pope: I want to go back to a point raised by Mr Keetch; either you did not answer it, or perhaps I did not understand the answer. I just want a clarification. Will Parliament be able to decide whether or not there is a referendum in this country, or is that decision for the Government? I think there is a very strong case for saying that Parliament should decide whether there is a referendum. I put it to you that I suspect that there is a majority in Parliament for a referendum.

Mr Murphy: On that specific point, my reading of recent history on that is that there was a demand for a referendum on the Maastricht treaty. There was a vote in Parliament. That, of course, is a matter of public record, and I cannot see any reason why that sort of principle should not be retained and maintained. That is an issue for Parliament if it so wishes to express that opinion.

Q231 Andrew Mackinlay: On that point, can you give an undertaking this afternoon that the draft legislation consequent upon this treaty, when it comes before the House of Commons, will be framed so that such an amendment can be tabled? As you know, you must have regard for the long title, and if the thing is drawn too narrowly, anybody who wanted at least to test whether or not Parliament wanted a referendum would fall at first base. In view of what you said to Mr Keetch and Mr Pope, it seems not unreasonable to ask that this afternoon you reassure Parliament and many people, friend and foe alike, that the legislation will be drawn so as it is competent for a Member to table an amendment saying, “And this matter shall be put to a referendum.”
Mr Murphy: I shall address that specific point and pick up on the other two questions that have been posed. [Interruption.] I hope that you will allow me to conclude my answer before you humph at me. I suspect that you will not enjoy the first part of the answer but perhaps you will be more reassured towards the end.

We have not got to the point of having a formal treaty text. We certainly have not got to the point of drafting a Bill—quite rightly—so I shall not speculate about its content, long title, length, number of clauses and everything else. But—thank you for not humphing until I got to this point—as I say, there is the precedent of legislation on Maastricht and other treaties whereby Parliament was able to table an amendment demanding a consultative referendum. I believe that was the situation in respect of Maastricht, and the Government at the time were opposed. I cannot see that it would be beyond the wit and wisdom of men and women to frame the legislation in such a way that the type of referendum that Mr Pope, Mr Keetch and yourself have talked about could be given effect through Parliament.

Chairman: We have to move on; I call Mr Younger-Ross, who has been very patient.

Q232 Richard Younger-Ross: Thank you. I am slightly puzzled and bemused because the opening line of the IGC mandate says, “The IGC is asked to draw up a Treaty”. Yet you seem to be telling us that they are going to draw up a treaty and we have no input in that process.

Mr Murphy: First, Mr Gapes, I realise—

Richard Younger-Ross: I am Mr Younger-Ross.

Mr Murphy: I know that. Mr Gapes, I realise that those who record our proceedings will not have an accurate reflection on how to use the Glaswegian word “humph”, and I do not know to correct that in terms of the parliamentary record. I think that the general tone of my comments gives it a certain definition, but I shall write to the Committee to clarify what I mean by it.

Mr Younger-Ross is right that Parliament in the United Kingdom does not negotiate the content of a treaty on the Government’s behalf. Those are our constitutional arrangements. The Government of the United Kingdom negotiates on behalf of the United Kingdom. Parliament then, through our parliamentary procedures and the nature of our sovereign arrangements, then agrees—or disagrees—to allowing that treaty to come into effect. Those are the arrangements that have been in place and they will be in place for this treaty too.

Q233 Richard Younger-Ross: The purpose of this Committee and the European Scrutiny Committee is to examine what your Department is doing. You keep telling us that there were no negotiations before June, and the previous Foreign Secretary said that there were no talks, discussions or negotiations. You now tell us that, in fact, we discussed and agreed this all in June. Are you really telling me that we agreed the whole of the IGC process—the mandate and all of that—in less than a week?

Mr Murphy: Yes.

Q234 Richard Younger-Ross: So we have a major document, which will change the constitution of the European Union—sorry, it will not, of course, be a constitution; it will fundamentally change the legislation, rules and regulations of the constitution—and we signed up to it in a week.

Mr Murphy: Your premise/question is based on the belief or view that this all came out of the blue. The conversation about the initial constitutional treaty went on longer than any human being wanted it to, or than was natural in any of our processes. It went on for a number of years, as you know, Mr Younger-Ross. The referendums changed the direction. There will no longer be a constitution. There is a process through the IGC and the German presidency, which I think handled it pretty skilfully and effectively to get agreement from all 27 member states. That process took place in June, and the previous Foreign Secretary was absolutely correct in what she said to this, and other Committees on the matter.

Q235 Richard Younger-Ross: The then Prime Minister contradicted her and said that negotiations and talks had been going on for years.

Mr Murphy: Mr Younger-Ross, I have just said that talks have been going on for years and that there were negotiations about the constitutional treaty—of course there were. That is a matter of repeated public record. What the previous Foreign Secretary spoke about were the negotiations about the specific content of the IGC mandate in June, and you and I are both aware that that is what both of them were speaking about.

Q236 Richard Younger-Ross: Minister, this comes to the nub of the matter. Scrutiny requires that these Committees are able to discuss what those negotiations are with the Ministers, and are not blanked off and told that nothing happened.

For what reason do we have a reform treaty and not a constitutional treaty? Do we have a reform treaty purely on the basis that it is two existing treaties? Are the contents of those treaties not fundamentally the same as they would have been in the constitutional treaty? Is it not just spin that makes us call it a reform treaty and not a constitutional treaty, because it is two elements rather than one?

Mr Murphy: No. First of all, I think that the phrase you used, Mr Younger-Ross was “blanked off”. That is not what we are doing. We are telling you the truth. You may enjoy a different answer, but it would not be accurate to give you one. We are telling you what happened in terms of the process of negotiation. That is being accurate and informing the Committee of the actual process rather than it being “blanked off”—it is nothing of the sort.

With regard to the previous constitutional treaty and the reform treaty and the difference between them, all 27 member states—I have said this previously—have agreed that the constitutional approach has been abandoned. That is what all member states have agreed to. All member states have moved away from the constitutional approach both in content and
style, but the UK in particular has moved further away from the previous constitution than any other member state of the European Union. That is a consequence of it achieving its red lines, a protocol on the fundamental charter, on justice and home affairs, and all sorts of other issues.

Additionally, and importantly, we have moved away from the trappings that were spoken about in the constitutional approach: the flag, the motto, the currency, the anthem. All of that important symbolism has been abandoned as well. Importantly and crucially we are not refounding the EU based on one new consolidating treaty. The architecture of the EU remains on the basis of a collection of different treaties rather than one. All of that is of crucial importance when you consider the aspects of whether it is or is not a constitutional treaty, even before we discuss the UK’s specific deal on our red lines.

Mr Illsley: I am sorry?

Andrew Mackinlay: The script, dear boy.

Mr Murphy: I was kind enough to send you a tome of paperwork—that is the one piece of paper I haven’t got.

Q237 Mr Illsley: I have the negotiations of the mandate there, I just lost the will to live for a minute. Before the June council was there any discussion of the idea of removing the constitutional element of the treaties and bringing it within a single treaty structure, rather than the apparently somewhat cumbersome idea of amending the two treaties together? Was there any discussion of just the one treaty?

Mr Murphy: I think that there was. Some had a grand ambition and an established ambition to bring all the treaties under one body of text and call that a constitution. We can debate that retrospectively if we wish, but in terms of what has happened, what we are now committed to as part of the IGC mandate is a traditional reforming treaty, in the way that I have outlined in answers to previous questions. The concept of bringing together all the powers, competences, rules and everything else into one consolidated, specific treaty and giving it the name of constitution is no longer on the cards. It is no longer on offer and, as I speculated with Mrs. Osborne, I do not think that it will be—certainly not in our political life, but maybe not in our life at all.

Q238 Mr Illsley: No, what I meant to ask was whether any discussion was given to the idea of having a single treaty, but without the constitutional power—in other words, to remove the idea that it would be a constitution? That is the root of the problem that we have had since 2004. The whole procedure has been given an importance that it simply does not deserve by the unfortunate use of the word “constitution”. Was any consideration given to simply removing the constitutional element and having a single tidying-up treaty?

Mr Murphy: I was not party to those conversations, because at the time I was discussing how to reform incapacity benefit at the Department for Work and Pensions, but if the Committee is comfortable with it, I will undertake to get access to all the conversations and negotiations of that time and share the appropriate details with the Committee on that specific point.

Chairman: That is helpful. Thank you.

Q239 Ms Stuart: It may be helpful—your legal advisers can interrupt me if I am wrong—to try to recast this. So far, if anybody listening to us has the vaguest idea of the difference between a constitutional treaty, a reforming treaty and an amending treaty, I applaud them. Let us start with 2002—the Laeken declaration and the convention on the future of the European Union. At that point, the UK Government were not in favour of a constitution. In summer 2002, by virtue of an article in The Economist, the UK Government suddenly said, “Actually, we don’t mind a constitution.” In 2003, a draft constitutional treaty was handed over to the IGC, which then negotiated. By 2004, it came back, still largely the constitutional document in terms of its legal packaging, but now called a constitutional treaty. At that stage, Parliament was told in a number of terms that it was a treaty enacting a constitution. Am I right so far?

Mr Murphy: I will allow you to finish your question, and then I will answer that.

Q240 Ms Stuart: No, it is quite important. Do your legal advisers have that understanding? The document that started as a constitution and was then simply called a constitutional treaty was still the constitutional approach. Is that so?

Mr Murphy: On that specific point, you are clearly closer to this—

Q241 Ms Stuart: No, Minister, I want to stress to you why it is so important, because so far I have singularly failed to pin down what abandoning the constitutional process means. In order to do so, I should like to pinpoint the last moment when we still thought that we were in the constitutional process.

Mr Murphy: Ms Stuart, I do not think that I need to take up your invitation to receive advice from my legal advisers. I suspect—well, I know—that the last time there was a commitment to a constitution and a constitutional process was prior to the referendums in France. That was pretty clear. As we trailed through the process and the two referendums in the Netherlands and France were held, it was pretty clear that the constitutional approach—the overarching consolidation of all treaties into one—had been given a pretty severe rejection by the electorate of those two states.

Ms Stuart: I know. Never mind about that.

Mr Murphy: At that point, it was clear that the constitutional approach would no longer be one—

Q242 Ms Stuart: Minister, please. We are talking about some very precise legal points that I want to pin down. It does not matter what the French and the Dutch have said about it. Would you say that the document that the French and Dutch voted on was one by which we still adhered to the constitutional process?
Mr Murphy: It was a referendum on a treaty for a constitution for Europe, yes.

Q243 Ms Stuart: So it was—fine. In a letter to me, the Foreign Secretary said, ‘The agreed basis for the new Reform Treaty states that ‘the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’, is abandoned.’ The Reform Treaty will be clearly based upon existing EU Treaties, and will be a traditional ‘amending Treaty’.

Lawyers, take note; please listen to this very carefully. Even the document handed to the French and the Dutch for a vote did not bring together in a single document all the previous treaties. It itself was an amending treaty because the Euratom treaties were never renegotiated. Those treaties, which were part of the treaty of Rome, were amended in the protocol. In other words, even the thing that you insist was the constitutional approach by your own legal definition was already an amending treaty. Now you say that you have abandoned it, but I suggest that you never had it in the first place. They were all amending treaties, and what we were told to have a referendum on in 2005 was an amending treaty.

Mr Murphy: Ms Stuart, given your involvement in these issues, you have had a deep knowledge of them over a prolonged period. However, the fact is that all 27 member states, based on strong and clear legal advice and the formulation of the policy, have said absolutely that what we had before was a proposal to have a treaty based on the constitutional concept.

Q244 Ms Stuart: Never mind, Minister. The other 26 are irrelevant. I would like you and your legal advisers to explain to me whether, in the light of what I have just said, your saying that you have abandoned the constitutional approach has any meaning. If the Euratom treaties were already an amendment to the original ones, they were all reforming treaties.

Mr Murphy: What was previously on offer was a constitution for Europe. That is clear. Every member state was clear that it was signing up on that proposal to a constitution for Europe. Now, because of the referendums, we have moved away from that approach and we have made that pretty clear.

I hope that the conversation in the next few months will be about where we go now and how we deliver and make Europe more effective through its reform. You were right, as well, in saying at the outset that you were not sure that everyone in the country was following the detail of our conversation. We would all have to do a huge amount of work if, despite the previous established procedures for ratifying treaties in the United Kingdom, we were ever to have a referendum; it would be important for such issues to play an important part in that. However, we have moved away from the constitutional approach and we will not come back to it.

Q245 Ms Stuart: Will you define what “moving away from the constitutional approach” means if it is not in respect of replacing it with just one document—which, as I have just told you, does not wash?

Mr Murphy: Moving away from the constitutional approach—

Q246 Ms Stuart: Which is what?

Mr Murphy: Moving away from the constitutional approach is the declaration by all member states of their clear determination not to have a constitution for Europe. That is what it is.

Ms Stuart: No—

Mr Murphy: That is what it is, Ms Stuart.

Q247 Ms Stuart: That is like sitting in front of a piece of cream cake and saying, “You will not make me fat—I declare that you contain no calories.” The cake would still have them. What can I tell anybody down in the pub about what “we have moved away from the constitutional approach” means if you do not accept my legal definition. It does not wash.

Mr Murphy: I am not sure that either of us should regularly have such conversations in pubs. The fact is that we have moved away. I do not think that you and I will have a meeting of minds on the issue at any point between now and the process through Parliament. Nevertheless, the fact is that all the member states have made pretty clear what they intend to do. It is very clear. We are no longer going to have the approach of that single consolidated text replacing previous treaties. We are not refounding the basis of the European Union, and it is important that we should not do so.

Q248 Chairman: May I take this a bit further? Some people argue that abandoning the constitutional treaty and going back to a basis of having parallel reform treaties involves a loss of clarity and transparency and therefore makes all this about how the European Union functions less comprehensible to the public—and also, not least, to those of us who try to follow it; clearly, most members of the public do not try to comprehend it. What would you say to that? Is it regrettable?

Mr Murphy: There is an enormous challenge for the European Union and also for member states about our level of understanding and informed conversation and debate on the European Union and the issues surrounding it. I would rather that we had a degree of understanding and a greater informed conversation about the nature of Europe and the big challenges that it faces. That is a challenge for members states and the European Union but, as part of that, it is important as we have this conversation to consider the previous constitutional treaty.

I am picking up on your point, Mr Gapes, and that made by Ms Stuart. I cannot add to that which the European Union and member states have declared in their mandate. I know that the Committee will have it, but I wish to quote from the draft IGC mandate. It states, “The constitutional concept which consisted in repealing all existing treaties and replacing them by a single text code of constitution is abandoned.” That is very clear. Mr Gapes, you are right that it is a challenge for all of us to talk about what Europe can do as a collection of sovereign states working
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Let us assume that, by one means or another, the reform treaty is ratified in the 27 member states. Is that the UK view of the Italians, the French or the Dutch? Is that the view in other parts of the European Union?

Mr Murphy: I do not want to be implicitly critical of any individual but, as I said in answer to Sandra Osborne, I do not think that public affection for Europe or what Europe is seeking to achieve will be met or achieved through structural change. Of course, structural change is a means to an end to reform Europe, make it more effective and deliver the things that really matter to people, but let us put aside for a moment the conversation about whether the reform treaty should be through Parliament or a referendum. At the end of the process, having a treaty in place will not in itself—as we know—lead to a reconnection between the public, Europe, its agenda and challenges. Affection for Europe will be driven by Europe’s capacity to deliver on things that matter to Europeans, not by a treaty and certainly not by the previous approach of a constitution.

Q249 Chairman: The origins of the whole process of the convention and everything else go back to 2001 at Laeken when the EU said that it would make itself closer to its citizens. Clearly, we now have—six or seven years later—a very difficult reform treaty process, and it is hard to see that it has made, is making or will make, the EU closer to its citizens.

Mr Murphy: I am not a spokesman for the Foreign Affairs Committee, so I do not have the detail of every sentence, and I do not want to be implicitly critical of any individual, but the point is, what changes are you going to make? There are seven areas of modest reform and the idea is not to open up a whole IGC process. What is intended there, absolutely, is that there would have to be unanimity. At one level, on the view that the treaty, in your words, prevails with the view that the treaty, in your words, facilitates and eases further treaty alterations and amendments by unanimity. Can you just explain that to me? If I am right, this paragraph simply did not make sense, and now is your opportunity to tell us whether I am correct in thinking that you will not need an IGC in all cases to amend the treaty in future if these provisions go through.

Mr Murphy: What we are talking about, of course—I think that this may be described in the document, but I did not have a chance to read the whole paragraph when it was mentioned—is the passerelle process. What is intended there, absolutely, is that there would have to be unanimity. At one level, on areas of modest reform, the idea is not to open up a whole IGC process in the way that has perhaps happened in the past. When you open an IGC process, the temptation for other member states may, of course, be to say, “Well, we’ve got a process now. Let’s put other things into it.” What we are saying here is that the passerelle is about minor changes that would not require an entire IGC process. However, the new general rules on passerelle—this may be in—

Q250 Chairman: Let us assume that, by one means or another, the reform treaty is ratified in the 27 member states. Is that the end of the process or will we have another spate of institutional reform and measures coming forward or the attempt to take things further in other countries?

Mr Murphy: That is an important point. The United Kingdom Government’s very strong view is that there are now challenges on delivery. With the reform treaty in place, Europe has the tools to do the job on the issues that matter—certainly for many of our constituents—and, for the foreseeable future, there will be no need for a return to reform treaties or otherwise, with the possible exception of further expansion.

Q251 Chairman: That is the UK view. Is that the view of the Italians, the French or the Dutch? Is that the view in other parts of the European Union?

Mr Murphy: I am not a spokesman for the Governments of other member states, but my conversations with other Ministers show that there is a determination to put the conversation about structures behind us when we conclude the reform treaty and deliver on the things that are more important. None of us comes into politics—I hope—just to introduce treaties of reform, important as they are. That is the same in other member states. I have meetings with Ministers in other Governments who share that ambition and determination, but the one caveat that I should offer is that, in our continued ambition for EU membership for other states, it would need a process to be ratified. That is an important caveat.

Q252 Andrew Mackinlay: The treaty itself facilitates subsequent amendments of the treaties. Those procedures allow for changes from unanimity to qualified majority voting. To follow up the Chairman’s point, if the treaty is approved and it is all structured, there will be facilities under it for it to be altered subsequently, but not for having an IGC. I refer particularly to page 14 of your document, which does not use plain English. Under the heading “Simplified Treaty Revision”, the document says, “The Reform Treaty will extend these procedures including to allow for changes from unanimity to qualified majority voting, or from other legislative procedures to co-decision . . . without a formal IGC.” It then goes on—ambiguously—to say that “any . . . changes must be agreed unanimously.” I read that and read it again, and it seems that you have conflated what might be our aspiration—that unanimity will prevail—with the view that the treaty, in your words, facilitates and eases further treaty alterations and amendments by unanimity. Can you just explain that to me? This paragraph simply did not make sense, and now is your opportunity to tell us whether I am correct in thinking that you will not need an IGC in all cases to amend the treaty in future if these provisions go through.

Mr Murphy: I think that this may be described in the document, but I did not have a chance to read the whole paragraph when it was mentioned—is the passerelle process. What is intended there, absolutely, is that there would have to be unanimity. At one level, on areas of modest reform, the idea is not to open up a whole IGC process in the way that has perhaps happened in the past. When you open an IGC process, the temptation for other member states may, of course, be to say, “Well, we’ve got a process now. Let’s put other things into it.” What we are saying here is that the passerelle is about minor changes that would not require an entire IGC process. However, the new general rules on passerelle—this may be in—

Q253 Andrew Mackinlay: But minor is in the eye of the beholder, is it not? Supposing you have a majority of states who say, “This is just logical—it’s a minor amendment,” but the United Kingdom says, “Hang on a moment—we don’t think it is.” How do you reconcile those positions if you have provided institutionally for qualified majority voting and the majority says, “This is minor.” I simply do not understand that. It was your words that I read out. This is not a trick question. I just do not understand how you can say, “This is minor,” because the term “minor” is subjective.

Mr Murphy: On the specific point, if there was going to be any proposed change that the United Kingdom considered substantial, we would insist on an IGC process. I cannot speak for other member states, but I am working on the assumption that that would be their approach. In terms of the general passerelle clauses, which are in the document and referred to in the treaties, there is a triple lock, which I hope would reassure you, Mr, Mackinlay. The process would require unanimity in the European Council, the
consent of the majority of MEPs and a veto by any national Parliament. That is an important set of protections around the process.

Chairman: On the same point, I will call Gisela Stuart and then Paul Keetch. Then I will move on to David Heathcoat-Amory.

Q254 Ms Stuart: Minister, may I invite you to replace “modest” with “incremental”? One single issue may be large or otherwise—it might relate to unanimity on the seat of the European Parliament, which currently goes out to Strasbourg. For the French, I am sure that that would be quite monumental, but we would regard it as a blessed—you know. So let us not have a value judgment—the word “modest” is a value judgment—and let us stick to “incremental”. You are quite right that there is a lock, but, in UK terms, that would mean that because an IGC is not required, an issue could be brought to Parliament in the shape of a statutory instrument. Parliament has a six-month period—[Interruption.] Would you like me to give you a moment to read?

Mr Murphy: No.

Q255 Ms Stuart: Parliament has only a six-month period in which it can lodge its opposition. So you could have a statutory instrument on an incremental change, which would come in at the end of the summer recess and the beginning of when we come back. The Government always have an inbuilt majority on an SI and they would hardly give Parliament enough time to build up a head of steam to oppose something that they had just unanimously agreed. Can we at least agree that it is not modest by definition; it is incremental, because they could have one of those every time they meet. Also can we agree that the parliamentary lock has some weaknesses because of its time and because, in the UK context, it could be in the shape of a statutory instrument?

Mr Murphy: I will not take up your kind invitation to replace your words with my own. I will quote from “The Reform Treaty, The British Approach to the European Union Intergovernmental Conference”, which was published on 23 July. Mr Mackinlay helpfully drew my attention to the correct paragraph. On page 14, it states: “The UK will insist that any fundamental change to the treaties will still require an IGC.” That is the Government’s position.

As for the timing of SIs, it is not a Government Minister who is responsible for such timings. It is for the usual channels—the Government and Opposition Whips—to timetable SIs. I served on European Standing Committees A, B and C for 18 months and my general view was that that was not an experience that every Member of Parliament celebrated. [Interruption.] Mr Younger-Ross, I do not think that you were a member of all three; I was. My general observation is that we could improve—and I made that point at the European Scrutiny Committee. We should look at ways to improve, for example, parliamentary scrutiny of European legislation through the Standing Committees. I do not think that we have got it right. It is not for me to decide how we get it right. That is an issue for Parliament. That is my sense, having sat there for that period of time—often for a two or three meetings a week, each of which lasted two-and-a-half hours. Five was the quorum and there was often a struggle to reach it.

Q256 Ms Stuart: That has got nothing to do with the question. The question is the amending of treaties, changing from unanimity to QMV, could in the UK context be achieved through statutory instruments, which European Standing Committees do not deal with. You are telling us that we only have the reassurance of the Government when the matter is significant, which has no legal merit and is not legally binding. I remember one of your predecessors standing in the Commons assuring us that the charter of fundamental rights had no more force than The Beano. Now we are discussing what is legally binding in reforming treaties. Unless Parliament has a much tighter definition of what is significant, I would suggest that the safeguard, while sounding impressive, is not effective as a triple lock.

Mr Murphy: On that again, Ms Stuart, we have to disagree. The triple lock we have signed up to is very strong. It is based on what I have said: domestic parliaments, a majority of MEPs and unanimity in the European Council. That is a strong and watertight triple lock.

Chairman: A brief question from Paul Keetch on this, and then David Heathcoat-Amory.

Q257 Mr Keetch: You mentioned MEPs. We are told that there was a meeting yesterday of the European Parliament’s Constitutional Affairs Committee. Apparently, the President of the European Parliament invited members of national parliaments to attend. I do not know whether you were invited to attend, Mr Gapes. I certainly was not.

Chairman: No.

Andrew Mackinlay: The Dail Eireann was represented.

Mr Keetch: Yes, members from Portugal, Lithuania and Malta were there, but possibly none from Britain. I would be interested to know why British Members of Parliament were not invited. On a very specific point, you say that MEPs will play some part in this process. In a paper that was passed to us just before this Committee started, we were told that the matter was raised at that meeting. There is something of the West Lothian question coming up in the European Parliament. If the UK has an opt-out on Justice and Home Affairs Council issues, should British MEPs be stopped from voting on such matters in the European Parliament? Have you heard about that? Regardless of your point of view on the West Lothian question as a Scottish MP, I take it that you would assert the right of all MEPs, whether they are British, Lithuanian or Irish, to participate in all discussions of the European Parliament.

Mr Murphy: I have a general view that there should not be different classes of parliamentarian. I believe in the United Kingdom and in the United Kingdom Parliament. We should have one class of MP in this Parliament, and we should have a similar approach in the European Parliament.
Mr Keetch: I am grateful.

Chairman: Mr David Heathcoat-Amory. Thank you for your patience.

Q258 Mr Heathcoat-Amory: The new treaty brings majority voting into more than 40 new areas and removes the national veto accordingly. As we have just heard, it also brings in a fast-track way of introducing majority voting to new areas without an intergovernmental conference. You are arguing that that is of no real consequence and that there should therefore be no referendum. Is it not interesting that when the former Prime Minister announced a change of heart on the referendum in 2004, he did not rely on textual analysis or even the substance? Instead, he said that the question was one of resolving “once and for all whether this country . . . wants to be at the centre and at the heart” of Europe. He famously added, “let the battle be joined.”—[Official Report, 20 April 2004; Vol. 420, c. 157]. In other words, he did not get into the terribly confusing debate about what is and is not significant. He said that the question was about our relationship with Europe and about giving people a vote on it. I have his statement of 20 April before me. Do you agree that those were valid reasons for granting a referendum?

Mr Murphy: In my view, referendums should be reserved for areas of substantial constitutional change. That is why we had a referendum on Scottish devolution, which was an important constitutional change for Scotland. There is a continuing conversation about whether there should have been a UK referendum on Scottish devolution. I do not agree that there should have been. You asked my opinion, and I have stated what I believe to be the benchmark. The exception, of course, was the 1975 referendum.

My argument against having a referendum is not based on a careful contextual analysis of the previous Prime Minister’s comments and assertions. As you say, the reason why I am arguing against the referendum is not because of disagreements over QMVs or anything of that sort; it is because we now have a treaty that is similar in its reforming approach to previous treaties. We did not have referendums on them: Parliament quite rightly at great length discussed and then ratified each of them in turn. That was the right thing to do in a system of parliamentary democracy and that is our intention this time, too.

Q259 Mr Heathcoat-Amory: So we have a clear difference. In 2004, Mr Blair did not refer to the content—indeed, he could not, because the constitutional treaty had not then been agreed. Instead, he referred to resolving our relationship with the European Union. You are saying that that is not a valid reason for having a referendum, which is interesting because it is a clear difference between you and the position of your party’s Prime Minister a few years ago. I just want to establish that. It follows logically from what you have just said, but I just want you to confirm it.

Mr Murphy: Mr Heathcoat-Amory, that is not what I said. If you analyse the record of our proceedings, you will see that, and it would be helpful if you did not claim that I said something that I did not say. You invited me to share my opinion with you, and I have done that. The treaty that is now under consideration and which will be put before Parliament is similar in nature and takes a similar approach to previous treaties. On that basis—in our long-established system of parliamentary democracy—it is right that we deal with it through the House of Commons and the House of Lords in the same way as we have previous treaties.

Q260 Mr Heathcoat-Amory: The point that I made to you is that those reasons were not given by Mr Blair in 2004. Indeed, he went almost entirely on resolving this relationship, which you have not referred to. There is no other way of describing it; there is a difference here.

I would like to tie you down a bit about the supposed difference between a constitution and a treaty, and remind you that when the German presidency wrote to member states in April, Mrs. Merkel suggested using different terminology without changing the legal substance. In other words, if we look at the substance rather than the label, she is saying that it should be the same. The fact that that is how it has turned out is endorsed rather powerfully by the man who drew up the first text, Valéry Giscard d’Estaing, who has said that “In terms of content, the proposals remain largely unchanged. They are simply presented in a different way.” If we cut away the question of what it is called, and look at what it does, such as on majority voting and the other areas we have touched on, it is the equivalent of, if not much the same as, the previous treaty, so, why are you abandoning the promise of a referendum?

Mr Murphy: You and I have had the opportunity to rehearse some of these arguments in the media, and it is right that we now have the opportunity to do so in the Committee. German politicians, such as Mrs. Merkel or others, are quite clearly referring in a domestic context to the version of the treaty that they are signing up to. They reflect the fact that they do not have the protocol on the charter or the opt-in process in justice and home affairs, and that more QMVs apply to Germany than to the United Kingdom, for example.

Each of the member states and prominent politicians in those countries, quite rightly and entirely properly, make observations about how the treaty will apply in their country and for their electorate. Equally, it is right and proper that we do the same, which is why I have said on a number of occasions that not only have we moved away from the constitutional concept, which has been abandoned, but the UK has a unique deal. Among all the 27 member states, the UK’s version of the treaty that we seek to implement is the furthest from the old constitution. The President of the European Parliament, Hans-Gert Pöttering, referred to this when he said: “Since making the charter legally binding and extending the Community competence to JHA were two of the most important features of the original constitution, the deal struck by Tony Blair in June means that, for
better or for worse.”—I suspect that he may think for worse—“much of its substance will simply not apply in Britain.”

Mr Pöttering is not a political ally of mine; he is, of course, a very prominent conservative politician, and that is his observation. And observations about the UK position have been made by other prominent European politicians. Comments by the Taoiseach, a great individual who provides strong leadership in Ireland, about the position of Ireland are being played back into the UK debate. That is simply the terms of the debate. The Taoiseach refers to the deal that Ireland has got, the UK Government will refer to the deal that the UK has got. That is why we are confident in terms of our deadlines; the substance of this treaty is substantially different to that of the constitutional treaty.

Q261 Mr Heathcoat-Amory: Actually, the Taoiseach in Ireland has said that over 90% of the new treaty is the same as the constitutional treaty.  
Mr Murphy: I think he said 95%.

Q262 Mr Heathcoat-Amory: Let me finish. Other leaders in Europe, including Prime Ministers and Foreign Ministers have said it is up to 98%. I will compromise and say that it is 95%.  
Mr Murphy: I think that the Taoiseach said 95%.

Q263 Mr Heathcoat-Amory: Well over 90%, anyway. They are all saying it is over 90%, and yet you are saying that it is so different as to render the previous promise on a referendum null and void.  
Let me refer you to one other document: the mandate governing the forthcoming intergovernmental conference. You said that it says the constitutional approach is to be abandoned, which is, of course, about the title rather than the substance. That mandate, which is published, also explicitly says that the reform treaty, “will introduce into the existing Treaties . . . the innovations resulting from the 2004 IGC”. That was, of course, the one that drew up the constitutional treaty. Even the mandate says that the innovations will all be rolled over into the new document, so how can you engage in a trustworthy way with electors—in the way that the new Prime Minister says that he wants to do—when you pretend that this is a completely different document and that therefore previous promises to hold a referendum, including manifestos promises, are inoperative? Is this not a breach of trust with the electors?

Mr Murphy: Not at all, because, as I have said, all member states have agreed that we are not going to have a constitution. I do not think that there will be a constitution for Europe in my lifetime. We have abandoned the constitutional approach and the constitutional concept. The reform treaty is different in content and approach from the old constitutional treaty; the trappings of the constitution are gone, and gone for good, I hope. There are new UK-specific safeguards, which are of crucial importance: a protocol on the charter of fundamental rights; the guarantees about the existing powers of member states to formulate and conduct their own foreign policy; the extension of the justice and home affairs opt-in; the strengthened emergency brake on social security; and the fact that it is made specific for the first time that national security is the preserve of member states. These are all important parts of a UK-specific version of the treaty that we intend to take through Parliament and have ratified by Parliament. The Italian Interior Minister, Mr Amato, reflected on 6 September that, “In the debate about the European constitutional treaty, we were talking about a treaty which would repeal all the existing main treaties. That would have been a new constitution, a new start, however what was agreed in Brussels at the European Council was not that. It was a cluster of amendments to the existing treaty. That is a crucial difference.”  
What we now have is a treaty similar in approach to the previous reform treaties—Maastricht and others. We had a debate in Parliament, before my arrival, of course, and others had an opportunity to vote on the demand for a consultative referendum. I did not have the opportunity to vote on that, but others did. They made their public position clear about parliamentary scrutiny and the need for a referendum. That is a matter of public record.

Chairman: I think that we will want to discuss a number of those issues in detail. We are running quite short of time and I do not want to spend too long on this point. I call John Stanley on this wider issue and then we will go on to some specifics.

Q264 Sir John Stanley: We are perhaps agreed that the central issue here is whether the substance of the proposed reform treaty is such as to warrant going through a proper, direct democratic process through a referendum. What is immaterial is how the new treaty gestated and how previous treaties were treated by previous Governments. What I simply do not understand from your answers to Mr Heathcoat-Amory is how you can sustain the argument that this treaty is not, in essence, as far as the UK is concerned, of the same substance and content as the previous one, upon which your own Government and your own party made a commitment to have a referendum. Even if you accept the quite dubious premise that all the opt-outs are legally watertight—there is huge doubt as to how watertight and valuable they will be; no doubt we shall come to that a little later—then one compares the two texts it seems that this treaty simply rearranges the parsley around the chicken. The chicken is just the same as the one that was previously rejected.

Mr Murphy: As a vegetarian, I do not know how to match the metaphor about chickens and parsley, but I shall try to do so. I do not accept, Sir John, the assertion that underpins your entire comment—that what happened before is immaterial. What happened before reflects the type of democracy that we have in the United Kingdom. We all celebrate the fact that we have parliamentary sovereignty, and we all seek to defend it. To suggest that it is immaterial that previous treaties were ratified in the established UK tradition is quite wrong. It is of absolute material significance, because it is the correct approach. It is our intention to take a similar approach—
Q265 Sir John Stanley: Why did your Government make a commitment to hold a referendum on the previous treaty?

Mr Murphy: Because it was a constitutional treaty, and we said clearly that it was a constitutional treaty. This is a standard reforming treaty in the spirit of the previous reforming treaties, and therefore it is not in any way immaterial. I referred earlier to the commitment by all member states that the constitutional concept should be abandoned. We have a specific deal unique to the United Kingdom. That is why it is different—very different indeed.

Chairman: Can we now move on? I call Fabian Hamilton.

Q266 Mr Hamilton: Minister, if the constitutional treaty was acceptable in 2004—albeit subject to a subsequent referendum that we had to abandon due to the decisions of the French and Dutch people—why have we now requested and negotiated the four areas of amendment in the red lines? Why have they come in now when they were not there before?

Mr Murphy: With the benefit of hindsight that no one enjoyed in that period, my sense, to pick up again on the question that Ms Osborne asked, is that there was a view that the solution to the disconnect—the lack of connection and affection for Europe—was simply about getting structures right and having a relatively maximalist approach to European structures. The referendums in the Netherlands and France put paid to that. They forced a rethink among politicians and the political class across Europe.

Q267 Mr Hamilton: So have we a lot to thank the French and Dutch peoples for?

Mr Murphy: Of course, that depends on your perspective. It put a brake on the direction of travel that the European member states collectively had embarked on. Throughout the continent—particularly in France and the Netherlands—it forced a serious rethink about their relationship with the European Union. It had an impact across the whole European Union. It is probably that more than anything else that led to a rethink, a reformulation and a much more modest reforming treaty being born.

Q268 Mr Hamilton: We have now negotiated the four red line areas that we previously endorsed and have negotiated, as you emphasised, an almost separate form of the treaty for ourselves. Do you think that that has damaged us with our EU partners and set us apart?

Mr Murphy: It is clear that some other member states and prominent politicians in other European Union Governments would rather that we signed up to their version of the treaty and that there was a universal approach, but we made it clear as part of the deliberations over the reform treaty that that was not our intention. Given a choice between doing what is in the UK’s national interest or, for its own sake, pleasing politicians in other member states, we chose to do the right thing, which was to negotiate a specific UK version of the treaty to implement here. Other member states will offer their own comments on our deal.

Q269 Mr Hamilton: Do you think that it is a damaging precedent? Surely, if Poland is unhappy with certain aspects, it can then negotiate its own version, or other EU countries can negotiate their own special versions of the treaty. Have we not just created a precedent that others will follow?

Mr Murphy: It is not a precedent in that sense. The UK has not participated in important European projects in the past—it was a mistake. I think in retrospect, but we did not that anticipate that—right at the commencement of the European Community. Even more recently, we have chosen—rightly, unless economic circumstances are different—not to participate in the euro or in the protocol and the charter of fundamental rights. There is some discussion that the Poles possibly, and the Irish—I understand that there is a conversation in Ireland—about whether they would have a protocol. I think that they probably will not end up having one, but it was a conversation for a while in Ireland. It is not a precedent or a principle specific only to the United Kingdom.

Q270 Mr Hamilton: Tony Blair said frequently that he wanted to put Britain at the heart of Europe, but do not the red line areas that we have negotiated and the precedent that we have set simply confirm to our European partners that we are not in the heart of Europe, that we do not buy into the European project and that we do not want to be part of what they want to achieve?

Mr Murphy: I think those red lines set out a demarcation in terms of where the Government feel it appropriate for the EU to have competency and a role, and what the Government think is the right balance between European co-operation and specific national interest.

We can only take the words of other prominent European politicians as to where the UK stands and its role in Europe. There is a continuing great affection and respect for the UK across Europe and beyond, and there is a real enthusiasm for many of the agenda that we are placing at the heart of the conversation such as environmental protection, economic dynamism and national security issues. I should also, Mr Hamilton, have referred to the fact that, for example, in the Schengen agreement we take a different approach. I do not think that that has harmed our reputation in the way that others thought it would. We remain determined to play an active part in a European delivery of the things that are important to us.

Q271 Chairman: Can we now move on to one of the red line areas that you mentioned: the charter of fundamental rights? I will bring in Mr Heathcoat-Amory in a minute, but before I do, I would like to ask whether you agree that the Government would have far less trouble with the TUC if we did not have a red line on the charter of fundamental rights, and had three red lines rather than four?
Mr Murphy: The TUC will make its own position clear for its own purposes. We think that four red lines are the right balance for the UK. It is a stronger deal because we have those four red lines. They are the four red lines that we said we would deliver on, and so we did. Some people will remain perturbed or unhappy about that, but that is the deal we negotiated.

Q272 Chairman: But, on balance would you accept that the arguments that are coming from the trade union movement on the treaty are rather different to those that are coming, for example, from The Daily Telegraph?

Mr Murphy: They are different arguments but we have done the right thing in the interests of the UK economy and the deal that we struck in June.

Chairman: No doubt we will come back to this later.

Q273 Mr Heathcoat-Amory: If there is a dispute in future about the validity or effectiveness of the opt-outs, who is going to decide it? For instance, suppose the Commission or another member state does not like the way that the charter of fundamental rights does not apply over employment law in some way, because it supposedly gives us an advantage, and it decides to challenge our opt-outs. Or, in the field of foreign policy, suppose that there is a claim that we ought to be bound by EU solidarity, and therefore there is a dispute. Which body or court will decide it?

Mr Murphy: First, I am sure that it was inadvertent but you called it an opt-out. It is not an opt-out, it is a protocol, and those are different things of course. What is clear about the protocol is that if the treaty is adopted and the protocol is adopted, it becomes part of EU law. In that sense, the European Court of Justice oversees these matters. The fact is that it will be an established part of European law, and in that sense watertight because of its placement there.

Q274 Mr Heathcoat-Amory: So it is the European Court of Justice. That is in line with the existing treaty provisions. It is the guardian of the treaty, it interprets the text and it decides disputes between member states or the Commission and other institutions. So the matter is going to be decided not by the British Government, by Parliament, or by the House of Lords or any supreme court here. It is going to be decided by a European Union institution. Can I draw your attention to article 9 of the draft text of the new treaty, which, as usual, carries forward from the constitution. It states that “The institutions shall practise mutual sincere co-operation.” It lists the institutions, one of which is, of course, the ECJ. Others are the Commission and the European Parliament. Therefore, the decision in any dispute would be an EU institution that is required by treaty law to practise mutual sincere co-operation with the institution that would be bringing the case against the British Government. Do you think that that is a fair way of deciding something as important as that, and are not we again exporting an important element of self-government?

Mr Murphy: Not at all, Mr Heathcoat-Amory. It is peculiar to be accused on the same day of doing two things that represent polar opposites on this issue. My friends in Brighton are going to have an observation about the protocol in the charter, which is critical from a perspective that is diametrically opposed to your own. It is important to be clear that the charter itself brings about no change in UK law and preserves the current position in UK law. It does not introduce new rights for any court in Europe or a domestic court to strike down any UK law. It is important to be absolutely clear about that. Both the charter and the protocol are part of European law. As I have said, the charter does not change the current position. Rather, it puts a series of existing rights that are found all over in different treaties and places and helps it to be transparent, but it does not change UK law at all. The ECJ ultimately looks at European law, but on the basis that the protocol is legally binding and accepted to be legally binding by all 27 member states. The truth is that not all of the other 26 member states are content that we have the protocol and there is a degree of frustration about that, but we negotiated a deal that was specific to the UK for clear purposes.

Mr Heathcoat-Amory: You are making assertions about our opt-outs. I am sure that they are sincerely held and you believe that they are watertight. However, we know that a number of other member states resent our opt-outs, and indeed there are people in this country who do not like the way that the charter will not apply. On questions of criminal justice, immigration and foreign policy, there will be plenty of disputes in the future that cannot be envisaged. Therefore, your version may not hold. I am interested in who will decide that, and I put it to you that there is a new provision in the new text that requires the deciding body—the ECJ—to practise “mutual sincere co-operation” with the very organisations that may bring a case against us. I do not think that that is a fair way of deciding British policy, and I am surprised that you have not picked that up and referred to it in your answer to me.

Mr Murphy: Much of this language about mutual sincere co-operation is in the context of previous treaties such as Maastricht and others. With regard to the specific point that you made, I am not making an assertion. I believe that it is not an assertion and many people know that it is not. Articles 1 and 2 of the UK-specific charter are not assertions, but statements of what will become European law if the treaty is ratified. They are not a Jim Murphy assertion, but European law, and there is an important distinction between the two.

Q275 Mr Heathcoat-Amory: But law has to be interpreted. There are disputes in our domestic courts, and lawyers make their living out of different interpretations of the law. I put it to you that when there is a dispute, it will not be Mr Murphy deciding the matter—I wish it was, as I am sure that you would decide extremely effectively in our favour. Instead, it will be a court that not only is a European institution, and therefore bound by concepts of ever-closer union, European integration and so on, but is
Q276 Sir John Stanley: Minister, in its paper on the reform treaty and the British approach to the European Union intergovernmental conference of July, your Department chose, from time to time, to put into bold sentences that it thought were of much importance. One of those sentences on page 8 says, “The IGC Mandate contains a declaration confirming that the provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations.” Can you confirm to the Committee that there can be no certainty that declarations appended to treaties will necessarily be legally binding?

Mr Murphy: Sir John, I am looking at page 8—Chairman: We are talking about the British declaration on common foreign and security policy.

Sir John Stanley: It is the last sentence of the penultimate paragraph, Minister.

Mr Murphy: What is clear, Sir John—of course, you will come back on this—is that CFSP will remain a matter for unanimity and will remain intergovernmental.

Q277 Sir John Stanley: Can I just have the answer to my very specific question, Minister? Would you like me to repeat it? I asked whether you can confirm to the Committee that there can be no certainty that declarations appended to treaties will be regarded as legally binding.

Mr Murphy: Sir John, I think that you are aware that declarations are political commitments on behalf of the member states of the European Union, and these issues will remain matters for unanimity. In that respect, there is an agreement and a declaration by all 27 member states—a very clear political commitment by all 27 member states.

Q278 Sir John Stanley: Thank you. You have confirmed what I expected you to say, which is that this is a political agreement, but the declaration does not necessarily have any legal force. Thank you, Minister.

Mr Murphy: Sir John, the point is that we have agreed to this as one of the 27 member states. Every one of us has agreed that the substantial issues of CFSP remain a matter for unanimity. The whole CFSP proposals were, of course, part of the Maastricht deal in 1993, so this is not new at all. However, it is important to have the declaration and for the UK to have worked with others to achieve it.

Sir John Stanley: Minister, I merely wanted your confirmation that the declaration does not have legal force. Thank you.

Q279 Chairman: Can I take up further issues related to this? Under the proposals, the high representative functions merges the External Affairs Commissioner with the Council’s high representative for foreign policy, Mr Solana. As a result, the Commission’s staff and budget will now be under a high representative who is accountable to the Council of Ministers and, therefore, to the member states. His budget and those working for him were previously with the Commission. He will form what is called an external action service. In our report last year, our Committee explicitly said that there should not be a “foreign ministry” of the European Union, nor any ambassadors or foreign service. Can you assure us that that will be the language that continues to be used after the agreement—if there is one—on a new, reformed treaty?

Mr Murphy: I give you the assurance absolutely that we shall not be having a European Foreign Minister. We shall have a high representative, as you mentioned. Terminology is important, of course, and that is the tone of terminology that should be reflected throughout—both in the debate and in agreements.

Q280 Chairman: But can I put it to you that, in practice—once you establish the position of high representative—that person will be known popularly as the EU’s Foreign Minister? Once you establish that person with a budget of billions of euros and a staff of hundreds if not thousands—1,800 was the figure, I think—they will take on a persona and a role whereby they will have a dynamic that grows over time. That is obviously the intention. How will that relate to the proposal before us, which seems to be that national Foreign and Commonwealth Office and other countries’ staff will be seconded to work in that structure? Will those staff be accountable to the high representative or will they remain accountable to their member Governments?

Mr Murphy: I am sure that you are right to strike a note of caution on all that. However, there is already a high representative who has that title.

Q281 Chairman: With a very small staff.

Mr Murphy: Of course, but it is a matter of conjecture whether the title itself leads to the person being described as a Foreign Minister—either in the past or
in the future. On the external action service, there has been an agreement for its commencement, but the detail is still being worked out. However, I know that it will be proceeded with on the basis of unanimity in the negotiations.

Q282 Chairman: What about the people who work there?
Mr Murphy: The detail of all of that is still to be worked out.

Q283 Chairman: Perhaps we can have a detailed note that explains where we are at this moment. Perhaps also—before the Foreign Secretary appears before us in October—we can have a note then as to where we are at that point, assuming that there are discussions if not negotiations between now and then. The issue is clearly one that we shall need to come back to, because it is fundamental to the way in which foreign policy works in this country.
Mr Murphy: I shall happily take up the invitation to provide whatever information is available.

Andrew Mackinlay: Mr Chairman, can I ask that the Foreign Secretary also make some proposals in relation to future parliamentary oversight?
Chairman: If there is time in the next 10 minutes we shall get to ask a question on that. We now move on to some questions about justice and home affairs.

Q284 Sandra Osborne: How would you envisage that the UK's opt-in on police and judicial co-operation in criminal matters will actually work in practice?
Mr Murphy: In practice, it would be a case of the United Kingdom Government considering the detail of any proposal and deciding at that point whether it would be appropriate for the UK to opt in if it were in our national interest. It will be on a strictly case-by-case basis. That UK distinction from other member states is important; they do not have such an arrangement in the reform treaty. That is our intention, however: to deal with proposals case by case on the basis of what is good for Britain.

Q285 Sandra Osborne: Do you think that that would be likely to cause resentment among the other member states?
Mr Murphy: That picks up a little on the point made by Mr Hamilton, which is that we have a record of being involved centrally in those parts of European Union decision making and policies with which we strongly agree, those that we do not share an ambition over and those that we think are not in the UK national interest to remain distinct from. I do not say that it is universally popular, but it is a well established British position and it is taken through in our opt-in on justice and home affairs.

Q286 Sandra Osborne: In terms of explaining matters to the public, it might be quite helpful if we could have some examples of the issue into which the Government would not wish to opt. As the matter is currently explained, it does not really mean a lot to people.

Mr Murphy: That is a fair point.

Q287 Chairman: I am conscious that you have been here nearly two hours, Minister. I am wondering whether it would be possible for us to have another 10 minutes beyond 4.30 pm so that we could ask you a couple of questions about Russia as well as the European Union?
Mr Murphy: Okay.
Chairman: Thank you. Let us move to social security.

Q288 Ms Stuart: I am sure that you will be glad that I have a brief question, Minister. One of the four red lines is social security and the strengthening mechanism, and the emergency brake on social security. As a former Social Security Minister, I wonder whether you can give us an example of what you think we had in mind about what might happen? It seems an incredibly widely phrased provision and something that would affect fundamental aspects of the social security system, including scope, cost or financial structure. You must have had some possible scenarios in mind. In case I have misread the text, I must say that I am assuming that the brake means that the Council will have to act in unanimity.
Mr Murphy: On the latter point, yes. As for what we have in mind, we have in mind any potential future development that we did not agree with and that was significant to our social security system, whether it be a new approach to benefit exportability, a new approach to benefit entitlement or any such issues. It is not aimed at a specific new proposal out there in the ether of our distant horizon, but it is an important wide-ranging protection, as you acknowledge, Ms Stuart.
Chairman: We now come to questions about the role of Parliaments.

Q289 Richard Younger-Ross: One of the bright points of the reform treaty is the fact that there will be additional scrutiny by national Parliaments. The proposals are that sets of votes should be allocated to the national Parliaments, and if one third of the votes cast say that something is a matter of subsidiarity and therefore legislation should not apply, the EU constitution proposing it would have to review its proposal. I believe that that is called the “yellow card”. If 50% of those voting decide that it is a matter of subsidiarity and not within the jurisdiction of the EU, the Commission would have to look at it in greater detail. We could have the position in which the majority vote in the European Parliament or 55% in the Council would be sufficient to kill off a proposal. That is referred to as the “orange card”. The orange card system came into the negotiations rather late in the day. Minister, can you say whether both the yellow card and orange card mechanisms for oversight of subsidiarity will be available?
Mr Murphy: Yes.

Q290 Richard Younger-Ross: Thank you, Minister. Can you say how those proposals will work within the British Parliament?
Mr Murphy: Yes. I am surprised that this has not caused greater excitement in the Westminster village because the plan is that each member state Parliament will be allocated two votes. Our intention as a Government—it is an established arrangement—is to have one vote for the House of Commons and one vote for the House of Lords. That is our intention.

Q291 Richard Younger-Ross: How would we use that vote? Who would decide on which way it was cast?
Mr Murphy: The House of Commons and the House of Lords would vote on those issues.

Q292 Richard Younger-Ross: So it would be a vote of the whole Chamber—not of a Committee, and not in respect of a statutory instrument?
Mr Murphy: We are going to work through the detail. It is a new proposal, a new protection and a new brake. It is an important new power. We will have conversations through the usual channels. Select Committees and others, about the detail of it and the most appropriate way of proceeding. However, as I confirmed to the House of Lords scrutiny Committee—I think that it was pretty pleased—there will be one vote for each Chamber in the Palace of Westminster.

Q293 Richard Younger-Ross: We are delighted that we will have the vote and that the Back Benchers of this House may have a say. I am slightly sceptical; they might have a better say in the House of Lords. I am not sure about how much ability we at our end of the House will have to override what a Minister might have already said in the Council. However, the document says that “National Parliaments shall contribute actively to the good functioning of the Union”. I believe, Minister, that when the House of Lords suggested that that rather imposed duties on Parliament and that the wording was probably inappropriate, you took the point and said that you intended to return to the issue in the IGC. Have you been able to do so?
Mr Murphy: We are looking at that through the process that is going on now. When the issue was raised with colleagues, it appeared that it was a matter of drafting rather than of intent, so it is not something to rectify or that would lead to our having to reopen the IGC mandate. It involves a specific word; the problem is one of drafting rather than one of purpose and intention.

Q294 Richard Younger-Ross: What would be the implication if the word “shall” was correct and was not a drafting error?
Mr Murphy: It is a drafting error, so I shall not speculate about what the alternative intention would be if it had been put there on purpose. It was not.

Q295 Richard Younger-Ross: Is the word “shall” going to remain?
Mr Murphy: That issue will feed through to the technical legal working groups—whether the word “shall” remains or whether we remove it. That is what the lawyers are looking at. It is an issue of drafting. The full picture is as follows. My French is pretty rudimentary, but the issue is about translation from French into English. In the French text there is no obligation, so there is no equivalent in the French version of the text to the word that has now found its way into the English version. I hope that that helps clarify the issue.

Q296 Richard Younger-Ross: My knowledge of French is probably even smaller than yours, Minister. However, my knowledge of lawyers is probably comparable. Whatever the intent behind a word, if a word is there, lawyers will latch on to it. I am rather surprised that you are reluctant to say what the implications would be if the word “shall” remained and we were unable to find the form of words that the French appear to have and we do not.
Mr Murphy: As I explained, the issue is that the English is a translation from the French. There is no equivalent word in the French and therefore the issue is about drafting error, not intent. There is no point in speculating about a word that we have no intention of having there.
Chairman: I shall take one last brief question on the issue from Gisela Stuart. Then we shall move on.

Q297 Ms Stuart: My understanding is that the Dutch Government were deliberately keen on the word “shall”. Can you confirm that?
Mr Murphy: No, I cannot.

Q298 Ms Stuart: Can you deny it, then?
Mr Murphy: Yes.

Q299 Ms Stuart: So no Government in the discussions wanted the meaning of “shall”?
Mr Murphy: What the Dutch Government want—I suspect that they are not alone; they may be joined by the Belgians and perhaps others—is reflected in some of the increased powers for national Parliaments. The intention is not to place a duty on national Parliaments. That is not the Dutch Government’s intention and it is not ours—it is not in the Dutch text, either.

Q300 Ms Stuart: So we can assume that when the final text comes to us it will say “will”. Any court knows what the word “shall” means. If it is meant to mean “will”, “will” will be used.
Mr Murphy: I am not going to speculate about which word will replace “shall”. My Dutch is much better than my French—

Q301 Ms Stuart: It is your English that I am worried about. Will it say “shall” or “will”?
Mr Murphy: Sometimes I think that my Dutch is better than my English.

Q302 Chairman: The next time that we have representatives from the Foreign and Commonwealth Office, as well as having a Europe specialist and a legal adviser with you, perhaps you could bring your linguists.
Mr Murphy: Is that to translate from Glaswegian, Mr Gapes?

Chairman: Yes, we will go there as well. There are some things on which we will write to you, but can we ask you some questions about Russia? Fabian Hamilton.

Q303 Mr Hamilton: Thank you. Minister, when you gave evidence to us in July, we discussed the situation regarding the UK and Russia, and our deteriorating relations following the lack of co-operation in the case of Alexander Litvinenko and the murder inquiry. You will recall, I think, that you gave evidence just two days after we expelled four diplomats. Have the measures announced in July had any impact on the UK’s official dealings with Russia, including anti-terrorist co-operation? It was also mentioned earlier, in May, that a Minister from the then Department of Trade and Industry, now the Department for Business, Enterprise and Regulatory Reform, would be travelling to Russia in July. Did that Minister travel to Russia, and what was the outcome? Are there any signs that the measures announced in July are getting us any further co-operation from Russia in the Litvinenko case? Finally, what representations has the FCO made about the latest developments concerning the BBC World Service in Russia, and what results have we had so far?

Mr Murphy: The Foreign Secretary announced on 16 July, I think, measures on co-operation with the Russian intelligence services, judicial co-operation and some visa issues. In terms of the announcements, we have not broadened those specific measures. That is the sphere and scope of the measures that we announced, and we remain committed to them. We have not broadened them in any sense. I tried to emphasise when I gave evidence to the Committee in July that our relationship with Russia is such that, if we disagree, we think that it is important for us to say so. Russia remains a very close strategic partner on a whole series of issues, but it would be quite wrong of us not to voice our concerns in the same way that this Committee has voiced its concerns about specifics of the Russian Government and authorities’ practices on human rights and other issues. As for the visit by a Government Minister, a visit by Malcolm Wicks took place. I am told that it was very constructive.

Ms Stuart: I saw him at the airport.

Mr Murphy: Where were you going?

Ms Stuart: Moscow.

Mr Murphy: He was accompanied by a Swedish Minister, to whom I spoke the weekend before the visit about nuclear decontamination and the important issues on which we still remain very close to Russia and in which we have a shared ambition. There was some public comment that we had suspended our co-operation with Russia on anti-terrorism. We have not, and we will not. If our systems in the UK suspect that there is a threat to Russia, it is right and proper that we should share that information with the Russian authorities, and we expect a similar degree of bilateral co-operation from the Russians. It is not about suspending co-operation on anti-terrorism at all. It is about the specific measures announced by the Foreign Secretary in July.

The BBC is caught, pretty clearly, in a maze of legal bureaucracy in some of its operations in Russia. Those problems could be overcome if the Russian authorities wished them to be. We continue to believe that the World Service—I think that it is on the FM frequency—should be allowed to broadcast and go back on air. It is within the power and the gift of the Russian authorities to make that happen. The BBC has been frustrated in an important way in broadcasting objective and high-quality journalism in Russia, and there is no reason for it. Having said that, we remain committed to a strong relationship with Russia. I spent the weekend in Ms Osborne’s constituency, and spent two or three hours with the Russian deputy Foreign Minister at a fantastic event in Ayrshire. It was clear that Russian Ministers and officials have a continuing desire not to allow the very strong disagreements that we have with Russia on specific matters to contaminate a genuinely important strategic partnership.

Q304 Andrew Mackinlay: In the middle of August, I received from our colleagues in the Home Office replies to some written parliamentary questions—I had waited five weeks. I assume that you would have been sent copies. I asked how many requests the Russian Federation had made over the past 10 years to extradite people from the United Kingdom and return them to its justice administration. The initial reply was that there had been about 27 requests, with an indication that none of those had been conceded by the United Kingdom. I queried it, because it was an ambiguous reply in a number of respects. The Home Office then, by letter rather than by parliamentary reply, said that the number was in fact 13 and that there were a number of repeat requests. I want to place that on the record.

If you remember, during all the heightened talk at the time of Litvinenko and the expulsion of various people, the British Government were putting around how unfair and unreasonable Russia was in not extraditing somebody to London. There was no reference to the fact that there had not been one extradition at the request of the Russian Federation during the past 10 years. Regardless of whether the number is 13 or 27, that is the fact. Does the Foreign Office have a view on this? Does it think that we are the Archangel Gabriel, Russia is wrong and that we should have extradited to us those whom we want from Moscow but that things should not happen the other way round? That approach is untenable.

Mr Murphy: I am not in a position to comment on the specific parliamentary answers from the Home Office. I shall make it my business to read them, but in mid-August I was enjoying my family holiday in Blackpool.

Andrew Mackinlay: So was I, but I phoned them up from my holiday.
Mr Murphy: In Blackpool?

Q305 Andrew Mackinlay: No, but carry on. It doesn’t matter where you were. What do you say about it?

Mr Murphy: It does matter. Blackpool is an enjoyable place to spend a holiday, but I am not here on behalf of the Blackpool tourist agency. My mother-in-law lives in Blackpool.

The end point of this process is that what happened on the Litvinenko case, as we discussed in July, was a matter of such importance—

Andrew Mackinlay: To us.

Mr Murphy: It was a matter of importance to us and, given the statement of the European Union, it was a concern to all other 26 member states of the European Union. Nationals of 18 member states had to be tested for polonium poisoning, so it was an issue not just for the United Kingdom, but for others. That is why all member states rightly take a strong view about the murder of one of their citizens on the streets of a capital city. That is our view.

Our view is also that there was a lack of willingness and co-operation on the part of the Russian authorities. It would have been within their power, given their system, to have enacted such co-operation, and we took the measures that we did because of that and because of the severe nature of the crime that was committed.

Chairman: I am sorry, Mr Mackinlay, but we cannot pursue this indefinitely. I want to get one last question in—

Andrew Mackinlay: I did not want to know about his mother-in-law; I wanted an answer to my question of why he justifies 13 requests being refused and our expecting them to respond to our requests. That is not an unreasonable approach.

Chairman: You have placed that on the record. No doubt, you will get a note—

Andrew Mackinlay: Or I will get a ticking-off from the security services here in London.

Chairman: I call Sir John Stanley to ask our final question.

Q306 Sir John Stanley: As you know, some members of the Committee visited Belgrade and Pristina in July. I think that everybody would agree that it is now inconceivable that President Putin will allow a resolution through the United Nations Security Council allowing Kosovo independence. If the current negotiations between Belgrade and Pristina come to naught, as seems likely, is it still the British Government’s position that Kosovo should be granted independence?

Mr Murphy: The end point of this process is that Kosovo should be granted independence, yes. Our preference is to establish that through the United Nations. It is a substantial diplomatic challenge. We are not under any illusion as to how difficult it will be, but we continue to work through the UN to help make that happen. Our view is that independence for Kosovo along the lines of the Ahtisaari plan, in the absence of an alternative agreed by Pristina and Belgrade, is the best solution.

Q307 Chairman: Minister, in the light of that, you will be aware probably more than anyone, but I was made aware forcefully last week, that there are at least five, possibly seven, EU countries on the record as opposing an independent Kosovo and even opposing the Ahtisaari plan, even though they have signed up to it. Do you expect therefore, in those circumstances, a split within the European Union?

Mr Murphy: That is possible. Other countries have offered their public reflections, in the same way that I have stated our policy today. We are confident in the way in which the process is evolving. The United Kingdom and others have shown a real determination to explore every potential diplomatic avenue, and having done that, we think some of the concerns of other EU member states will be overcome. On that basis, I am confident that the scenario, which in the past would have been possible, is now unlikely to arise.

Importantly, it is also about retaining a degree of stability on the ground, because that is going to upset and have a dramatic effect not only for the people of Kosovo, but also on the diplomatic process around us, through the UN and elsewhere. That is one of the reasons why I think it is helpful to confirm to the Committee today that the UK Government have invited the team of unity from Kosovo to meet us in London, to reassure them of our continued support for where this process should conclude, and to encourage them in the same way that we encourage others to retain a degree of patience. That is sometimes difficult, but it is of crucial importance as the process comes to a conclusion, up to 10 December.

Chairman: No doubt we will revisit the issue. Having been in Kosovo, it is quite clear that you are facing completely diametrically opposed positions and it seems that there is no possibility of an agreement internally; we will come back to you and press you on the matter over coming weeks.

Minister, I thank you and your colleagues for coming today, for two reasons especially: we are in a recess, as we have already commented, and you have given us more of your time than we asked for. We wish you the best for the rest of the summer recess.
Letter to the Chairman of the Committee from the Minister for Europe

Thank you for inviting me to appear before the Committee on 12 September. I promised to come back to you on a number of points which were raised during the discussion.

COMMON FOREIGN AND SECURITY POLICY

You asked for a note on the External Action Service (EAS) that explains where we are at the moment. As I set out in front of the Committee, the draft EU Reform Treaty provides for the creation of an External Action Service. That is set out in Article 1, point 30, which amends Article 13 of the Treaty on European Union. Paragraph 3 of that new article states that:

“In fulfilling his or her mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.”

Member States will not discuss the possible scope, remit or operation of the External Action Service, together with the Commission, until a Treaty has been agreed and signed. This is made clear in a Declaration on the EAS which will be attached to the Reform Treaty. This states that:

“following the signature of the Treaty modifying the Treaty on European Union and the Treaty establishing the European Community, the Secretary General of the Council/High Representative for the Common Foreign and Security Policy, the Commission and the Member States should begin preparatory work on the External Action Service”.

Decisions on the functioning and organisation of the EAS will be taken by the Council, acting by unanimity, on the basis of a proposal from the new High Representative for Foreign Affairs and Security Policy, once the Treaty has entered into force. This too is clear from the draft Treaty text. That decision will be subject to Parliamentary scrutiny in the usual way, and I will update on the Committee on the progress of this issue.

You also queried whether the High Representative and the EAS “will take on a persona and a role whereby they will have a dynamic that grows over time.” The role of the High Representative is very clearly set out in the Treaty. He or she will be tasked by Member States on foreign policy, and it is Member States who decide CFSP policy, by unanimity. Equally, as the new Treaty makes clear, it is Member States, acting by unanimity, who will decide on the role, scope and operation of the External Action Service. So no evolution of this role unless we agree.

On the subject of European Court of Justice (ECJ) jurisdiction over the Common Foreign and Security Policy (CFSP), as I said before the Committee, the Reform Treaty will expressly exclude ECJ jurisdiction over the CFSP, except in two limited areas. The first relates to the power of the ECJ to monitor the boundary between the CFSP (which will be contained in the new Treaty on European Union) on the one hand, and other EU policies under the Treaty on the Functioning of the European Union (presently called the Treaty establishing the European Community) on the other. The ECJ already has this task under the current treaties. The second limited area of ECJ jurisdiction relates to the right of natural or legal persons to ask the ECJ to review the legality of a CFSP decision which imposes sanctions on them. New text in the Reform Treaty will set out, more clearly than before, that ECJ jurisdiction is otherwise excluded from CFSP. This, of course, was a key objective for the UK. The new text (Article 1, point 27—amending Article 11 (1) of the Treaty on European Union), reads:

“The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [ie the CFSP] . . .”

THE ABANDONMENT OF THE “CONSTITUTIONAL” CONCEPT IN THE EU REFORM TREATY

Eric Illsley MP asked for further details of the process of discussion leading up to the June European Council, where all Member States agreed to abandon the “constitutional” concept. Following the rejection of the Constitutional Treaty in France and the Netherlands, two founding Member States, it was clear that a fundamentally different approach was needed. At the June 2005 European Council Member States agreed on a period of reflection in their countries on the best way forward. The June 2006 European Council agreed

1 Unofficial FCO translation of the French text.
2 Unofficial FCO translation of the French text.
to extend the period of reflection for a further 12 months. The Government set out its general approach to agreeing a new Treaty in the then Minister for Europe’s Written Ministerial Statement of 5 December 2006. During the German Presidency of the EU, as the Committee is aware, there were a series of meetings of “focal points”—two officials from each Member State—at which UK officials repeated the Government’s publicly stated position. These meetings took place on 24 January and on 2 May. No text was provided or discussed at these meetings—the first draft text of an IGC Mandate was not provided until 19 June. On 25 March, the German Presidency, along with the Presidents of the European Commission and European Parliament, signed a “Berlin Declaration”, setting out the aspiration of “placing the EU on a renewed common basis” before the European Parliament elections in mid-2009. There was no mention of the old Constitutional Treaty in this political declaration. There followed a series of unilateral statements by a number of Member States, in public. For example, the Dutch Prime Minister Jan Peter Balkenende meeting the Prime Minister in London on 16 April said at the press conference afterwards:

“we should work with the idea of having an amending treaty . . . it shouldn’t have the characteristics of a constitution.”

The then Prime Minister echoed that position, at the same press conference. And Nicolas Sarkozy said at the G8 on 7 June:

“It should be a new treaty and not a small constitution”.

This public approach was not surprising, given the clear signal already delivered by the French and Dutch electorates. In bilateral contacts with each Member State, the German Presidency had asked for their general position on the nature of any new Treaty. The Prime Minister had set out the UK’s general approach to any new Treaty before the Liaison Committee on 18 June. Foreign Ministers had a discussion of the issues around drawing up a new Treaty on Sunday 17 June, ahead of the General Affairs and External Relations Council on 18 June. As the Committee is aware, for that discussion the German Presidency produced a short note summarising, broadly, the well-known positions of those Member States who had ratified the Constitutional Treaty on the one hand and of those who had not, on the other. They stated that this reflected the bilateral consultations they had had with Member States. In drawing up a draft Mandate for discussion at the June European Council, the German Presidency took account of Member States’ positions, which were public, on the nature of a new Treaty. A draft Mandate was circulated, for the first time, at the third and final meeting of focal points on 19 June. Fundamentally, that draft Mandate reflected the political reality that the “constitutional” approach had been rejected. There was then an intensive negotiation at the European Council itself on the main terms of a new, amending Reform Treaty, which was reflected in the final IGC Mandate agreed by all EU leaders.

**The Likely Bill on the EU Reform Treaty**

Paul Keetch MP and Andrew Mackinlay MP asked whether “the draft legislation consequent upon this treaty, when it comes before the House of Commons, will be framed so that such an amendment [ie for a referendum on the Reform Treaty] can be tabled?” As I said in front of the Committee, once a final Reform Treaty is agreed, the Government will introduce a Bill to implement it through Parliament. We have not yet considered the content of that Bill; that will be done once a Treaty has been agreed.

As the Prime Minister has made clear, if the final Reform Treaty respects the UK’s red lines and is fully in line with the IGC Mandate agreed at the June European Council, the Government will seek to implement it in our national law through Parliament, as with all previous EU amending Treaties. Therefore, I do not anticipate any provision relating to a referendum being included in the Bill. It will be open to all Parliamentarians, as with any Bill, to propose amendments. Again, as with any Bill, amendments need to be within the scope of the Bill. While scope is a matter for the Speaker, I would not expect it to be difficult to draft a selectable amendment raising the issue of a referendum on the Treaty.

**The Nature of the 2004 Constitutional Treaty**

Gisela Stuart MP argued that the Constitutional Treaty was, in fact, an amending Treaty, not a “refounding” of the EU. In my opinion this is simply incorrect. Her argument appeared to rest on the basis that the Constitutional Treaty did not repeal and replace the Euratom Treaty, which established the European Atomic Energy Community. That is correct. However, the Euratom Treaty deals only with a very limited and discrete area—atomic energy cooperation. The Constitutional Treaty would have repealed and replaced the existing EC and EU Treaties, completely collapsing the pillar structure, and creating a new Union based on a single, “constitutional” Treaty. So the Constitutional Treaty was not an “amending” Treaty. In contrast, the Reform Treaty will amend the existing Treaties on European Union and on the European Community and it will leave us with two Treaties—including a separate Treaty governing CFSP—not with one constitution.
THE EQUAL STATUS OF MEPs

On whether UK MEPs might be excluded from voting on EU issues on which the UK did not participate, such as elements of JHA, I said before the Committee that we believe that there should only be one class of MEP, with full rights to participate in all debates and discussions in the European Parliament. That is in fact the position at the moment. Various national opt outs have existed since 1993—in no case have they affected the equal status of MEPs from those countries. For example, UK, Danish and Swedish MEPs sit on and participate fully in all aspects of the work of the EP’s Economic and Monetary Affairs Committee, although the UK, Denmark and Sweden are not members of the eurozone.

I hope this is helpful. I know that the Foreign Secretary is looking forward to providing further evidence on 10 October.

Jim Murphy MP
Minister for Europe
2 October 2007
Wednesday 10 October 2007

Members present:

Mike Gapes (Chairman)

Mr Fabian Hamilton  Mr Malcolm Moss
Rt Hon Mr David Heathcoat-Amory  Sandra Osborne
Mr John Horam  Mr Ken Purchase
Mr Paul Keetch  Rt Hon Sir John Stanley
Andrew Mackinlay  Ms Gisela Stuart

Witnesses: Rt Hon David Miliband MP, Secretary of State, Ms Shan Morgan, Director, Europe, Foreign and Commonwealth Office, gave evidence.

Q308 Chairman: Good afternoon everyone. Foreign Secretary, your first appearance before the Committee is very welcome. We obviously know your officials from previous sittings. This meeting is very important and there is a lot of public interest in the matter. Are you content with the documents that were agreed last week by the expert working group and the process so far? When will your legal linguistic experts complete their examination of the text?

David Miliband: I hope that you will first give me a couple of minutes in which to say how delighted I am to be here. Our colleagues will say that I have always sought to have a close, productive and engaged relationship with members of Select Committees in respect of those Departments for which I have previously been a Minister, and that is certainly my intention now. It is my very strong view that all aspects of policy, but perhaps foreign policy in particular, benefit from the degree of ventilation that can be provided by Select Committee inquiries. The Committee should never be in the position where it feels that it is not getting the co-operation and engagement that it wants from the Foreign Office. I know that we shall focus on the European treaty today, but other pressing foreign policy issues of immediate concern have also been flagged up, so we have made provision to extend my time here to ensure that we have as long as possible to cover them. I look forward to that, too.

As for the legal texts that were deposited in the Library and with the Clerks of the Committee as promised last Friday, the work will continue right through until final signature in December because it is right that we continue to be focused until the December Council when it is planned that Heads of Government will finally sign a new treaty and thereby move to the next stage of ratification. The documents that were published are important. For example, for the first time in the history of the European Union, the treaty will establish that national security is a matter for nation states. The documents are important. They will be discussed next week at the European Council by Prime Ministers and Heads of Governments, but we shall be working on them all the way through. It is certainly one area in which the Committee has shown interest before and there is more work to be done.

Q309 Chairman: You said that you will be working on the texts until December. Will any issues require a significant amount of more work or are you at the point when you think that it is just a question of a small number of modifications, interpretations or translations of words?

David Miliband: Rather than speaking in general terms, let me give one important example that has been raised by the Committee. It is our clear view and that of our European colleagues that the role of national Parliaments should be increased in the new set-up. One aspect is that it should be for national Parliaments to decide how they shall contribute to the processes that have been established. But certainly in respect of what I believe to be a misunderstanding about the intention of the mandate, it is clear to us that we need to make clear that, when the text states that Parliaments shall contribute to the functioning of the Union, that means that they shall be able to choose to do so in their own way and time. It is obviously for Parliament to choose how it does its own business; that is just as true for our Parliament as for others. That is one example of where there is more work to be done, including by—I always get this wrong; I do not know whether it is the jurists/linguists group or the linguists/jurists group—the group of jurists and linguists that is going to work on this.

You also asked, I think, about process, which is something that the Committee has highlighted. I do not know whether you want me to comment on that or whether you want to come back on what I have said.

Q310 Chairman: If you could say something in general, we shall come to some specific questions in a moment.
David Miliband: On process, I would say—obviously I was not the Foreign Secretary in the first half of this year—that, if one steps back, it is clear that Mrs. Merkel was dealt a pretty tough hand when she took over the presidency on 1 January. There had been 18 months of this so-called “period of reflection” or “pause for reflection”, and the debate had moved on in a significant and positive way in that, in the words of the Dutch Council of State, the centralising and federalising ambitions that had motivated some of those who had pushed for the constitution had been rebuffed. But she had 27 member state Governments who were having their own debates, and she had a tough hand in trying to bring them together.

Mrs. Merkel decided to approach it with a distinctive—I think that that would be a diplomatic way of putting it—approach, which was to talk to all 27 Government bilaterally through the focal points group, which actually met four times not three; I think that we have alerted the Clerk to that. She had those bilateral discussions and then, on 19 June, she produced the draft treaty. I say that that was distinctive; it reflected the difficulties of the hand that she was dealt. But I do not move away at all from what the former Prime Minister said after the European Council in June: that Mrs. Merkel really did an outstanding job in pulling together a mandate for an intergovernmental conference that reflected and respected the different interests of different nations.

Q311 Chairman: Before we move to some more detailed questions about process, can you clarify whether the UK Government submitted a legal opinion to the working group of legal and linguistic experts?

David Miliband: This was raised, I think, by an MEP either last week or the week before. It was a group of legal people, so they were expressing their legally informed views as they went along. I know of no “legal opinion,” “single legal opinion,” or, as there was talk of somewhere, some special, written legal thing. I saw that, but I do not know whether it was in the papers or in the briefing.

I have been errant in one regard—I should have introduced my colleagues. I am sorry about that. Shan Morgan is the director of EU policy in the Foreign Office; Mike Thomas is here from our legal department. I hope that it is okay with the Committee, if at certain stages in the discussion when we have a particularly detailed legal or policy discussion, for me to bring them in and let them provide the details. I genuinely want to ensure that the Committee gets all the facts and figures that it needs.

Q312 Chairman: So to be clear, there was no legal opinion submitted by the UK to this working group.

David Miliband: I do not understand; Mike can say, but it is absolutely clear that it was a legal group, so we had legal work going on all the time, but I do not know what document they could be thinking of.

Mr Thomas: No, and there was not a mechanism to submit legal opinions to the group.

Mr Purchase: Quill pen?

Q313 Chairman: Maybe a pigeon.

Finally before I move on, if this informal council next weekend fails to reach a unanimous agreement for some reason, let us say because of the politics in Poland, what will happen? Is there a plan B?

David Miliband: I would not want to speak for the presidency. The Polish election is obviously taking place and all sorts of things are said during election campaigns. We are happily in a period in which we do not have to feel that every word is quite taken to have such geopolitical significance, but, as I say, I would not want to speak for the presidency, but it has been clear that the final signature happens in December, so that gives it scope to make sure that the proper systems are followed.

Q314 Mr Purchase: Do we not have to take as gospel every word in the manifesto?

David Miliband: Who said that?

Mr Purchase: You talked about “during election campaigns.”

David Miliband: I said that we are not during an election campaign at the moment.

Mr Purchase: Agreed, we are not. But you mentioned—

David Miliband: Manifesto commitments are very important.

Mr Purchase: You said that, maybe, in an election campaign—

David Miliband: Things are said.

Q315 Mr Purchase: Yes, okay. Things are said. In our election campaign in 2005, we set out clearly that we would campaign for the European constitutional treaty. Now, it has all changed, and I am one who does not think that we now need a referendum. But at that time, we said that should that constitutional treaty come before us, we would have a referendum and we would campaign for it. May I ask you, Foreign Secretary, in the light of what you have just said about campaigning, would you have been happy to campaign for that full constitutional treaty?

David Miliband: I shall certainly answer that. Just to be absolutely clear, though, when I referred to “things” being said I meant the words being used in campaign speeches in Poland, which are different from what is written in a manifesto. I stand by the manifesto that you and I stood on. It seems to me that we should.

As you say, there are two significant changes—well, there are actually three. They are changes of structure, of content and of consequence. The change of structure that has occurred is that the attempt to collapse all previous existing EU treaties—notwithstanding the interesting debate you can have about Euratom; but, none the less, we know what we are talking about—into a new treaty refounding the European Union. The constitutional concept has gone; it has been abandoned.
Secondly, in terms of content, there are significant differences, not least for the UK, which has a number of derogations, opt-outs and other significant issues that make our treaty different. Thirdly, the consequence of the new reform treaty is different as well, because I think that it settles the debate about whether Europe is going to be a coalition of nation states, or whether it is going to move in a more federalist direction. I think it settles it in a way that is not just the British point of view, but the long-standing point of view of other countries as well.

Q316 Mr Purchase: But the answer to my question was yes, you would have been prepared to campaign for a full constitution?

David Miliband: Of course. I stand behind the manifesto that we stood on.

Chairman: Can we move on?

Q317 Mr Heathcoat-Amory: Secretary of State, the European Scrutiny Committee established last week that the British Government saw no text at all of the treaty before 19 June—that is, only 48 hours before the European Council at which the whole thing was agreed politically. So these negotiations were compressed into a terrifyingly short period of 48 hours. It is not even certain that other Departments were consulted in that short time, so it is not surprising to me that there are a lot of ambiguities and loose ends still to be decided.

The European Scrutiny Committee also of course compared the two treaties and concluded that they were substantially equivalent, and it cast doubt on the security of the red lines—the opt-outs and so on. In answering that point yesterday in the House, you implied that the Committee’s report was out of date. You said, “The Committee’s report was written and printed before the legal text was published on Friday.” That was 5 October. We now have the text and, in the light of what you said, I would like you to tell us now what changes you have secured between the original text and the text we have now before us, because certainly the only substantive change I can find is one that is actually very unhelpful to the United Kingdom. It is about the transitional arrangements for justice and home affairs, and the fact that it will become, eventually, subject to the jurisdiction of the European Court of Justice. Perhaps you can tell us what favourable changes you have secured in the latest text.

David Miliband: Can I just pick up a number of the points? I shall certainly get to the last one. You said right at the beginning that the Select Committee “established” that it was on 19 June. I think, to be fair, my colleague Jim Murphy appeared before you and sent a letter to you that made that clear. Secondly, you made the point, perfectly reasonably, that if a text is published on the 19th and there is an agreement on the 21st, that is a very compressed period—I think that you said terrifyingly compressed. I think that is a perfectly reasonable point to make. As I said in my introductory remarks, I think that that reflects the difficult hand that Mrs. Merkel was dealt and the way in which she went about putting it into practice. I hope that you will accept that one consequence of the reform treaty, should it pass, is that the system of a six-monthly rotating presidency in which a country is dealt a hand for six months will no longer be the case. None the less, your point that there were only two days is a reasonable one. Obviously, our focus in the discussions that happened in advance of the 19th and afterwards, between the 19th and the 21st, has been on the red lines issue. I think it is important to establish that.

You also said that the Committee had commented on the similarity or difference between the reform treaty and the constitutional treaty. It is important, for the record, to be clear what the Committee said. You referred, I think, to what it said in paragraph 45 but not what it said in paragraph 72. In paragraph 72, it was absolutely clear that “for those countries which have not”—underline not—“requested derogations or opt outs from the full range of agreements in the Treaty” the two treaties are substantially equivalent. It is important, not least in the British context, to put that on the table. If you remember, that was the matter of content to which I referred. Notwithstanding that point, in a matter of structure, the reform treaty is different for all European countries, because it does not collapse all previous treaties and create a new one. It amends existing institutions. That point is important for the record.

In terms of the importance of the text that was published on Friday, the best area is to go through in detail the arrangements that are being put in place for justice and home affairs and the opt-in that will exist there. If you look, you will see that there is substantial detail in that area relating to how the opt-in will be protected in a whole range of areas: transitional, but also in respect of the Schengen agreement, of which we are not members. If you are asking me where there is a good example of where the legal text takes us, justice and home affairs is a good area to look at.

Q318 Mr Heathcoat-Amory: I put it to you, on the question of the 48 hours, that you just meekly accepted this German timetable. The Sherpas or “focal points”—one of them is sitting next to you—were appointed back in January. No British Government trying to stand up for national interests should have accepted that we should not see a text at all—any text, that is what we were told last week until 48 hours before it was all to be agreed. I find that a frightening abdication of national responsibilities and I am very surprised that you should seek to defend that.

David Miliband: Can I come back on that? You have used the word “meek” and the word “abdication”, which are both quite strong. I do not think that anyone would have described the performance of Tony Blair and Margaret Beckett as meek in the run-up to, and in the discussions at, the June Council. I think that you would agree with me, because you have studied these things—I do not mean just in your role as a member of the convention, but also before from other European treaties,
intergovernmental conferences and councils—that the mandate that was agreed at the June Council was uniquely detailed. I think that everyone agrees about that. Far from airbrushing any difficult issues, the preparation and engagement up to 21 June, actually 23 June, did get into those texts in a very detailed and serious way. I assure you that there was neither meekness nor abdication, and I think that the benefit of having a detailed mandate will be seen as we roll forward, because we will see that the detailed mandate gets translated into detailed text and that it was worth engaging very substantively.

**Q319 Mr Heathcoat-Amory:** We will leave behind what I regard as a major dereliction of duty in June. We are now faced with an even more unsatisfactory situation. The European Scrutiny Committee describes in detail deficiencies in the red line and, despite your selective quote just now, it addresses the question as follows, “Even with the ‘opt-in’ provisions on police and judicial cooperation” and so on, “we are not convinced that the same conclusion”—that is to say, its being substantially equivalent—“does not apply to the position of the UK under the Reform Treaty.”

The text of the report actually says that these red lines are inadequate. We now look now to strengthen them. I have just asked you how they are strengthened in the recent text and you have not given me an answer. You referred to some elaborations of the opt-in on justice and home affairs, but on reading those, as I have just done, they seems to make the British position worse, because after five years those things are going to become judicable under the European Court of Justice. So rather than moving our way, there seem to be substantial problems with the existing red lines; they are certainly not being strengthened. Do not forget that you have just given me chapter and verse about how the improvements have taken place.

**David Miliband:** I am sorry, but I did not quote selectively. In fact, I quoted very accurately from paragraph 72 of the report. In respect of the transitional measures that you mentioned, you say that there is a transitional period of five years—there is—but you have not mentioned the fact that, at the end of the five-year period if some measures have not gone through the transition—in other words, those on which we have had the ability to decide whether to opt in or not—we have the chance for a block opt-out. So our red lines are protected. I am very keen that we get into the detail, but I hope that you will agree that to say, after five years, it is done and dusted is only a partial rendering of what is actually agreed. After five years, for any measures that have not been through the transition—in other words, those which have not given us the case-by-case choice about whether to opt-in or not—we have the chance and are able to have a block opt-out. I think that that is an important strengthening of the red lines.

**Q320 Mr Heathcoat-Amory:** I am sorry, but at the minute the ECJ does not have jurisdiction. That is a settled position. To say that there is an improvement, as you are suggesting and that after five years it will not be done, is not an improvement. At best, we will maintain the status quo. It is certainly not an improvement. I want you to tell us in what way the red lines have become less ambiguous and have improved, to avoid the strictures that are laid down in the European Scrutiny Committee’s report of last week. You have not given me an example.

**David Miliband:** I am sorry, but I have just given you an example. It is a perfectly reasonable question to ask, but you have to engage with the answer. The answer is that when the Committee was examining Jim Murphy or others, none of the detail of these transitional measures was there—how they would be addressed, how the opt-in worked, what happened after five years—and now it is, in a way that makes it absolutely clear that, for each and every item, there will be a process that either has transition case by case, in which case we get to exercise our opt-in on each individual measure, or at the end of five years, if they have not all been through that process, we have a block opt-in or opt-out. That is, I think, clear evidence of the way in which the political agreement in the mandate for an opt-in for the United Kingdom across all JHA measures has now been followed through on to the details of the JHA.

Just imagine if I had come here and said, “I don’t know what’s going to happen about the transition”, which is all I could have said if I was appearing here before Friday. You would have had my guts for garters and would have said, “This is a gaping hole or a black hole in the red lines on defence.” I do not know whether red lines can have black holes, but anyway you know what I mean. You would have said that the red lines were being breached. Actually, I can come here today and say, “Let’s look in detail at this transition period.”

**Chairman:** A number of colleagues want to speak. Andrew Mackinlay first.

**Q321 Andrew Mackinlay:** It is 14.55. I do not want to labour this point, but you say that this was available from Friday and you know I dispute that. But we are talking about a considerable volume of documentation, which has just become available—if you could find it.

Listening to your exchange with Mr Heathcoat-Amory, it seems that we are in difficulty in terms of scrutiny. You say that the red lines have been met and you have given examples, to be fair. We cannot hold this session indefinitely because of the time factor, but it is not unreasonable of us to ask you to undertake to write a letter overnight, which can be made available to press and public so that there can be some adjudication on this, of precisely where the red lines have been met in the documentation that is now available. If we do not have that, we will be talking in general global terms.

Also, it is not unreasonable of us to pin you down. I ask you to give an undertaking that Parliament people, as it were, will have overnight a piece of paper saying, “We said this was a red line. This is met by article so and so, or protocol this or declaration that.” Is that fair and reasonable?
David Miliband: Completely. I am very happy to go through each of the four so-called red lines.

Q322 Andrew Mackinlay: At least there will be clarity. We can also focus on any disagreement.

David Miliband: Tomorrow, we will send to the Chairman a letter going through this. As I say, I will be appearing before the Scrutiny Committee next Wednesday. From my point of view, and I am sure that this is true for all sides in the European argument, the more people you can get to understand your point of view, the more they will agree with you. That is life in politics. There is nothing to be gained from not having the ventilation of the issues that you want.

Q323 Andrew Mackinlay: May I just ask you this? Declaration 49, which I am sure you lie awake at night thinking about, is one that has been put in by the Kingdom of Belgium to cover its two chambers of Parliament and its three other constituent assemblies. If it is good for Belgium to put that in, surely there should be an appropriate declaration to cover the Scottish Parliament, Northern Ireland Parliament and Welsh Assembly. To use the words in the declaration, which you have acquiesced in—perfectly properly as well—the competencies exercised are not now, whether we like it or not, exclusively with Westminster. Why is there not a comparable declaration? Or should there not be a comparable declaration from the British constitution’s point of view with the devolved Assemblies and Executives?

David Miliband: The Chairman is shaking his head, but I hope that he will let me address this, because there is an important point here. First, I am sorry to disappoint you but I do not lie awake at night dreaming of Belgium and declaration 49.

Mr Keetch: I am very glad to hear it.

David Miliband: My father was born in Belgium, but my Belgian allegiance knows some limits.

In respect of the relevant constitutional arrangements, I think that you would agree that the Belgian situation is not the same as ours. We have a unique constitutional settlement with devolution in the UK. An important part of that is that the UK Government negotiate on behalf of the UK at European level. That is very important.

Q324 Andrew Mackinlay: This is about Parliaments, and Parliaments enact. The Scottish and Northern Ireland Parliaments also enact European legislation. In any event, you Ministers go holding hands with Scottish and Irish Ministers when you go to—

David Miliband: May I make a point now? The UK Government negotiate in Europe on behalf of all the citizens of the UK. The UK Parliament passes or does not pass the treaties. Given the constitutional set-up in the UK, the devolution settlement in the UK requires—that makes it sound more legal than it is—or has the benefits of providing mechanisms for the devolved Administrations to have their input in the discussions that take place before Ministers go to the European Council or elsewhere. There is the Joint Ministerial Committee on Europe, which I chaired last week with representatives of the three devolved assemblies. That Committee focuses more on day-to-day policy business, but it also looks at issues including the reform treaty. I will look at the Belgian declaration, but I want to ensure that we have our own system that reflects our own circumstances.

Q325 Mr Keetch: May I come back to the politics of this? You said today that the Prime Minister has said consistently that he wants Parliament to make the decision on the ratification of this particular treaty. You said that the treaty was designed to increase the role of national parliaments and how they decide they should be party to that. When the European Minister came before us on 12 September, Mr Mackinlay, Mr Pope and I asked him whether the Bill that would be presented to Parliament would allow Parliament to say that it required a referendum. Mr Murphy was reasonably helpful at that meeting, but he has since written to us, on 2 October, saying, “I do not anticipate any provision relating to a referendum being included in the Bill.”

He then goes on to say, of course, that any Bill coming in to Parliament could be amended. There are people around the table who have had greater experience of Parliament and the Commons than you or I, but you know as well as I do that if it is not actually part of the Bill, the chance of an amendment being taken—even if it is from an opposition party or a group of senior Back-Bench MPs—is dependent upon a process which is difficult, to say the least. Would it not be easier for the Government to include in the Bill a straightforward vote in the House of Commons, so that the national Parliament could have its say on whether it wanted to allow the people to have their say?

David Miliband: Take it from me, you will have the chance to vote on this matter as an individual MP; I and all of us will have the chance to have our vote. I have never seen a suggestion anywhere that the Government are trying to pretend that the debate about a referendum is settled by refusing to allow an amendment to the Bill—you mentioned politics, I cannot think of worse politics.

The reason that we are cautious is simple. First, Bills are drafted for what the Government want them to do, not with respect to amendments. Secondly, it is ultimately for the Speaker to decide whether an amendment should be accepted. It is important that I and others do not step on to his rightful terrain. The Maastricht treaty did not have a referendum built into it.

David Heathcoat-Amory will remember well whipping many of his colleagues against the referendum on that treaty. He did an excellent job as Deputy Chief Whip and ensured that the proposed referendum was defeated handsomely in 1992. The treaty did not have a referendum written into it, but, nevertheless, it was written in a way that was amendable. I cannot conceive circumstances under which I would come before the Committee trying to explain why a vote had not been allowed to happen.
Q326 Mr Keetch: So let me be clear on that. If I table an amendment to the Bill with other colleagues, allowing the House of Commons to vote as to whether there should be a referendum, you will not get the present-day Labour Chief Whip and Deputy Chief Whip to do the same job to try to defeat that initiative? 

David Miliband: David Heathcoat-Amory did the job of defeating the amendment, not stopping it being tabled, so I would not want to—

Q327 Mr Keetch: But you will allow a vote to come before the Chamber of the House of Commons as to whether there should be—

David Miliband: It is not up to me and I have to keep saying that, as this is a parliamentary Committee and I cannot start saying that I am making the decisions. I do not think that I could be more plain: I expect to participate in a debate and a vote on a motion to have a referendum on the passage of the reform treaty. I do not think that anyone should expect otherwise, but I will not say today that I have decided that it is your amendment rather than someone else’s amendment, and I am certainly not going to say that I have decided, in the place of the Speaker, what should happen and when it should happen. I have no doubt that your strong support for the treaty will find a chance for full ventilation at the appropriate time.

Mr Heathcoat-Amory: As I keep being mentioned—

Chairman: I will allow you to come back—

Q328 Mr Heathcoat-Amory: May I make one simple point? The most important provision of the Maastricht treaty was that on the euro, the single currency. The Conservative party and, indeed, the Labour party are committed to a referendum on the euro.

David Miliband: So are we.

Q329 Mr Heathcoat-Amory: It is baffling to some of us that on the constitutional treaty, which is the political equivalent to that, you are denying a referendum.

David Miliband: This is good stuff for the Floor of the House and I apologise for tempting you back on to the topic.

Chairman: Can we move back to the draft treaty rather than Maastricht treaty?

Q330 Mr Hamilton: I received a letter from a constituent a couple of days ago on this matter; I am sure many MPs in this room have received such letters. He said that he felt betrayed as 18,500 people who voted for me at the last general election, and of those who voted for any other Labour MP. I dare say that his sympathies were not particularly towards our party, but I want to understand why it is that the British public—many, many of the British public, either deliberately or perhaps not deliberately—believe that this treaty is identical in every respect to the constitution, with one difference—it is called a treaty and not a constitution. What are we doing, and what are you doing, to make sure that the public understand that this treaty is not the same—it is substantially different—and that, given that we had no referendum on the Maastricht or the Nice treaties, we do not need to have a referendum on this?

David Miliband: I have always believed that for the last 10 years the Government have been better at substance than at presentation. What you are saying is that we need to do a better job at presentation. I never understood why Alastair Campbell was paid more than I was.

Andrew Mackinlay: I cannot understand why he was paid more than me either.

David Miliband: Is that a matter of presentation or of substance?

Andrew Mackinlay: And value.

David Miliband: On value. I am sure you are right.

Andrew Mackinlay: Twice the amount.

David Miliband: Twice what?

Ms Stuart: Girth.

David Miliband: Oh girth, right. Let’s leave the girth out of it.

I think that we are in truth at the beginning of a process in which the public are being introduced to the detail of this treaty. After all, there was no legal text until Friday. As I said in an earlier exchange, to anything that I said about how we were protecting this, that or the other, or how we were advancing this, that or the other, someone would say, “Yes, but there is no legal text.” I believe that the more discussion, the more debate in Committees like this, but also eventually on the Floor of the House, that we have, the more we will demystify and debunk the myths that are associated with it.

That will also bring to light something that came up in Foreign Office questions yesterday: our voting weight in European Councils, as a result of this treaty, goes up, not down. It goes up by 50% plus, so there is a stronger British voice. I also believe that it is relevant that there will be fewer Commissioners—many people have complained for a long time about Brussels bureaucracy. There are nine fewer Commissioners, nine fewer offices, nine fewer sets of cars and all the rest of it. Those facts would be a mystery to your constituent and to mine. I think that the facts are the only answer, and that is what we have got to try to get across—hopefully in a way that respects the questions that people are asking. It is perfectly respectable for people on this Committee to ask hard questions about the treaty, and we have got to answer them.

Q331 Mr Hamilton: Do you not accept that the problem we have is that, the more we read things in the press by commentators and, obviously, by the
Opposition—who are doing quite a good job of telling the public that the treaty is exactly the same as the constitution—the perception in the public mind will be, “You promised a referendum on a constitution, this is the same thing”?

David Miliband: Yes, but it is not, as you yourself said.

Q332 Mr Hamilton: But we are failing in telling the public that.

David Miliband: Well, I am sure that you do not want me to come back and say that we have doubled the size of the Foreign Office press office in order to get our message across. I do not think that that is the conclusion that I would draw. I think that if you are saying that we have to do a better job of explaining it—fair do’s.

I am not sure how much of this is being run by the Opposition and how much is not being run by them, but we will leave them out of it. They are more jumping on the bandwagon than driving the bandwagon, but we will leave that to one side. There are, of course, members of the Opposition who are not taking the same sort of cataclysm view of the consequences for the UK as a result of this treaty. We must ensure that your constituent gets an answer. As a matter of interest, how many letters have you had about the European treaty?

Mr Hamilton: Not many.

Mr Keetch: There is a postal strike on.

David Miliband: That is why there are not enough signatures on those petitions; the postal strike is stopping them.

Q333 Sir John Stanley: You began on a very welcome note by saying that you wish to treat the Committee seriously and I am sure that you will respond to this question seriously and spare us the knockabout stuff as to who whipped in which way for the Maastricht treaty. Is not the key issue whether this particular treaty is of a different order of constitutional magnitude compared with any other since we entered the European Union?

There are a number of points on which one could argue that that is the case but I would like to highlight one that I thought was extremely well expressed by the European Scrutiny Committee in its unanimous conclusion, in paragraph 76: “We wish to emphasise that the proposals in the Reform Treaty raise a serious difficulty of a constitutional order”—I stress the phrase “of a constitutional order”—“in as much as they appear to impose, whether by accident or design, a legal duty on national parliaments ‘to contribute actively to the good functioning of the Union’ by taking part in various described activities. National parliaments, unlike the European Parliament, are not creations of the Treaties and their rights are not dependent on them. In our view, the imposition of such a legal duty on the Parliament of this country is objectionable as a matter of principle and must be resisted.”

Is not that an absolutely central constitutional point? Although in previous treaties we have accepted competencies going to the EU that, when translated into directives give primacy to EU law over the law passed by our sovereign Parliament, is it not the case that never before has our sovereign Parliament, by treaty from the EU, been placed under a permanent, open-ended obligation to fulfil certain obligations towards the EU? If that is not constitutionally important and worthy of a referendum, I must ask what is?

David Miliband: I agree with you completely that the issue is about constitutional magnitude—I think that that was the phrase that you used. You are absolutely right that the test of whether there should be a referendum concerns the fundamental constitutional balance of power. The constitutional magnitude that you describe is a good way of putting it.

I wholeheartedly agree with the sentence: “National parliaments, unlike the European Parliament, are not creations of the Treaties and their rights are not dependent on them.” That is absolutely correct. As I said earlier, it is for Parliament to decide how it contributes to the functioning of the EU. What I tried to say and perhaps did not say well enough earlier is that the allegation that the treaty tells Parliament what to do and imposes duties arises from the phrase stating that Parliament shall contribute to the effective functioning of the Union. My understanding and the understanding of my colleagues is that that means that Parliament shall be able to choose how to make an effective contribution. You and I would welcome, Sir John, the fact that, although we might argue about whether the role for national Parliaments should be larger, for the first time the constitutional balance of power in Europe gives a role to national Parliaments, which has not existed in this way before.

It is for Parliament to choose how it exercises the so-called yellow card, orange card system. It is absolutely right that we should make clear our understanding—an understanding that you and I share—that the choice about how Parliament shall play this role is made in Parliament. I hope that you feel, not just by my answer, but by the fact that I specifically raised this issue at the beginning of my remarks, that I take it as seriously as you do and we are going to follow through to ensure that that understanding is recognised.

Q334 Sir John Stanley: Can you give us one single precedent under EU treaty legislation where such a legal obligation—open-ended and divorced of any specific subsequent directive—has been placed on our national Parliament with regard to its sovereignty?

David Miliband: I am saying that the treaty does not do that. I am sorry to get into this, but the word “shall”, it turns out, has different meanings in different languages, and the other languages in which the treaty is written make it clear that “shall” does not therefore mean “We are telling you what to do.” It makes it clear that it is for the Parliaments to decide how to do that. Our clear view, which is shared by colleagues, is that it is for this Parliament to decide how it does its business.
Q335 Sir John Stanley: May I say, Foreign Secretary, that you are really saying that we agree on this and—this is an absolutely crucial and vital point—that this all hangs, apparently, on a view of interpretation and there are different interpretations?
David Miliband: No, I have not heard anyone express or determine an alternative explanation. The explanation is that we shall determine our own procedures as MPs and as Parliament.
Andrew Mackinlay: I think—
Chairman: Just a minute.
David Miliband: For better or worse I am not a lawyer. Perhaps Mr Thomas would like to add a legal point.
Mr Thomas: The point to make is that the text is not yet final.

Q336 Sir John Stanley: Precisely. That has blown it out of the water. You are out of the water, Foreign Secretary.
David Miliband: No, quite the opposite actually. The negative interpretation that has been put on the word “shall” is quite erroneous because it is for Parliament to decide what it shall do.

Q337 Ms Stuart: For a lawyer, the meaning of the word “shall” is absolutely clear, and there is no question of a negative interpretation or otherwise. I want to make it clear that the English text will say “will” and the Government, if they come back in December and the text reads “will”, should not herald that as a great triumph of Britain having secured another victory. They will simply have put on the face of the treaty what should have been there all along.
David Miliband: We will make it clear that it is for Parliament to decide how it shall do its business, and we all agree on that. Whatever view we take on the reform treaty, it is for Parliament to decide what it shall do.

Q338 Mr Moss: The question here is on the interpretation of the French word “contribute” from the French text, and there are those who will say that it has the same meaning in English as “shall contribute.” The people working on this have declined to be definitive because they have no political authority at this moment. Those legal people and the translators are unlikely to address that issue until after the intergovernmental conference, so where does that leave them with regard to political authority?
David Miliband: All of the member states are clear that we are in favour of Parliament being clear about its own responsibilities and fulfilling them. You quoted from the French text and I am not going to start competing with regard to my French, never mind my legal knowledge. However, the clear view both of our lawyers and others whom we have talked to is that we can make it absolutely clear that it is for Parliament to decide how it shall exercise its functions.

Q339 Mr Purchase: I am somewhat fed up with this “Britain against the world” type of attitude, which we are again hearing today. It seems to me that history tells us that alliances and co-operation are the way to prosperity and peace. I do not want to get into a wrangle with anyone about the precise meaning of a disaggregated sentence. I think it is important, Foreign Secretary, that earlier you said that you would have been prepared to campaign for a constitutional treaty, had there been one. I shall make one point on which I feel strongly; that we are opting out of the charter of fundamental rights. Regrettably, I continue to be a subject of a monarchy in this country. I want my fundamental human rights. Will this legislation, when it comes before the House, give the opportunity to opt into matters such as our fundamental human rights, or will we continue to be second-class citizens in Europe?
David Miliband: There is no question of any citizen of Britain being a second-class citizen. Every single one of the rights in the charter of rights exists already. It is a record of existing rights, not a vehicle to create new rights, so there is no question of anyone being a second or third-class citizen. You have your rights and they are protected. What the protocol for the charter says is that the charter does not extend the remit of the European Court of Justice. That is an important point because the rights that you have here in a whole range of areas are established by national and international law, but they are not established via the charter.

Q340 Mr Purchase: Workers’ rights are substantially less than they would be under the charter.
David Miliband: But Ken, that is a matter for the UK Parliament. It goes back to our earlier discussion. If we want more rights for UK workers—you and I would agree that we have extended that significantly over the last 10 years—that is a matter for this Parliament to decide. The Prime Minister was talking two weeks ago about extending maternity leave, which is something that this Parliament should extend; you and I agree about that. The protocol to the charter reinforces that.

Q341 Sandra Osborne: May I follow up that question? Is it not the case that far from being regarded as meek within the EU, some of the major countries regard us as nothing short of troublemakers because of our lack of enthusiasm for further integration? That is something the Committee heard when we were recently in Portugal. If there were a referendum, is it not quite likely that people would be voting more with regard to what our position in Europe should be rather than the actual treaty itself? Indeed, some people, including our former Prime Minister at one stage, felt that it was high time we settled this matter once and for all. What is your view of that?
David Miliband: I think I am right in saying that in the French referendum quite a lot of people voted on what they thought of President Chirac rather what they thought of the French constitutional treaty.
Your political instinct is as good as mine as to what people would vote on in a referendum. My own view is that quite a lot of the people who are antipathetic to the activities of the European Union would remain antipathetic to them; they have remained so post-1975.

In respect of the question how we are regarded in the rest of Europe, I think it is fair to say that the agenda has been set in this country in respect of issues like climate change, welfare to work and economic reform. Those are issues that are being taken up at European level. I would not sign up to the description of us as “troublemakers”, but we are seen as extremely vigilant in advancing our national interest. Ten or 15 years ago perhaps—but maybe not, actually. It has always been other countries that have had a reputation for being very clear about their national interests. This Government is clear about that; the fact that we have a positive agenda is very significant. Many people in Europe would say that British ideas are playing an important role in the European Union at the moment, although it is probably better that we do not boast about it because that carries with it its own problems.

Q342 Ms Stuart: Just for record, Foreign Secretary, can I clarify one or two things? You mentioned that one of the points of a referendum is the constitutional significance of the document. But am I right that in 2005 the Prime Minister’s reasons for giving a referendum made no mention of the constitutional significance? It was because this was the right thing to do with an important document.

David Miliband: Just for the sake of accuracy, he did make mention of the constitutional, or otherwise, nature of the document but said it was not that that induced him to support a referendum. I think he used the phrase “clear the air”.

Q343 Ms Stuart: So it is a Labour Government who accept the fact of a referendum on something, not just because of the constitution. Secondly, just for the record, when we succeeded in having a referendum outcome that we wanted to see in Wales and Scotland, am I right in not recalling a single Government Minister who suggested that the people did not know what they voted on or that they had voted on something else? In other words, the British public have a recent history of a mature democracy that knows what a referendum is all about.

David Miliband: I referred only to the French public.

Q344 Ms Stuart: Indeed. We regard ourselves as a mature democracy that knows how to deal with referendums.

David Miliband: Completely.

Q345 Ms Stuart: Fine. I now want to move on to something that has bedevilled this whole debate. Whenever we try to explore a subject we are moved on to the merits of the document itself. You demonstrated that in your answer to Mr Hamilton. He wanted to know why we are not having a referendum and was quickly moved on to the virtues of the document.
were to propose to join the euro the content of that decision would trigger a referendum. Our case is that the content of this proposed treaty has nothing in it that reaches that constitutional bar. There is then the question of consequences.

Q349 Ms Stuart: Let us agree that we disagree on the structure. In terms of the structure you quite interestingly said that it settles the debate that this is a coalition of nation states. At the same time in the introduction, much to my surprise, you said that national security is now a matter of the nation state and you thought that this was a very important statement. I always thought that it was quite clear that whatever is not in is not EU competent. Are you now saying that we need to state what is a matter for the nation state?

David Miliband: No, I am not saying that. I am saying that it is good that it is clear and established. People say all sorts of things about the ECJ and other institutions. We know where we stand.

Q350 Ms Stuart: Mr Mackinlay asked for a list of the red lines and their vulnerability. Could I ask you to add something to that? With the open derogations, I know what Schengen is all about, I can tell whether we are in or out. I know what the euro is all about, I can tell if I am in or out, but the problem with a lot of the opt-ins and opt-outs and derogations is that they are extremely vulnerable to the European Court of Justice and the rulings thereof. We know that we are also very vulnerable to political negotiations. The European Court of Justice has, as part of its mandate, that it should interpret rulings to further deeper political integration. I would therefore be extremely grateful if, when you list the red lines, you will also list your assessment of their vulnerability and where those red lines could be changed.

David Miliband: Perhaps, reflecting on the slightly different points of view that we take on this, I might list the strengths of the protocols, opt-ins and other measures that we have achieved. One person’s strengths are another person’s weaknesses. What Andrew Mackinlay set us tough. He gave us 24 hours to write to you. We will give it our best shot. We will go through each of the red lines and explain our understanding of why they are protected.

Q351 Ms Stuart: And in what sense they are new might be helpful as well.

David Miliband: We will do our best. You can always ask us for more.

Chairman: We now move on to some questions about the ratification process.

Q352 Mr Keetch: We now know that we are not going to have a general election for the foreseeable future, so can you tell us, Foreign Secretary, what is your timetable? Assuming that the treaty is signed in December, what is the timetable for its coming before the House as a Bill and, assuming that there is not a referendum, when do you hope that the whole thing will be signed?

David Miliband: The truth is that there is not a timetable yet. I think that I said in my first oral questions in July that we would proceed promptly. That remains the case. Let us get to December and ensure that the business managers and others get into this, but I stand by that.

Q353 Mr Keetch: Do you have any idea about the other nation states?

David Miliband: The Foreign Ministers discussed this matter in our formal sessions and in the informal Gymnich that we held in Portugal in September. I think that most, if not all, of them would sign up to the notion of proceeding promptly. I have not seen anyone who is seeking a delay. I think that there are different political issues in different countries, not least in respect of elections that they might need to have. However, we have this 18-month window to get it done and I think that that is what all countries are committed to doing.

Q354 Chairman: To be clear, at the moment there is only one out of the 27 EU countries, the Republic of Ireland, which is obliged to hold a referendum.

David Miliband: But the Republic is obliged to have a referendum by virtue of its constitution. Every country with a choice is putting the question to its Parliament.

Q355 Chairman: And the intention is that, by the middle or the end of 2008, in good time for the European Parliament elections in 2009, the ratification will have taken place in all 27 states.

David Miliband: Are you asking me or saying that that has been said?

Chairman: I am asking you.

David Miliband: Has that been said somewhere? I cannot remember.

Ms Morgan: The aim is that all member states will try to ratify the new treaty in time for the new Parliament in June 2009.

Chairman: Thank you. We have spent some time on the role of national Parliaments, but there is one more question from Mr Malcolm Moss.

Q356 Mr Moss: Returning to the role of national Parliaments, the draft reform treaty seeks, as did the constitutional treaty before it, to strengthen the role of national Parliaments in policing the subsidiarity principle. Controls were introduced under the constitutional treaty that became known as the yellow card mechanisms and similar checks and balances are in the reform treaty, which have become known as the orange card mechanisms. Do the Government have a view as to which of those mechanisms they prefer? Will they work in parallel or separately and when will negotiations on a definitive decision take place?

David Miliband: I shall be glad if we have time to address that—even if it is only a short time, because I agree that it is significant issue and a significant step forward in the role of national Parliaments. To be absolutely clear, we do not have to choose between orange and yellow cards. As Parliament, we have
both at our collective disposal. It is not a matter of choosing which we prefer; we like both, because they both give a say to national Parliaments.

Chairman: Thank you. Gisela Stuart has some questions on the common foreign and security policy.

Q357 Ms Stuart: Before that, what provision is there for the possibility of the treaty not being ratified in one EU country?

Mr Keetch: What happens if somebody says no? Does the whole world fall apart?

David Miliband: If the reform treaty is not passed?

Mr Keetch: Yes.

David Miliband: The reform treaty requires unanimous passage and ratification in every European country, as does every other treaty. We would be back to square one.

Ms Stuart: The dead parrot.

David Miliband: No, we would not go back to the dead parrot, we would go back to the pre-existing, current treaties.

Chairman: Back to Nice.

David Miliband: Pre-Nice, I think. No you are right, to Nice.

Q358 Mr Hamilton: Foreign Secretary, may I move on to the declaration on foreign and defence policy that is attached to the treaty? When your colleague, Jim Murphy, gave evidence to the Committee last month, he said that the declaration had absolutely no legal force. What is the point of it?

David Miliband: The political declarations can be seen only in the context of the legal framework within which they operate. It would benefit the Committee, and people watching, I hope, to know what the amendment to Article 11 actually says, because I think that it debunk[s] some of the allegations that are being made. It says, “The common foreign and security policy is subject to specific rules and procedures.” The significance of that is that it is in a separate treaty from all the rest of EU business. It is ring-fenced, which I think is important, not just as Foreign Secretary but as a Member of Parliament. It then says, “It should be defined and implemented by the European Council and the Council acting unanimously”. We may talk about sanctions and the patrolling of the boundaries, which are referred to, but I think that that statement is important too.

There is a second important point, not least in light of the discussion that I just had with Gisela about the ECI. Article 240a says, “The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.” Those are certainly two matters to which we shall draw attention in the letter which Andrew Mackinlay has requested, because they provide the legal context.

Foreign and security policy is therefore an issue of national veto and unanimous agreement. In other words, the CFSP discussions take place in a political framework—or rather, within a legal framework for political decision making. The declarations are worth while, even if they do not have legal force—Jim was right that they do not have such force. They are worth having because they set out the views of heads of state about the way in which CFSP should work.

Q359 Mr Hamilton: Jim Murphy went on to say that, although the ECJ will not be empowered to adjudicate on foreign policy decisions under the treaty, it would be able to adjudicate on the boundary between CFSP and other EU policies. Can you give us any examples of how that power has been used in practice in the past?

David Miliband: Obviously, there is no CFSP example yet, because the treaty has not been passed.

Mr Hamilton: I mean the power to adjudicate.

David Miliband: Yes, I understand. It might be instructive if I were to read something out, although I shall not do so as a lawyer. There is a case in relation to a small arms and light weapons decommissioning project. You can see why that raises boundary issues. The Commission claims that that area falls within its competence because of its development aspect and because of its connection with conflict prevention. Actually, the advocate-general of the much mentioned ECJ has recently published his opinion, stating that the case would be thrown out, as the planned decommissioning project clearly serves the purposes of preserving peace and strengthening international security—the preserve of member states and the Council, not the Commission. I think that that is an interesting example. It is almost doubly interesting, because it comes from the ECJ, which is alleged always to be pushing the other way. This is an example where, to be absolutely clear, the ECJ has to issue its final opinion in November, but the advocate-general has issued this opinion. It addresses directly the suspicion—that does not exist in your minds, but might exist in some minds—about what policing the boundary actually means. What we have here is the only case that I know of where the court is quite clearly in the direction of saying that is a matter of international security.

To finish the point—I had the chance earlier to refer to this obliquely, and it is important—the ring-fencing of common, foreign and security policy in its own treaty, is not just important because it is ring-fenced; it is also important because the two treaties of the European Union will have equal status. The treaty establishing CFSP—what will now be the treaty on the European Union—will not somehow be an inferior sibling to the treaty on the function of the Union. It will sit proudly next to it. It is ring-fenced, but it also has significant integrity as the intergovernmental pillar of the Union.

Mr Stuart: Just like Euratom was.

David Miliband: I knew that Euratom would come back to haunt us.

Q360 Sir John Stanley: Foreign Secretary, in your reply to Gisela Stuart, you ended critically short of some very important wording, when you referred to article 11. You read out to Gisela Stuart that “the Court of Justice and the European Union shall not
have jurisdiction with respect to these provisions”, and then you stopped. The remainder of the sentence reads, “with the exception of its jurisdiction to monitor the compliance with article 35 of this treaty, and to review the legality of certain decisions provided for by the second paragraph of article 240A of the treaty of the European Union”. I am well aware that—

David Miliband: Just for the record, you are absolutely right that I stopped reading at the word “unanimously”, but I went on to say that there were issues of boundaries and sanctions—

Q361 Sir John Stanley: I acknowledge that, Foreign Secretary, but in the quotation, you stopped short, before we got to “with the exception of”—which I want to come to, and to which Mr Hamilton rightly drew attention. Without getting into the significance of those two exceptions and their width, would you not agree that one of the huge difficulties in this area, where you have acknowledged exceptions stated in the treaty, is that if the European Court of Justice decides that it is within its vires to accept that a particular case put to it of non-compliance is within its jurisdiction, that ultimately if the court decides to take it, and produces a decision on it, which is legally binding on all member states, that is it, unless the treaty gets amended.

I would like to put it to you—it would be very reassuring for many people, and particularly, perhaps, for this Committee and the House generally—whether you see any prospect in the further negotiations of being able to end that sentence, where you ended your initial quote with respect to these provisions, and delete from “with the exception of”?—

David Miliband: But the quotation that you read out included the words “article 240A”. However, article 240A is precisely the article that says—this is directly relevant to your point—“the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to common, foreign and security public, nor, with respect to Acts adopted on the basis of those provisions.” Precisely the quotation you read refers back, in words of one syllable, as follows, “shall not have jurisdiction”—which has more than one syllable—“in this area”. There is a boundary issue and an issue about the way in which sanctions should be done. We cannot pretend that that matter does not exist, because it does. But the lock that you are seeking is precisely in article 240A.

Q362 Sir John Stanley: Could you just further clarify that, because that is not how I read the letter that you sent to the Committee on 2 October? The first exception is on the boundary issue and the second exception, as I understood it from your letter, was as follows, “The second limited area of ECJ jurisdiction relates to the right of natural or legal persons to ask the ECJ to review the legality of a CFSP decision which imposes sanctions on them.”

David Miliband: Sanctions, yes. It is about sanctions.

Q363 Sir John Stanley: Exactly. That is the point I am making. It is not about the blanket non-involvement of the European Court of Justice in the CFSP, which is what you said just a moment ago. If you ended with the word “provisions”, then it would be absolutely clear. I should just like to ask you whether you will consider ending that sentence at “provisions” and not include the two exceptions.

David Miliband: I am very happy to arrive with more legal detail about that, because the sanctions are different from the policy.

Q364 Chairman: Perhaps we can have a note on this.

David Miliband: Okay.

Andrew Mackinlay: On a point of order.

Chairman: No. I have a list of people.

Andrew Mackinlay: I just want to ask a question and clarify something.

Chairman: No. You put yourself on the list. I have four other Hon Members—

Andrew Mackinlay: On a point of order, Chairman, I just want to ask—

Chairman: It is not a question of order.

Andrew Mackinlay: You have not heard me yet, have you?

Chairman: No. Four of your colleagues have already indicated—

Andrew Mackinlay: Chairman, I could have dealt with it by now.

Chairman: No.

Q365 Andrew Mackinlay: All I want to ask is, when they refer to articles do they mean articles of the treaty, which exists, or the draft treaty? Could you just clarify that? It is difficult to follow. That is why it is a matter of order.

David Miliband: It depends which treaty I am referring to.

Chairman: We will get a note that will clarify the answers.

Andrew Mackinlay: If he can make it clear, then we can know and look for cross-references. That is not unreasonable.

Chairman: The next person to speak is David Heathcoat-Amory.

Q366 Mr Heathcoat-Amory: Secretary of State, we are discussing an absolutely crucial red line, if it is about the freedom of action of British foreign policy. You said that our position is defended by the declaration.

David Miliband: No. I said it is defended by the treaties.

Q367 Mr Heathcoat-Amory: Well, the declaration says that the provisions in the treaty set up an enormously complex foreign policy. The declaration says that it does not affect the responsibilities of a member state, as they currently exist, for the formulation and conduct of their foreign policy.

David Miliband: I am sorry, but that is not a declaration. What I have said is that the legal protection comes from what is in the treaties. I
agreed with Fabian that the political declarations are not legal, they are political. The protection stems from the legal protection.

Q368 Mr Heathcoat-Amory: Since we are talking about the treaty text, can I mention—that independence would be undermined by the solidarity clauses? Article 11 in the existing treaty is replaced by a very much expanded text about how the member states shall give mutual solidarity to each other in this field of foreign policy. In one particular respect, it actually confers an obligation on us. We know that in the existing treaty member states “shall support the Union’s external and security policy”—that is in the existing treaty on European Union—but, crucially, the new treaty adds to that, “and shall comply with the Union’s action in this area.” It is that word “shall” again. We discussed that earlier, on national Parliaments contributing actively to the good functioning of the Union, and you claimed “shall” is only a prediction. We take the common-sense view that that is an instruction. That must clearly be the case in the new text, which says, in respect of the field of foreign policy, “shall comply with the Union’s action in this area.” That cannot be a prediction. That, quite clearly, is a duty.

David Miliband: Just to follow Andrew, where are you quoting from?

Mr Heathcoat-Amory: Article 11.

Andrew Mackinlay: A reasonable point, was it?

David Miliband: Article 11 of what?

Mr Heathcoat-Amory: Article 11 of your treaty.

David Miliband: Article 11 of your treaty—what is it?

Mr Heathcoat-Amory: It is both article 11 in the existing treaty—

David Miliband: Are you reading the amended treaty? Which version are you reading?

Mr Heathcoat-Amory: It is both. It is article 11 in the existing treaty and it is going to be article 11 in the reform treaty.

David Miliband: I know that it remains article 11. I am asking you which version.

Q369 Mr Heathcoat-Amory: I will give you time to look it up. It adds the words “and shall comply with the Union’s action in this area”—“this area” being the foreign and security policy. Please do not pretend this time that “shall” means some sort of airy prediction about what may happen in the future. Clearly, it is an instruction to comply. I put it to you that that is in treaty law and conflicts with any supposed safeguard we have not to comply.

David Miliband: No. I am very sorry. We have unanimous decision making on the common foreign and security policy. If we decide that we agree with something, we shall obviously support it. If we do not want to support it, we shall not agree with it. So it will not happen. It is simple. We have a unanimous requirement for any common foreign and security policy. We are not going to vote for something if we do not support it. It is just common sense.

Q370 Mr Heathcoat-Amory: No, it is not common sense. Have you ever heard of general elections in this country? Let us suppose that there is a foreign policy and a change of Government. There might have been one this month, and a new Government do not want to comply with the Union’s action in this area as laid down and let through by the previous Government. No election would change that under the wording because it says that we—the United Kingdom—shall comply with the Union’s action in this area for an unlimited period. That is a clear restriction on the ability of this country to formulate and crucially change its foreign policy, perhaps after a general election and clearly undermines any safeguard that you pretend we have about the autonomous decision making for which you hope.

David Miliband: I am sorry. I do not recognise your description, unless you want to make the case that the whole of the European Union involves commitments that, after a general election, could only be got out of by getting out of the European Union. That is a different kettle of fish. CFSP is an area of unanimous, veto-making power. The general election point has nothing to do with the text. It is about the European Union as a whole.

Q371 Mr Heathcoat-Amory: I make a simple point that a new Government might want a new policy. They might want to change our foreign policy. They might want to get troops out of Iraq or put them back in.

David Miliband: That might be true. Hang on.

Q372 Mr Heathcoat-Amory: Let me finish this point about Union policy that has been laid down by the previous Government. There will be no way that we can change our policy because—to complete the phrase—we shall comply with the Union’s action in this area. How can you pretend that the wording is in any way consistent with a supposed safeguard about the autonomy and freedom of action of British foreign policy? That is a crucial red line that certainly the last Prime Minister said that he wanted to protect.

David Miliband: And this Prime Minister says that he wants to protect. Let us be absolutely clear about matters. I am sure that you will want to correct the record. Your mention of Iraq and decisions about the employment of British troops in Iraq has absolutely nothing to do with the European Union.

Q373 Mr Heathcoat-Amory: Of course, it does not. I am giving hypothetical examples for the future.

David Miliband: It would not apply to the future either. If British troops are to be deployed or not in Iraq, that is a matter for this Parliament not just for any Government. Let us take the Iraq thing off the table for the purposes of our discussion. There is a big difference between you and I, but it is not actually about this clause in foreign policy. There are all sorts of things that you do not like about the way in which the European Union works. Some of them cannot be changed after a general election, except by withdrawing from the European
Union. Some of them we can try to renegotiate. If your party wants to renegotiate the commitment to give everyone four weeks’ annual holiday, fair enough. But that is not a point about the specifics of foreign policy, which has a unanimous agreement. You could make a stronger point than that if you wanted to make an anti-EU argument, say, in areas of qualified majority voting and general election changes. However, let us leave that to one side. In respect of foreign policy, we have a requirement that every nation must sign up to anything before it goes ahead. It then seems perfectly reasonable to say that you sign up for it because you want to support it. It would be odd to sign up for it and not support it.

**Chairman:** I think we have to move on, because there are other areas to cover, including the role of the high representative and the external action service. We have spent a lot of time on this matter. John Horam has been extremely patient and I will bring him in now.

**Q374 Mr Horam:** Coming down from this theological and legal level, Foreign Secretary, presumably the simple intention behind all this is that the Committee’s foreign and security policy should have a more effective impact. Presumably, behind the parabola of Euro-jargon, the intention is to have a more effective CFSP. Is that correct?

**David Miliband:** Yes.

**Q375 Mr Horam:** Do you think that the arrangements, subject to these circumscribing conditions, will be effective?

**David Miliband:** We are going to come on to three issues: Kosovo, Russia and Burma, which are—

**Mr Horam:** Those might be examples?

**David Miliband:** Yes. The truth is that CFSP is unanimous now and it will remain so in the future.

**Q376 Mr Horam:** No change on that?

**David Miliband:** There is no change in the unanimity requirement in respect of that. The truth is that there is a big choice for the European Union to make in how it engages with the world beyond its borders. If you take the issue of Kosovo—

**Q377 Mr Horam:** How will the arrangements enlarge its ability to deal with Kosovo, for example?

**David Miliband:** Not significantly, because of unanimity. What fundamentally decides whether the European Union has a foreign policy on Kosovo is whether you can reach agreement among the 27 members. But I think that the experience in the 1990s in respect of Kosovo is a stark warning.

**Q378 Mr Horam:** How will the arrangements add to the effectiveness of a common foreign and security policy?

**David Miliband:** In respect of the unanimity requirement, there is no change. However, at the moment, we have two or, you could argue, three commissioners who work in that area. There is the External Relations Commissioner, Javier Solana and there is Mrs. Ferrero-Waldner. To have one representative of the nation states’ foreign policy or of the decisions of the nation states in executing European foreign policy, as opposed to their own is a useful change. To have one person rather than two, is—

**Q379 Mr Horam:** So it is the practical arrangements that will change and make it more effective?

**David Miliband:** Yes.

**Q380 Mr Horam:** The problem with these practical arrangements is that they are double-hatted, in the sense that they partly straddle the Commission and partly the Council.

**David Miliband:** I know what you are getting at, but I would not want to say that they straddle. The Council is in the driving seat when it comes to foreign policy, in that the high representative will be able to do only what the Council of Foreign Ministers asks him or her to do.

**Q381 Mr Horam:** So you think that the external action committee or whatever it is—

**David Miliband:** Service.

**Mr Horam:** That will be partly under the Commission and partly under the Council, and that will not pose practical problems?

**David Miliband:** It is executing the will of the nation states in deciding what they want the high representative to do. It is servicing that ambition.

**Q382 Mr Horam:** You are confident that the practical arrangements will produce an effective foreign and security policy?

**David Miliband:** That is a big claim. You know well that Kosovo and dealings with Russia are very tricky issues.

**Q383 Mr Horam:** So you are rather sceptical there?

**David Miliband:** No, I simply do not want to be Panglossian about how easy it will be to make things work. I think that they can make a practical contribution.

**Q384 Chairman:** The external action service is going to take people from national Governments and FCO officials—

**David Miliband:** That has not been decided yet, Mr Chairman.

**Q385 Chairman:** If it is going to be effective, presumably it cannot be based only on the current Commission? [Interruption.]

We will adjourn for 15 minutes and if there is one vote we will start again at 4.15 and continue hopefully on to Russia, Kosovo and the other issues that were mentioned.

3.59 pm Sitting suspended for a Division in the House.

4.15 pm On resuming:—

**Chairman:** I was midway through asking a question about the external action service and the relationship to FCO staff. Assuming that there will be some FCO officials who are seconded to work for
the external action service, what will be the lines of reporting and responsibility? Will they still be subject to your own authority or will they come under Mr Solana or his successor?

David Miliband: To repeat, decisions have not been made on this. It is a perfectly fair starting point that there will be officials of national civil services as well as European officials. In the same way as for any other secondment, a secondee will operate in their management line. For example if they are working for Shell or the European Commission, they are not working for me. Therefore, it would be a secondment.

Q386 Chairman: Are there any additional resource implications of this new arrangement and have they been factored into the comprehensive spending review?

David Miliband: It is important to say—and I should have said this before—that CFSP is subject to unanimity as is the external action service. If anything, it would save rather than cost us money because we would be shipping people rather than bringing them on. Do not tempt me. I do not think that there are any dangerous financial implications.

Q387 Chairman: If ratification goes ahead, and the new arrangements of the high representative comes into effect in 2009, would you expect Mr Solana to be that person or would there be a process to appoint a new person? If so, how would that work?

David Miliband: There would have to be a process, and it would have to work. Quite how, I am not yet sure. I think that it would be premature to say how. You know from the treaty that there are arrangements about how these appointments are done, including the majority that is required for an appointment. I do not know whether Mr Solana wants to do the job. It is probably better not to speculate on individual names.

Q388 Chairman: Okay. Can we now move to some of the specific CFSP issues and begin with Russia? As you know, we are doing an inquiry on Russia and we will be producing a report in a month or so.

David Miliband: Have you been yet?

Q389 Chairman: We were in Russia in June. We have also taken evidence. Jim Murphy gave evidence to us on Russia a few months ago. How would you assess the current state of relations between the UK and Russia?

David Miliband: I think that there is a paradox at the heart of Anglo-Russian relations at the moment. On the one hand, economic integration between the UK and Russia has never been greater. Economic links have never been greater. You could even make the case that quite a lot of cultural interchange is strong at the moment. However, we are not on the same page on some very serious diplomatic issues. We are in a very different position. I am sure that I do not have to tell the Committee that the murder of Mr Litvinenko on London’s streets was an extremely serious event. The determination of our prosecuting authorities to seek the co-operation of the Russian authorities was also done in a very serious way. The fact that that has not been forthcoming led to the diplomatic exchanges that you will have seen in July.

There are big issues that we need to work with Russia on, such as Iran and Kosovo, which we will probably talk about separately, but I think it is significant that European Foreign Ministers devoted three hours of our informal meeting to a discussion of an EU relationship with Russia. Every single Foreign Minister said that while we have bilateral relations, and they have an integrity of their own, it is also important to recognise that we are stronger in a number of areas where we engage with Russia on a multilateral, Europe-wide basis. We have things that Russia wants—European markets, most obviously—and it is important that we stand together in trying to leverage the best possible outcome and the best possible protections. The UK played an important part in those discussions. There is a paradox in that we want Russia to be an ally and a proud and respected member of the international community and we want Russia’s status and weight to be reflected in international discussions, but we need Russia to engage with us in a positive way, and in a number of areas that has not happened.

Q390 Chairman: There is an EU-Russia summit coming up in a couple of weeks. Do you think there is any prospect of any progress being made on the new partnership arrangements between the European Union and Russia? The current one expires very soon.

David Miliband: The so-called PCA, the partnership and co-operation agreement, remains blocked on the vexed issue of Polish meat exports to Russia—exports from Poland. We would like to get on with the PCA, but it is blocked at the moment. We would like to get on with it with the clear view that there are responsibilities as well as rights associated with it for Russia. It contains things that Russia wants, and we want it to behave in a responsible way to get them.

Q391 Chairman: It has been suggested by some people that we do not need a new PCA with Russia and that we could just operate on the existing relationship and recognise that the hopes we had about Russia becoming a more European country and about having more co-operation with Russia have been dashed. Certainly, when we were in Moscow in June, I was struck by the language—what I would describe as pre-Gorbachev language—that many of the people to whom we spoke to were using. What is your reaction to that?

David Miliband: I think your report on this is going to be very important. I have not been to Russia yet, since I have been in this post. I have been on two previous occasions. I would not want to get into a sort of pre-Gorbachev labelling, although it is your prerogative to do so, but I think Russia faces a choice in the same way that every other country faces a choice: does it want to engage internationally in support of a rules-based, institution-based system, or not? That is a choice for us—we are debating the European treaty, and that is part of the dilemma or
choice that we face—but Russia faces that choice as well. I had a bilateral meeting with the Russian Foreign Minister two weeks ago in New York and made it clear to him that I thought it very much in Russia’s interests as a big power to develop a rules-based system of international institutions that actually works. That message needs to go not just from Governments and Parliaments—if you can send that message it is important—but also from business, because the positive side of the balance sheet that I talked about depends on a Russian rule of law and Russian business conditions that are of international standard.

Q392 Sir John Stanley: Foreign Secretary, Russia is the last place one would wish to support any curtailment of legitimate freedom of expression, but can you assure the Committee that the British Government will not tolerate intimidatory, thuggish behaviour towards the British ambassador or any other members of the British embassy staff in Russia?

David Miliband: We certainly do not tolerate it, and if ever it occurs we protest about it. It is good that you have raised that point, because there is not only intimidation—that is probably a good word—of British embassy staff, but there are issues in respect of the British Council, which I know is of concern to the Committee. We try to send a message loud and clear about ways of operating. It is fair to say that it is not easy to be a diplomat in Russia—there are locally engaged staff as well—but our diplomats are extremely professional, and they carry this dual message that we want the Russians to observe standards but we believe that the partnership that we can develop with Russia is very important. It is about trying to be clear about what are our red lines, but also about what the offer is for Russia.

Q393 Sir John Stanley: There has been more than one incident of the variety I have mentioned, some of which have been reported in the press. I trust that they have been fully reported to you.

David Miliband: Absolutely. During the July incidents in respect of the Litvinenko affair, I made a point of talking to the ambassador about our staff and the message that I wanted to go the staff. In a number of places in the world, most recently in Burma, the care and support of our staff are very important matters for the Foreign Office. As it happens, I met the deputy head of mission, our deputy ambassador, yesterday in London. He was passing through, and I made a point of asking him about staff morale and staff support. He has been there for seven weeks and he was grateful for the way in which the management of the Foreign Office, and the politicians there, have expressed concern but also support for staff. I am confident that we do take the matter seriously, but I would not be complacent about it at all. It is an ongoing thing.

Chairman: Can we now move on to some questions on Kosovo?

Q394 Andrew Mackinlay: Yesterday you met the President, the Prime Minister and the leader of the opposition of Kosovo. I think it is fair to summarise that the United Kingdom is, in principle, favourably disposed to an independent Kosovo. Against that, we do not just have the views of Russia which—I think with some legitimacy—points out that there is also the question of Transnistria, and other places where they could articulate a parallel. Putting aside Russia’s case—I just want to flag it up as I do not want to get diverted—we want to get agreement among the European Union. Clearly we know that some of our partners also have some hesitations.

The United States has indicated very much in favour of Kosovo. What if we have the scenario of a unilateral declaration of independence, followed by a recognition in the United States, but disagreement within the European Union? What happens then? Where do we stand? What is of paramount importance to us? Unity, solidarity in the EU or—?

David Miliband: Of paramount importance is stability in the western Balkans. That is the objective of our policy. I do not want to be diverted on to this, in line with your injunction, but it is important to say that whenever we discuss Kosovo, we see it as a sui generis issue. It is the last piece of the Yugoslav jigsaw. It is a unique political process that has been going on since the late 1990s. I want to put on the record that we do not see this as being a basis for other examples elsewhere in the world, and I know that you do not either.

In respect of our position and that of the US, I think that it is important that I report to you what I said to the Kosovo unity team yesterday, and also to the Serbian Foreign Minister whom I have also met. That is that there are responsibilities on both sides in the period up to 10 December—the end of the current 120-day negotiation period—notwithstanding the support that they may or may not have for the Ahtisaari plan, which is the independence plan that you describe. Those responsibilities are important because we have launched a final period of negotiations that we take seriously. I have said publicly in terms of that that there is no option for any side to run down the clock waiting for 10 December. The behaviour and engagement of each side with the troika team is critical in this period.

There are also responsibilities after 10 December for both sides. I have said publicly that the Ahtisaari plan remains the foundation. I said this in an article with the French Foreign Minister in Le Monde, which speaks to your European point. In respect of the period after 10 December, the clear goal of peace in the western Balkans and the respect for all the minorities in the western Balkans, which is consistent with the foundation of the Ahtisaari plan must be kept in mind. I think that European unity means that it is possible not to hide differences, but to overcome them. In other words, it is not a lowest common denominator position.

The US Secretary of State, Condoleezza Rice, has made it very clear that she wants to see responsible behaviour not just from the international
community, but from all the actors locally. Our aim is peace and stability there, supported by European unity, with the United States playing a positive role.

Q395 Andrew Mackinlay: The concern of some people is that even those who might be sympathetic to Kosovan independence—taking your point about the stability of the region—are concerned about the very fragile Serbian democracy. If there was a recognition of an independent Kosovo, it would destabilise the actual building up in, what is clearly the key player of the former Yugoslavia.

David Miliband: That is a very important point. All I would say is that there are consequences of action and there are consequences of inaction. At the United Nations in New York, I chaired a meeting of the contact group on Kosovo involving France, Germany, Italy, Russia and the United States and I invited the Secretary-General of the UN to open that meeting. He opened it by saying that the status quo was unsustainable. So there are risks associated with not taking a decision as well as with taking a decision. I hear what you say about Serbian democracy—the point was put to me very forcefully by the Serbian Foreign Minister—but equally we have got the legitimate aspirations of the people of Kosovo and I suppose the job of diplomacy is to make sure we balance them out in a fair way.

Q396 Chairman: Where will we be if, as you mentioned earlier, Security Council resolution 1244 continues in existence but there is a unilateral declaration of independence? Some of us went to Kosovo and Serbia in July and concerns were expressed about the status of KFOR and what might happen in terms of some countries believing that they cannot remain there in a changed circumstance. Nevertheless, the remit that KFOR is under is that Kosovo is part of Serbia pending negotiations, but there might then be a UDI, with a number of countries recognising an independent Kosovo. What will happen to KFOR?

David Miliband: We are confident that the legal cover that is provided by resolution 1244 continues, that it does not cease but continues to provide an important legal basis for action. Obviously, there was a search for a further UN Security Council resolution in July, which unfortunately the Russian Government chose to threaten to veto. But their threatened veto does not invalidate the UNSCR that exists and I think that that is very important.

Q397 Mr Purchase: Are you still hoping you can get another UN Security Council resolution after December 10 or is that process coming to an end?

David Miliband: The search for a resolution in July came to an end because of the threatened Russian veto. The troika process was then established for the 120 days up to December 10. I think that we are confident about the existing legal base for activity and the continued legal base for activity under 1244, but we do not rule out or rule in any course of action in order to fulfil the maximum possible chances of the stability that we want, and the unity of the international community that we want as well.

Chairman: I have no doubt we will come back to this subject. You are due to appear before us again—before the end of the year so we might be discussing it around that time.

Q398 Mr Hamilton: May I move on to Iran? It is obviously something that is vexing the EU—

David Miliband: It is a dizzying speed of travel.

Q399 Mr Hamilton: We are whizzing you round the world pretty quickly, but I am sure you are used to that.

The French Foreign Minister, Bernard Kouchner said recently—I think it was on 5 October—that we should take a harder line on Iran. He was quoted as saying that the west should “prepare for war” against Iran if they did not toe the line on their nuclear ambitions. Can you tell us whether you think the EU three—that is, ourselves, France and Germany—are still united in their policy towards Iran?

David Miliband: Yes, I can answer that very clearly, because the EU three sat together in a meeting the week before last in New York with the other three, if you like, the Russian, Chinese and US delegations. A statement came out of that meeting, which I am sure you have. There is a very clear view that Iran is in breach of three United Nations Security Council resolutions: in respect of uranium enrichment and of the additional protocol related to that and in respect of the outstanding issues from their behaviour in the early 2000s. The international community is absolutely clear that Iran needs to comply with those resolutions and it is pursuing a dual track—a big offer to Iran in June 2006 for economic, social, political and educational co-operation and clear sanctions as well. That was raised by Sir Malcolm Rifkind in Foreign and Commonwealth Office Questions yesterday; the diplomatic track needs to show that it has teeth and I think it does. EU trade with Iran fell by 37% in the year to May 2007. I would say that the French statements obviously reflect the new French Government but they are also a symptom of international concern and frustration with the issue and I said as much to the Iranian Foreign Minister.

Q400 Mr Hamilton: Both Mohamed el-Baradei of the International Atomic Energy Agency and Javier Solana, the High Representative of the EU, have been asked to prepare reports in November. We are also, as you will be aware, going to Iran ourselves next month. How confident are you that those reports will be positive and that we will have made progress by then?

David Miliband: No one can be confident that they will be positive. It depends on whether the Iranians engage. Maybe the Chairman and I should have a word: we might profit from a further discussion before you go. I think that the timing of your visit is important. I will not say more now. The overall point is that it depends on the Iranian regime. It can produce a positive outcome from the el-Baradei talks. A work plan has been agreed to go through the outstanding issues with Mr el-Baradei. That has
deadlines and meetings. The so-called P1 and P2 issues were addressed on 25 September, but they were addressed with more questions being asked about the questions than answers to them. Nonetheless, there is the IAEA board meeting on 22 November to which Mr el-Baradei reports. Mr Solana will meet Mr Larijani. We must tell all the Iranian Government that a positive outcome is possible in both tracts. But it needs to happen in both those tracts to avert further sanctions.

Q401 Mr Hamilton: Thank you. Absolutely crucial to this, as you just mentioned, is Ali Larijani. Do we know whether he has the full authority to negotiate?

One often of the problems is that you have a negotiator, someone who is the front-person for that regime, and then you finally conclude an agreement that the regime does not agree with. Do we have confidence that what he says is authoritative?

David Miliband: I think he is a very important person in these discussions. I have seen nothing to suggest that he is not an important and useful interlocutor for Mr Solana. And he is the nominee of the Iranian Government to meet with Mr Solana. Chairman: We have a couple of more areas, but, Paul Keetch, you want to come in on this.

Q402 Mr Keetch: Just briefly on Iran, Foreign Secretary. We have heard from your predecessors discussions about Iranian involvement in what is happening in Iraq and also possibly even in what is happening in Afghanistan. We all have constituents who are in Iraq at the moment and we are very concerned about any supply of Iranian weapons. Without going into too many details, is there any indication that the potential support of Iranian factions for the insurgency in Iraq is declining, or is still as active as we believed it was?

David Miliband: I think we have a very serious situation in respect of the uranium enrichment that we were talking about. But we also have a very serious situation in respect of the contribution that Iran is making to regional instability. The Iraq situation is well known. The Afghanistan situation also has some coverage. There has also been coverage of the interdiction that has happened of a number of weapons shipments. It is a very serious international situation and it is a very serious charge to make against any country that it should be supplying weapons to terrorist groups that are then used against forces who are in Iraq and Afghanistan under United Nations Security Council cover.

Whatever view one might have taken about the decision to go to war in Iraq, the unity of this Parliament and the international community in respect of Iranian misbehaviour is very important. I think that the neighbours conference that has been called for 2 and 3 November—the second neighbours conference on Iraq—is an important occasion to reinforce the point that there is a choice between positive engagement and negative engagement. Obviously it is a particular issue for us in the south-east of Iraq and Basra. But the decline in violence which the Prime Minister spoke of on Monday in his statement to the House is obviously welcome. But it is obvious to anyone that there is a big Iranian stake in stability on the Iraqi side of the border. I would have thought that we should all be saying that there is therefore an Iranian opportunity to play a constructive rather than a destructive role. However, I do not think that you should be in any doubt that there are serious efforts to disrupt any attempts to support terrorists or other groups who gain shipments from Iran.

Q403 Sandra Osborne: May I take the Foreign Secretary to another very serious situation—the situation in Burma? It is expected that the EU will announce tougher sanctions on 15 October. Are you confident that that will help the pro-democracy movement in Burma, given the attitude of the regime? What pressure is being brought to bear on the Chinese Government to use their influence in a positive manner in this situation?

David Miliband: I know that some of you have taken an interest in this issue. After 45 years of military dictatorship, I must be careful about saying that I am confident that there will be a quick change. Equally, I have spoken a number of times to our ambassador in Rangoon and there is no question that the moment we are looking at is different in significant ways from what has happened before and there is a window of opportunity. There are opportunities that have not existed in the same way. I have recently met the Chinese and Indian Foreign Ministers because they have a very important role to play in engaging with the regime. I think that the message of the international community has been heard in Burma and it has been a pretty unanimous message for restraint, but also for a political process of reconciliation involving all the opposition groups. That is what we have to focus on now. That is what Ambassador Gambari, the Secretary General’s representative, has been arguing for and I think that that is the right stepping stone. There was an election in 1990. We have got to be saying that the test for the regime is to engage and to create a political process that involves all the opposition and all the ethnic groups.

I think that it is premature to talk about confidence, but we are clear that a tightening of the EU sanctions regime in respect of visas, for example, is more than justified. If the regime was to reject the Gambari proposals, that should trigger much tougher action. Chairman: Foreign Secretary, I will take one further question on this and then discuss one more subject.

Q404 Sir John Stanley: On Burma, I expect you feel that you have to follow the EU party line. I wonder whether you often ask yourself, as I hope your predecessors under both Governments asked themselves, whether, had this country been free to determine its own policy position on Burma and not been locked in to the EU common position, we would have adopted a policy alongside or very close to the American position rather than the EU position years ago.

David Miliband: We have. There is no trade of any significance with Burma. The idea that I am beholden to EU foreign policy in framing our own
decisions about our own companies and our own laws in respect of Burma is not a tenable position and I am very sorry that you phrased it in those terms. On Monday, as I am today, I will be articulating a British position and that will be a position born not of following any EU line, but of following our own view of what is the right thing to do.

I cannot see any purpose that is served by the allegation that you have made. It is perfectly reasonable to disagree about aspects of the European treaty without pretending to the outside world that we are in cahoots with supporting the Burmese regime and not taking tough action against it because of some EU foreign policy that has not yet even been put into treaties.

Q405 Sir John Stanley: I am sure that you did not want to misinterpret what I put to you, which was about the history and not the immediate present. Surely you would agree and understand that for many, many years American policy towards Burma has been quite different from that followed by this Government and the previous British Government, particularly in relation to sanctions. Is that not the case?

David Miliband: We are in a situation where other European Governments have historically tolerated much greater levels of investment in Burma than we have. At the moment, there is not a single major British company that we can find—I had an extensive discussion about this with Mr Paxman—that is investing in Burma. Zero. People say the same thing with regard to Iran and ask, “Wouldn’t it be better if the EU was doing more in Iran?” There has been a 37% fall in our trade with Iran. With regard to Burma, we cannot find any major British company that is investing in that country. I am surprised that you should have adopted the tone that you have, because we will decide our own policy—that is the whole point of common security policy.

Ms Stuart: indicated assent.

David Miliband: It is good that Gisela is on my side on that one, so I must be right—I should not say that, because that might have implications for other issues.

Q406 Chairman: Foreign Secretary, on Monday I had an exchange with Mr Barroso, the President of the Commission, about the EU-Africa summit and, when I explained and supported our Prime Minister’s position that he will not attend if Robert Mugabe attends, I got the sharp reaction that that the EU-Africa summit is extremely important and has to go ahead. Clearly, it is important, but I welcome the position that the Prime Minister has taken. Can you clarify at what level the UK will be represented if the summit goes ahead, and what is happening with regard to the discussion about the EU travel ban on Mugabe and senior officials of his regime?

David Miliband: I am having lunch with Mr Barroso on Friday, so you have obviously warmed him up for having lunch with me—I do not know if you were the appetiser and I will be the main course or if that will be the other way round. It is important that we get across the point that we want a successful EU-Africa summit. It is important that the EU does not try to repeat what individual countries do with African countries, but recognises that a strategic relationship between the EU and Africa is needed, not least because of the centrality of European markets to the world trade deal. I would add that China has a strategic view of its relationship with Africa, so, my goodness, Europe needs to be thinking in those terms as well.

We want it to be a successful summit and we had a Cabinet Committee yesterday discussing ideas about how we could put that into the Portuguese presidency so that there will be a successful summit. But our view is that it cannot be a successful summit if it is turned into a media circus with the United Kingdom and G. Brown sitting next to Zimbabwe and R. Mugabe. That would be a media circus, not a serious summit. We are clear that there will not be senior ministerial representation at the summit, and think that that is the right thing to do. We will take a view much closer to the time about whether there should be representation and, if so, at what level. I am sure that it is a agreed across the Committee and the House that the problems of Zimbabwe are, in a significant part, caused by the Mugabe regime, and the idea that we are going to sit around talking about governance, human rights, economic development and health and pretend that this terrible tragedy is not unfolding in what was once a rich country seems ridiculous. Therefore, we are not going to be party to that sort of media circus. Equally, I believe that the more substantive the agenda the EU can put on the table for the whole of Africa, the better the chance we have of the Zimbabwe issue not poisoning the summit. That is why it is important that the Prime Minister said that, in the circumstances of Robert Mugabe going, neither he nor I would go.

Q407 Chairman: What about the EU travel ban?

David Miliband: I am sorry. The precedent on that is mixed. The French organised a summit in Cannes which involved African leaders, but Robert Mugabe did not come to that, although the travel ban was not imposed—it was one of those things that happen in diplomacy. If there is an EU-Africa summit, however, it depends on how the invitations are issued and who issues them. It would actually be an EU-African Union summit, and it would be for the AU to invite their representatives, so there are some difficulties about who issues the invitations. I believe that Kate Hoey asked a question yesterday about the decision that we took in respect of the Darrell Hair case and about a witness coming from the Zimbabwe cricket board. We did not see any reason for him to be given a visa, not least because he could give his evidence by videoconferencing. We take very seriously the need to ensure that the travel ban bites.

Q408 Sir John Stanley: After the utterly abominable way in which Mr Mugabe has treated his people, I am absolutely delighted with the
position that the British Prime Minister has taken. Is there any other Prime Minister in the EU who is prepared to take the same position?

David Miliband: Thank you for that comment. The answer is that I do not know. No other Prime Minister has yet declared their position. It was interesting that, at the informal meeting of EU Foreign Ministers at the beginning of September, there was a much wider spread of condemnation of the Zimbabwe regime, in much the same terms as you have used. There was also quite a lot of interest in the Prime Minister’s idea of an EU envoy for Zimbabwe, which is something I shall be discussing next week. There is a lot of hiding going on in the regime on the issue, in that the regime is trying to put it into a bilateral box. I am sorry to mention the CFSP, but the Prime Minister’s idea of an EU envoy is an area where a bit of European solidarity and common action could take the issue into a different domain. Although I do not know about other Prime Ministers, it is quite wrong for people in Zimbabwe to say that Zimbabwe is just a British obsession and that the rest of Europe thinks that what they are doing is great. That is completely ridiculous. The fact that the issue has received such cross-party attention in the House can only be helpful, and I am sure that through party and official networks we shall try to get the message out about the terrible reality of what is going on in Zimbabwe and about the readiness of the international community to support the country’s reconstruction as soon as Mugabe is gone.

Q409 Chairman: Foreign Secretary, I assure you that there is support for our position in Foreign Affairs Committees in some other European countries. I was quite heartened yesterday when several other chairmen of Committees at the COFAC meeting said that they thought their Governments were currently having an internal discussion about whether their leaders will be at the meeting. I know that that is true of some other European Governments too.

David Miliband: For the sake of clarity, it is important to say that we are not campaigning to wreck the summit. We have decided on our own participation, and it is for others to choose how and in what circumstances they participate. I know that no one is suggesting it, but it would be very unfortunate if the wrong message went abroad about our engagement. We want a positive agenda, and we shall contribute all our development experience to creating that, including on trade and governance. Given that there was no way that the Prime Minister was going to go in December, it was better that he say so now, rather than to have an alleged nail-biting situation closer to the time. He has made his position clear, which is good.

Q410 Ms Stuart: You kindly agreed to write to us about the red lines. Could I ask you also to explain the politics behind the appearance of article 10 in the protocols and of declaration 39? They are the two items that appeared in the 5 October translation that were not present previously. That would be helpful.

David Miliband: Could I just say that it is now 4.55 pm? Mr Mackinlay asked for a response overnight. I do not know whether he meant that he wanted it literally by the time he gets to his desk at 6.30 am tomorrow, but we shall happy to address both points, either in two letters, one after the other, or together.

Chairman: You have been generous with your time, Foreign Secretary, as have your colleagues Mr Thomas and Ms Morgan. We look forward to seeing you again in due course. Thank you.

Letter to the Chairman of the Committee from the Foreign Secretary

I welcomed the opportunity to discuss the EU Reform Treaty with you and the other members of the Committee on October 10. Andrew Mackinlay asked, and I agreed, to provide factual references on where the red lines were protected in the actual Treaty text published in English on October 5. As the Government set out in its White Paper “The Reform Treaty: The British Approach to the European Union Intergovernmental Conference, July 2007”, the red lines are:

- Protection of the UK’s existing labour and social legislation (relevant text in Annex I).
- Protection of the UK’s common law system, and our police and judicial processes (text in Annex II).
- Maintenance of the UK’s independent foreign and defence policy (text in Annex III).
- Protection of the UK’s tax and social security system (text in Annex IV).

The red lines that we asked for have been achieved in this draft, and I believe that this will be confirmed in the final conclusion of the Intergovernmental Conference to be signed in December. The following are the main points for each of the red lines. The Annex gives the relevant Treaty and other texts. I will be happy to provide further details or commentary as necessary, and will write separately on the other questions raised.
The Charter of Fundamental Rights

The Charter of Fundamental Rights is intended to record, not create, rights. The Government pledged that nothing in the Charter of Fundamental Rights would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This will be achieved in the Reform Treaty via a package of safeguards:

1. A clear provision in the Treaty stating that courts, including the ECJ, must have due regard to the “Explanations” detailing the sources of the rights contained in the Charter when interpreting its provisions.
2. “Horizontal Articles” setting out the precise scope and application of the Charter. These confirm that the Charter cannot be used to expand any of the EU’s powers.
3. A specific UK protocol, with legal force, that guarantees that the Charter does not create any greater rights than already apply in EU law, or extend the powers of any court—European or domestic—to strike down UK laws.
4. A Declaration of the 27 Member States on the Charter underlining that it does not extend the EU’s powers to act.

The text of the Charter of Fundamental Rights will not be included in the text of the Reform Treaty. Therefore it is not printed in the draft text. However Article 1, point 8 of the draft Treaty (which will become Article 6, Treaty of the European Union) provides that it shall have the same legal value as the Treaties. The Charter will be published, with the Horizontal Articles and Explanations (setting out the existing sources of the rights it records) in the EU’s Official Journal. The Protocol, which is also legally binding, and has the same status as the Treaty, will form part of the Treaty.

Justice and Home Affairs

The Government was clear that we needed to protect our common law system and police and judicial processes. This meant that no Justice and Home Affairs proposal should be imposed on the UK against our will and we therefore needed the full right to choose, across the board, whether to participate in EU co-operation in JHA.

This will be secured in the draft Reform Treaty by an extension of our existing opt-in covering Title IV of the current Treaty on the European Community (on asylum, immigration and civil law matters) to all JHA proposals, and by amendments to the existing Schengen Protocol. The details are extensive, covering “transitional measures”, amendments to existing JHA measures, and measures building on Schengen acquis. I can provide a commentary on what is very dense procedural text if that would be helpful. In addition, the draft Reform Treaty includes an “emergency brake” which Member States can pull where they think a proposal will affect fundamental aspects of their criminal justice system.

For measures already agreed under intergovernmental “third pillar” arrangements, we have ensured that there will be no extension of ECJ jurisdiction for the UK unless the UK agrees to it. In other words, we will choose whether or not to participate.

The new Treaty will also make explicit, for the first time, that national security remains the sole responsibility of each Member State.

Common Foreign and Security Policy

The Government is committed to ensuring that the UK should retain its independent foreign and defence policy. The Reform Treaty will confirm that CFSP will remain an intergovernmental process. In fact, CFSP remains distinct from other policy areas, in a separate Treaty. In effect, we have retained it in a separate pillar. Unanimity in decision-making will remain the rule (i.e. the UK will hold a veto), legislative activity is excluded, and the ECJ will not have jurisdiction over CFSP except, as we discussed, on consequential questions of boundaries and sanctions.

As is the case now, it will be the Heads of State or Government (in the European Council), acting by unanimity, who set the strategic interests and objectives of the Union. It will be the Member States (in the Council) who then task the new High Representative for Common Foreign and Security Policy to take forward activity under the CFSP.

The preceding is all in the Treaty. Two Declarations will confirm that all 27 Member States agreed that provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations.
TAX AND SOCIAL SECURITY

As our White Paper reiterated “it is long-standing Government policy that tax matters should continue to be decided by unanimity.” The current Treaties guarantee this and there will be no change to the status of unanimous decision-making on tax in the draft Reform Treaty.

The Government was clear that the UK should have the final say on any matters affecting important aspects of its social security system—including cost, scope, financial balance or structure. This was achieved by a strengthened “emergency brake” mechanism. This provision allows any Member State to refer a proposal to the European Council, for decision by unanimity, where it might affect important aspects of its social security system. If the European Council does not reach agreement within four months, the proposal will automatically fall. This means that under the terms of the Reform Treaty, the UK retains ultimate control over any proposals which might affect important aspects of its social security system.

I am copying this letter to the Chairman of the European Scrutiny Committee, the Chairman of the Lords EU Select Committee; the Clerks of all three Committees; Tom Hines, FCO Scrutiny Co-ordinator; Guy Janes, FCO Parliamentary Relations Co-ordinator; and to Les Saunders at the Cabinet Office European Secretariat.

I have arranged for the annex to this letter to be placed in the Libraries of both Houses.

David Miliband
11 October 2007

Annex I

Charter of Fundamental Rights (N.B. provisions relating to the UK red lines are in italics)

Red line: protection of the UK’s existing labour and social legislation

Draft Reform Treaty Article 1, point 8

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at . . . on . . . 2007], which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Protocol No 7 On the application of the Charter of Fundamental Rights to Poland and to the United Kingdom

THE HIGH CONTRACTING PARTIES

WHEREAS in Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights;

WHEREAS the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself;

WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article;

WHEREAS the Charter contains both rights and principles;

WHEREAS the Charter contains both provisions which are civil and political in character and those which are economic and social in character;

WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles;

RECALLING the obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally;

NOTING the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter;

DESIRING therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom;

REAFFIRMING that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter;

REAFFIRMING that this Protocol is without prejudice to the application of the Charter to other Member States;

REAFFIRMING that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Declaration 29: The Charter of Fundamental Rights

The Charter of Fundamental Rights, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

Annex II

Justice and Home Affairs (N.B. provisions relating to the UK red lines are in italics)


Article 10

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 226 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community.
4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to reestablish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

Draft Reform Treaty—Schengen Protocol

The Protocol integrating the Schengen acquis into the framework of the European Union shall be amended as follows:

Article 5 shall be replaced by the following:

“1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties.

In this context, where either Ireland or the United Kingdom has not notified the Council in writing within a reasonable period that it wishes to take part, the authorisation referred to in Article 280d of the Treaty on the Functioning of the European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within three months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for adopting the measure building upon the Schengen acquis shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or until the notification is withdrawn at any moment during that procedure.

3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission. That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.

4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by a qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.

5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen acquis shall be terminated. If the said measure is subsequently adopted any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date of this adoption. When taking its decision, the Commission shall respect the criteria referred to in paragraph 3.”
Draft Reform Treaty—Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

The Protocol on the position of the United Kingdom and Ireland shall be amended as follows:

(a) at the end of the title of the Protocol, the words “in respect of the area of freedom, security and justice” shall be added;

(b) in the second recital of the preamble, the reference to Article 14 shall be replaced by a reference to Articles 22a and 22b of the Treaty on the Functioning of the European Union;

(c) in Article 1, first sentence, the words “pursuant to Title IV of the Treaty establishing the European Community” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union”; the second sentence shall be deleted and the following paragraph shall be added:

“For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.”;

(d) at the beginning of Article 2 the words “provisions of Title IV of the Treaty establishing the European Community” shall be replaced by “provisions of Title IV of Part Three of the Treaty on the Functioning of the European Union”; at the end of the Article, the words “acquis communautaire” shall be replaced by “Community or Union acquis”;

(e) Article 3(1) shall be amended as follows:

(i) in the first sentence of the first subparagraph, the words “pursuant to Title IV of the Treaty establishing the European Community” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union” and the second sentence shall be deleted;

(ii) the following new subparagraphs shall be added after the second subparagraph:

“For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.”;

(f) in Articles 4, 5 and 6, the words “pursuant to Title IV of the Treaty” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union”;

(g) in the second sentence of Article 4, the reference to Article 11(3) shall be replaced by a reference to Article 280f(1) of the Treaty on the Functioning of the European Union;

(h) the following new Article 4a shall be inserted:

“Article 4a

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title IV of Part III of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council. If at the expiry of that period of two months from the Council’s determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.
4. This Article shall be without prejudice to Article 4.

(i) at the end of Article 5, the following shall be added: “, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise”;

(j) In Article 6, the words “the relevant provisions of that Treaty, including Article 68,” shall be replaced by “the relevant provisions of the Treaties”;

(k) the following new Article 6a shall be inserted:

“The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 15a of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title IV of Part Three of that Treaty where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 15a.”

(l) in Article 7, the words “Articles 3 and 4” shall be replaced by “Articles 3, 4 and 4a” and the words “Protocol integrating the Schengen acquis into” shall be replaced by “Protocol on the Schengen acquis integrated into”

(m) in Article 8, the words “the President of” shall be deleted.

Draft Reform Treaty Declaration 39b on Article 5 of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference notes that where a Member State has made a notification under Article 5(2) of the Protocol on the Schengen acquis integrated into the framework of the European Union that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen acquis.

Draft Reform Treaty Declaration 39d on Article 5(3) of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference recalls that if the Council does not take a decision after a first substantive discussion of the matter, the Commission may present an amended proposal for a further substantive re-examination by the Council within the deadline of four months.

Draft Reform Treaty Article 1, point 5 on national security

Article 3, renumbered 4, shall be replaced by the following:

“Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Annex III

Common Foreign and Security Policy (N.B. provisions relating to the UK red lines are in italics)

Red line: maintenance of the UK’s independent foreign and defence policy

Draft Reform Treaty Article 1, point 27

Article 11 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following two paragraphs:

“1. The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the
exception of its jurisdiction to monitor the compliance with Article 25 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 240a of the Treaty on the Functioning of the European Union.

Draft Reform Treaty Article 2, point 223

The following two new Articles 240a and 240b shall be inserted:

“Article 240a

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 25 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Draft Reform Treaty Declaration 30 concerning the common foreign and security policy

The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

It stresses that the EU and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.

Draft Reform Treaty Declaration 31 concerning the common foreign and security policy

In addition to the specific rules and procedures referred to in paragraph 1 of Article 11 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State’s membership of the Security Council of the UN.

The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

Annex IV

Social Security emergency brake (N.B. provisions relating to the UK red lines are in italics)

Red line: protection of the UK’s tax and social security system

Draft Reform Treaty Article 2, point 51

1) Article 42 shall be amended as follows:

(a) in the first paragraph, the words “migrant workers and their dependants:” shall be replaced by “employed and self-employed migrant workers and their dependants:”;

(b) the last paragraph shall be replaced by the following:

“Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter
Foreign Affairs Committee: Evidence

be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.”

Letter to the Chairman of the Committee from the Foreign Secretary

When I appeared before the Committee on 10 October, I promised to write with further details on two points: ECJ jurisdiction over CFSP; and the details of our JHA opt-in arrangements.

ECJ and CFSP

As I made clear in my evidence, CFSP remains intergovernmental and in a separate Treaty (Treaty on European Union). Unanimity is the rule and the ECJ has no jurisdiction over CFSP policy or ESDP missions. Sir John Stanley MP asked for further information on the exclusion of ECJ jurisdiction over CFSP, and the two small exceptions to that rule.

ECJ jurisdiction over CFSP is limited to two very specific areas: policing the boundaries between CFSP and other EU external action; and hearing appeals against EU sanctions.

Article 240(a) in the Treaty on the Functioning of the European Union (TOFU) sets out the limits of the ECJ’s role:

“The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 25 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

This means that the ECJ will continue to monitor and give a ruling on which actions should be undertaken by the Council through CFSP, and which actions should be undertaken by the Commission through the tools it has at its disposal such as development assistance. The ECJ already performs this role under Article 47 of the current Treaty on European Union, a provision introduced by the Maastricht Treaty.

The Reform Treaty, however, considerably improves on the existing position. It makes clear that the implementation of other Community policies (which are set out separately in the new Treaty on the Functioning of the Union) cannot affect the procedures and powers of the institutions when taking action under CFSP. This is designed to ensure the “ring-fencing” of CFSP as a distinct, equal area of action.

The second area of ECJ jurisdiction is to do with EU sanctions. This provides that the ECJ will be able to hear appeals from individuals and groups against their listing as targets of EU sanction. This provision is intended to ensure the judicial protection of the individual and consistency with ECHR obligations. I should underline that this does not in any way force the UK to implement sanctions only through the EU.

As I said before the Committee, the Reform Treaty gives a very clear statement that ECJ jurisdiction over CFSP is excluded, except for the two very limited areas set out above.

JHA

Gisela Stuart MP also raised a question about the impact of both Protocol 10 and Declaration 39, which both relate to aspects of Justice and Home Affairs, on the UK’s red lines. The Government was clear, from the start, that we needed to protect our common law system and police and judicial processes. There was a clear commitment in the IGC mandate that the UK would have a right to choose whether or not to participate in all JHA measures. The provisions which Gisela Stuart raised are part of the package of measures which secure this.

Protocol 10 on transitional measures addresses existing police and criminal judicial co-operation measures in the current “Third Pillar” of the EU.Existing third pillar measures were not drafted with ECJ jurisdiction in mind, and Member States will need to prepare for the transition to full ECJ jurisdiction and a Commission role in any infraction process. We are clear that this is a change which requires the UK to have the opportunity to decide whether or not to opt in.
We were concerned to ensure that such measures are transposed effectively in a way the UK can accept, which is why we have secured a commitment from the Commission, through declaration 39a, to amend or replace as much of this legislation as possible during the first five year period. We have an opt in on all measures to which this process applies, and we would expect key instruments such as the European Arrest Warrant to be amended or replaced early on in the process.

After five years, any Third Pillar measures that have not been amended or replaced will become subject to full ECJ jurisdiction. We were clear that the red line required a choice for the UK whether or not to accept this change. We have secured the right to choose to opt out, en bloc, from all such remaining measures, in order to avoid ECJ jurisdiction. But we have also secured the possibility to opt back in to individual measures on a case by case basis subject to the existing rules under the Schengen and JHA Protocols—and thus continue to benefit from valuable JHA co-operation where it is in the UK interest to do so.

This means that ECJ jurisdiction cannot be extended to JHA measures in the UK without the UK having expressly chosen to take part in that measure.

Gisela Stuart also asked about Declaration 39, on the non-participation of a Member State in a JHA measure. This is a political declaration; as such, it cannot trigger legal consequences, should a Member State choose not to participate in a proposal. The reference in the Declaration to Article 96 of the Treaty of the European Community does not add anything to the status quo: the Commission’s powers as set out in Article 96 already exist, and in practice Member States are already able to ask the Commission to examine a situation in the light of this Article. The only legal basis for consequences following a UK non-participation in JHA are in the UK’s Schengen and Opt-In protocols.

I am copying this letter to the Chairman of the European Scrutiny Committee; the Chairman of the Lords EU Select Committee; the Clerks of all three Committees; Tom Hines, FCO Scrutiny Co-ordinator; Guy Janes, FCO Parliamentary Relations Co-ordinator; and to Les Saunders at the Cabinet Office European Secretariat.

David Miliband
18 October 2007

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Letter to the Chairman of the Committee from the Foreign Secretary

Following my appearance before the Committee on 10 October, I wrote to set out in detail where the UK red lines were reflected in the draft Reform Treaty. As I mentioned, some of the provisions, in particular those relating to Justice and Home Affairs are very complex. To provide further explanation, I attach an annex explaining how the provisions relating to each red line (on the Charter of Fundamental Rights, Common Foreign and Security Policy, Justice and Home Affairs, and Tax and Social Security) ensure the UK’s concerns have been met.

I hope these are helpful in setting out the deal secured by the UK, and I look forward to continuing contacts with the Committee as the parliamentary ratification process takes place.

I am copying this letter to the Chairman of the European Scrutiny Committee, the Chairman of the Lords EU Select Committee; the clerks of all three Committees; Tom Hines, FCO Scrutiny coordinator; Guy Janes, FCO Parliamentary Relations Coordinator; and to Les Saunders at the Cabinet Office European Secretariat.

I have arranged for the annex to this letter to be placed in the Libraries of both Houses.

David Miliband
18 October 2007

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Justice and Home Affairs

RED LINE: PROTECTION OF THE UK’S COMMON LAW SYSTEM, AND OUR POLICE AND JUDICIAL PROCESSES


Commentary: this section of the protocol on transitional measures sets out the legal arrangements for measures agreed under the existing third pillar following the entry into force of the Reform Treaty.
Article 9
The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.

Commentary: This Article confirms that the legal effect of existing “third pillar” measures does not change for as long as they are left unamended. In particular, this means that existing third pillar measures will continue not to have direct effect which means that an individual cannot rely in a national court on any rights set out in a third pillar measure unless it has been implemented by national law.

Article 10
1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 226 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

Commentary: This Article states that for a transitional period there shall be no extension of ECJ jurisdiction or right for the Commission to initiate infraction proceedings for measures agreed under existing “third pillar” intergovernmental arrangements.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

Commentary: This confirms that if in future existing third pillar legislation is amended, full ECJ jurisdiction along with the right for the Commission to initiate infraction proceedings will apply. However, in the case of amendments to existing legislation the UK’s opt-in would apply, so we would be able to choose whether to accept the amended proposal with ECJ jurisdiction and Commission powers.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community.

Commentary: This states that the transitional period for which ECJ jurisdiction and Commission infraction proceedings will not apply to existing third pillar measures will run for five years after the Reform Treaty has entered into force.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

Commentary: This paragraph allows the UK to decide to opt out en bloc of all remaining “third pillar” measures that are unamended (ie haven’t been repealed and replaced or amended) at any time up to six months before the end of the five year transitional period. Where the UK decides to opt out, the remaining third pillar measures will cease to apply to the UK once the five year transitional period has ended.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

Commentary: This paragraph provides that a decision shall be taken by qualified majority (without UK participation) on any necessary arrangements that should be made following the UK’s decision to opt out of the remaining measures. This might for instance include administrative arrangements necessary following the UK’s decision to opt out (e.g., how to amend existing processes for information exchange to take into account of the UK’s intention not to participate).
The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

Commentary: This paragraph provides for a decision to be taken by qualified majority (with UK participation) on any "direct" financial consequences, which are "necessarily and unavoidably" incurred as a result of the UK’s decision to opt out of existing measures. There may be cases where our non-participation in a measure incurs costs, and where it would be reasonable to expect the UK to bear those costs. For instance, in the unlikely event that the UK were to cease to participate in Eurojust (the EU’s agency responsible for co-ordinating investigations into serious crime), it would be reasonable to expect the UK to bear the costs of bringing UK staff home from Eurojust, and settling their contracts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to reestablish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

Commentary: This paragraph enables the UK to apply to opt back in to any JHA measures under the relevant provisions of the Schengen and opt-in protocols. This means that the UK can choose to accept ECJ jurisdiction and Commission powers to initiate infringement proceedings for individual measures where it is willing to do so. The provision sets out clearly that the Union institutions should accede to any UK request to participate so far as is possible without affecting the operability of the relevant parts of the JHA Acquis.

Draft Reform Treaty—Schengen Protocol

Commentary: The UK currently participates in the police and judicial co-operation aspects of the Schengen Acquis as set out in Council Decision 2000/365/EC.

The Protocol integrating the Schengen acquis into the framework of the European Union shall be amended as follows:

Article 5 shall be replaced by the following:

1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties.

Commentary: This reflects the existing provision that a proposal building on an aspect of the Schengen Acquis will have a legal base from the relevant part of the Treaties.

In this context, where either Ireland or the United Kingdom has not notified the Council in writing within a reasonable period that it wishes to take part, the authorisation referred to in Article 280d of the Treaty on the Functioning of the European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

Commentary: This clarifies that where the UK/Ireland have decided not to opt in to a Schengen building measure, permission to proceed on the basis of enhanced co-operation is deemed to have been granted to the other Member States.

2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within three months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for adopting the measure building upon the Schengen acquis shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or until the notification is withdrawn at any moment during that procedure.

Commentary: This paragraph makes clear that, notwithstanding Council Decision 2000/365/EC (which sets out the parts of the Schengen Acquis in which the UK participates), the UK has the right to decide whether or not to opt in to a Schengen building measure. This safeguards the UK’s red line by ensuring that the UK should not be automatically bound to participate in any measure proposed as part of the Schengen Acquis.

3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission. That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability
of the various parts of the Schengen acquis, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.

Commentary: This provision allows for a Council Decision (taken on the basis of a qualified majority on a proposal from the Commission) to limit UK participation in some parts of the Schengen Acquis as a whole, should the UK’s non-participation in the Schengen building measure “seriously affect . . . the practical operability of the various parts of the Schengen Acquis”. This decision shall take effect only when the proposed measure that the UK has not participated in comes into force. This allows other Member States to safeguard the coherence of the Acquis as a whole, whilst ensuring that any limitation on UK participation is subject to robust and objective criteria.

4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by a qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.

Commentary: This enables any Member State to refer the matter to the European Council if no decision has been adopted within four months. The European Council may then take a decision by qualified majority. This allows the UK to escalate the decision on the UK’s ongoing participation in the relevant parts of Schengen, should there be disagreements at the JHA Council.

5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen acquis shall be terminated. If the said measure is subsequently adopted any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date of this adoption. When taking its decision, the Commission shall respect the criteria referred to in paragraph 3."

Commentary: This provision states that where there has been no decision on whether to limit UK participation in the Schengen Acquis at Council or European Council level, the Commission shall take a decision, respecting the objective criteria for determining the extent of UK participation—namely that the decision should retain the widest possible participation of the Member State concerned, whilst also preserving the coherence and operability of the Schengen Acquis. This means that there is no prospect of the UK’s participation in the Schengen Acquis being limited automatically. Comprehensive discussion must take place at Council level at least twice, with the matter elevated to European Council level if necessary. The UK has the right to withdraw its opt-out at any point up to the adoption of the Schengen building measure.

Draft Reform Treaty—Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

The Protocol on the position of the United Kingdom and Ireland shall be amended as follows:

Commentary: This extends the UK’s existing Title IV opt-in protocol to cover all justice and home affairs matters and makes minor technical changes.

(a) at the end of the title of the Protocol, the words “in respect of the area of freedom, security and justice” shall be added;

(b) in the second recital of the preamble, the reference to Article 14 shall be replaced by a reference to Articles 22a and 22b of the Treaty on the Functioning of the European Union;

(c) in Article 1, first sentence, the words “pursuant to Title IV of the Treaty establishing the European Community” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union”; the second sentence shall be deleted and the following paragraph shall be added:

“For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.”;

(d) at the beginning of Article 2 the words “provisions of Title IV of the Treaty establishing the European Community” shall be replaced by “provisions of Title IV of Part Three of the Treaty on the Functioning of the European Union”; at the end of the Article, the words “acquis communautaire” shall be replaced by “Community or Union acquis”;

(e) Article 3(1) shall be amended as follows:

(i) in the first sentence of the first subparagraph, the words “pursuant to Title IV of the Treaty establishing the European Community” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union” and the second sentence shall be deleted;
(ii) the following new subparagraphs shall be added after the second subparagraph:

"Measures adopted pursuant to Article 64 of the Treaty on the Functioning of the European Union shall lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Title IV of Part Three of that Treaty.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union."

(f) in Articles 4, 5 and 6, the words "pursuant to Title IV of the Treaty" shall be replaced by "pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union";

(g) in the second sentence of Article 4, the reference to Article 11(3) shall be replaced by a reference to Article 280f(1) of the Treaty on the Functioning of the European Union;

(h) the following new Article 4a shall be inserted:

"Article 4a

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

Commentary: This confirms that the UK has the right to choose whether to opt in to proposals for amendments to existing measures in which it already participates.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

Commentary: This provides for a decision to be taken by qualified majority in the Council to urge the UK to participate in the amended measure should UK participation in the unamended measure without amendment make application of the amended measure "inoperable" (a very high threshold). It also confirms that there is an additional two months for the UK to consider its position in this case.

If at the expiry of that period of two months from the Council's determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

Commentary: This confirms that the original measure shall cease to apply to the UK where it has chosen not to opt in to the amendment and the Council has decided that the UK's non-participation makes the measure inoperable.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating in the adoption of the amending measure. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

Commentary: This ensures that a full discussion takes place and that the decision is taken by a qualified majority representing all the Member States participating in the amendment.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

Commentary: This provides that should the Council may take a decision by qualified majority on whether the UK should bear any "direct financial consequences . . . necessarily and unavoidably incurred" as a result of its non-participation. The UK participates in this decision-making process, and the test for bearing financial consequences is robust.

4. This Article shall be without prejudice to Article 4.”

(i) at the end of Article 5, the following shall be added: “, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise”;

(j) In Article 6, the words “the relevant provisions of that Treaty, including Article 68,” shall be replaced by “the relevant provisions of the Treaties”;

(k) the following new Article 6a shall be inserted:

“The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 15a of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title IV of Part Three of that Treaty where the United
Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 15a.

Commentary: This ensures that where the UK has chosen not to participate in a JHA measure, the relevant rules relating to data protection shall not apply for the UK.

Draft Reform Treaty Declaration 39b on Article 5 of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference notes that where a Member State has made a notification under Article 5(2) of the Protocol on the Schengen acquis integrated into the framework of the European Union that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen acquis.

Commentary: This confirms that the UK has the right to notify its intention to participate in a measure building upon the Schengen Acquis at any time before adoption.

Draft Reform Treaty Declaration 39c on Article 5(2) of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference declares that whenever the United Kingdom or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen acquis in which it participates, the Council will have a full discussion on the possible implications of the non-participation of that Member State in that measure. The discussion within the Council should be conducted in the light of the indications given by the Commission concerning the relationship between the proposal and the Schengen acquis.

Commentary: This Declaration confirms that there should be full discussion on the implications for the Schengen Acquis if the UK chooses not to participate in a Schengen building measure. This discussion should be based on the Commission proposal, which must respect the objective criteria set out in Article 5(3) of the Schengen protocol; “shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence”.

Draft Reform Treaty Declaration 39d on Article 5(3) of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference recalls that if the Council does not take a decision after a first substantive discussion of the matter, the Commission may present an amended proposal for a further substantive re-examination by the Council within the deadline of four months.

Commentary: This confirms that should the Council fail to take a decision based on a first Commission proposal, a second proposal may be examined within the four month period.

Draft Reform Treaty Article 1, point 5

Article 3, renumbered 4, shall be replaced by the following:

“Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Commentary: the final sentence of paragraph 2 explicitly confirms for the first times in the Treaties that matters relating to national security are the sole responsibility of Member States.

Charter of Fundamental Rights

RED LINE: PROTECTION OF THE UK’S EXISTING LABOUR AND SOCIAL LEGISLATION

The Government pledged that nothing in the Charter of Fundamental Rights would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This sets out what will be the legal consequences of the amendments to the draft Reform Treaty concerning the Charter of Fundamental Rights.
A reference to the Charter in the Reform Treaty (new Article 6 TEU) will make the Charter legally binding once the Reform Treaty comes into force. The Charter will be addressed primarily to the EU institutions who will be required to recognise the rights, freedoms and principles in the Charter. The Charter simply records existing rights which already bind Member States when they implement EU law. The Charter creates no new enforceable rights.

The text of the Charter and explanations will include the amendments made in the Constitutional Treaty. Courts will have to give due regard to the horizontal articles in the Charter, and to the accompanying explanations. These confirm that the Charter does no more than to reaffirm rights, freedoms and principles already recognised in EU law, and restates the circumstances in which courts can already take them into account. The Reform Treaty reference to the Charter will set out how the ECJ should use them to interpret the Charter. Furthermore, the Reform Treaty will also include a declaration, agreed by all Member States, underlining that there is no extension of the EU’s powers to act, and a specific UK Protocol. The Protocol guarantees that the Charter does not create any greater rights than already apply in EU law nor extend the powers of any court to strike down UK laws. This package of safeguards guarantees that the charter would not give national or European courts any new powers to strike down or reinterpret UK law, including our labour and social legislation.

The mandate notes that the reference to the Charter is to “the version of the Charter as agreed in the 2004 IGC which will be re-enacted by the three Institutions in [2007]. It will be published in the Official Journal of the European Union.

The Charter does not create any new rights, freedoms or principles. It simply records rights, freedoms and principles that are already recognised in EU and national law, and makes them more visible. This is made clear by the horizontal provisions in Title VII of the Charter, as amended by the 2004 IGC, and by the accompanying explanations. In particular, the horizontal provisions say:

— The Charter applies to Member States “only when they are implementing Union law”.
— The Charter does not extend or modify the Union’s powers or tasks.
— Rights deriving from EU law or the ECHR are the same (ie the rights in the Charter are not more extensive).
— Rights resulting from the common constitutional traditions of the Member States “shall be interpreted in harmony with those traditions”.
— Acts of the Union may implement provisions of the Charter that contain principles, but these principles “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”.
— “Full account shall be taken of national laws and practices as specified in this Charter”.

As is well-established in the case law of the ECJ, courts already have the power to strike down national legislation that is incompatible with a fundamental right constituting a general principle of EU law, if the legislation implements or derogates from EU law. After the Charter is made legally binding, that will remain the case. The Charter does no more than to restate the fundamental rights to which courts have always had regard, and the circumstances in which they may take those fundamental rights into account.

The Charter also includes “principles”, that—as the Horizontal Articles explain—do not have legal effect independently of the legislation that gives them effect. Their purpose is to guide the EU legislature, rather than to give justiciable rights to individuals. For instance, the Charter records that when the EU legislates, it should do so in a way that will ensure a high level of human health protection. But that does not create an individual right to health care. And a court may only have regard to such principles when considering whether the EU legislature has taken them sufficiently into account when acting.

Incorporating the Charter into the Treaties

Article 1, point 8 of the draft Reform Treaty states that current Article 6 TEU which deals with fundamental rights will be replaced with the following:

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at . . ., on . . . 2007], which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Commentary: This article makes the Charter legally binding, giving it the same legal value as the Treaties. The text of the Charter will not however form part of the draft Reform Treaty. There is also a clear provision that the Charter does not extend the competences of the Union beyond what is provided in the Treaties. The article also confirms that the Charter must be interpreted in the light of the Horizontal Articles (as set out in Title VII of the Charter) and the Explanations. Additionally, the Union will accede to the ECHR—again this will not affect the Union’s competences.

Protocol no: 7 on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom

Commentary: The protocol specifies what an incorporated Charter does and does not do, bearing in mind that it does not create new rights and principles but simply records those that already exist. The protocol is intended to guarantee for the UK that the new reference to the Charter in Article 6 EU does not increase the extent to which courts applying EU law may already have regard to fundamental rights, freedoms and principles.

Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it recognises.

Commentary: This makes clear on the face of the Treaty that the Charter cannot have the effect in the UK of “extending” the ability of any court to strike down UK law, because it does not “extend” any aspect of EU law. Therefore if, despite what the Charter provisions say, someone tried to argue that the Charter creates new rights, the argument would fail: the Protocol makes it clear that the Charter does not give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation.

2. In particular, and for the avoidance of doubt, nothing in [Title IV] of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.

Commentary: This paragraph applies “in particular” to the social and economic provisions in Title IV of the Charter. Some of those provisions contain principles rather than rights. Other provisions expressly say that they apply in accordance with national law. It follows that, as this paragraph guarantees, those articles either do not reflect any rights at all, or do no more than reflect the rights that already exist in UK law. As the words “in particular” indicate, the same is also true of other provisions in the Charter that either contain principles rather than rights, or expressly give no rights going beyond those provided for in national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.

Commentary: This applies to provisions in the Charter that refer back to national law and practice. It reinforces the point—as provided for in Article 52(6) of the Charter—that those provisions are limited in the same way as national law.
Declaration on the Charter of Fundamental Rights

1. The Charter of Fundamental Rights, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined by the Treaties.

Commentary: This Declaration, agreed by all Member States, underlines the fact that a legally-binding reference to the Charter does not extend the application of Union law or modify existing tasks or powers in any way.

Common Foreign and Security Policy

RED LINE: MAINTENANCE OF THE UK’S INDEPENDENT FOREIGN AND DEFENCE POLICY

Draft Reform Treaty Article 1, point 27

Article 11 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following two paragraphs:

“1. The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.”

Commentary: This provision sets out the scope of CFSP in the same terms as are already used in the existing Treaty. It reiterates that all areas of foreign policy and matters relating to the Union’s security continue to fall within the intergovernmental provisions of CFSP. CFSP continues to be defined and implemented in accordance with the EU Treaty and as such is kept distinct from other EU policies which are contained in the Treaty on the Functioning of the European Union. The distinct character of CFSP is reinforced against encroachment by non-CFSP matters by the improved provisions of Article 25 (formerly Article 47).

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor the compliance with Article 25 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 240a of the Treaty on the Functioning of the European Union.

Commentary: This new overarching provision sets out explicitly the distinctive legal and procedural character of CFSP. It sets out the separate framework within which the CFSP is carried out, emphasising its distinctive intergovernmental nature and the fact that there is limited Commission and EP participation. In particular it is clear that legislative acts can not be adopted, and that ECJ jurisdiction is excluded other than in two defined areas.

Draft Reform Treaty Article 2, point 223

The following two new Articles 240a and 240b shall be inserted:

“Article 240a

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article(25 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

Commentary: The powers of the Court are listed in the Treaty on the Functioning of the European Union. This provision makes absolutely clear that the ECJ will have no jurisdiction over either provisions relating to CFSP or any acts based on such provisions.

There are only two specific exceptions.

4 The cases in which the Council or the European Council may act by QMV when taking decisions in CFSP are set out in Article 17 (2), Article 28 (3) TEU, Article 30 (2) and Article 31 (2) and (3) as amended by the Reform Treaty, Article 1, Point 34, Point 46 and Point 49)
The reference to Article 25 TEU relates to the power of the Court to adjudicate, as now, on the boundary between the CFSP and the Treaty on European Union and other Union policies contained in the Treaty on the Functioning of the European Union (TOFU).

However, in contrast to the existing provision (Article 47 TEU) which simply provides that nothing in the EU Treaty shall affect matters in the EC Treaty, the new Article 25 TEU also explicitly provides that the implementation of policies under the Treaty on the Functioning on the European Union shall not affect the procedures and extent of the powers of institutions provided for under CFSP. The Court must therefore protect the distinct character of CFSP against encroachment from non-CFSP provisions.

Article 230 allows individuals and groups, in limited circumstances, to challenge legal acts which affect them directly. ie The ECJ is currently is already able to review Community regulations imposing sanctions on individuals and groups under the TEC (and has done so on a number of occasions)—sanctions that will have followed from a CFSP decision. This judicial protection of individuals’ rights is reinforced by allowing those directly affected to seek review of a CFSP Council Decision listing them as a target for sanctions.

Draft Reform Treaty Declaration 30 concerning the common foreign and security policy.

The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

It stresses that the EU and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.

Commentary: This Declaration confirms that nothing in the provisions relating to CFSP affect Member States’ own responsibilities in relation to foreign policy.

Draft Reform Treaty Declaration 31 concerning the common foreign and security policy.

In addition to the specific rules and procedures referred to in paragraph 1 of Article 11 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State’s membership of the Security Council of the UN.

The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

Commentary: This Declaration reaffirms that the CFSP does not interfere with Member States powers in the conduct of their own independent foreign policies nor affect their national diplomatic services, membership of international organisations, including the UN Security Council, or relations with third countries. It also confirms the limited role of the Commission and European Parliament.

**Tax and Social Security**

**RED LINE: PROTECTION OF THE UK’S TAX AND SOCIAL SECURITY SYSTEM**

Social Security brake (draft Reform Treaty Article 1, point 51)

"Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four (months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.”."

Commentary: Under the terms of the provision, where any Member State assesses that it would affect important aspects of its social security system (including cost, scope, financial balance or structure) it may refer the proposal to the European Council. In that case the legislative procedure is suspended. The European Council then takes a decision by consensus on how to proceed. If no action is taken within four months the proposal will fall.

Declaration 33 on the second paragraph of Article 42 of the Treaty on the Functioning of the European Union.

The Conference recalls that in that case, in accordance with Article 9b(4), the European Council acts by consensus.

Commentary: This Declaration (agreed by all Member States) confirms that any decision taken the European Council under the above brake must be by consensus—ie all Member States must agree. So once the brake is activated, any Member State can block a proposal and it falls.

18 October 2007
Wednesday 21 November 2007

Members present:

Mike Gapes (Chairman)

Mr Fabian Hamilton  Mr Malcolm Moss
Rt Hon Mr David Heathcoat-Amory  Mr Ken Purchase
Mr John Horam  Rt Hon Sir John Stanley
Mr Paul Keetch  Ms Gisela Stuart
Andrew Mackinlay  Richard Younger-Ross

Memorandum submitted by Professor Richard G Whitman, University of Bath

FOREIGN, SECURITY AND DEFENCE POLICY AND THE REFORM TREATY: SIGNIFICANT OR COSMETIC REFORMS?

The EU Reform Treaty is to be signed in Lisbon on 13 December 2007. The Treaty includes a set of revisions to the Common Foreign and Security Policy and the European Security and Defence Policy and these changes are outlined and assessed below. A consolidated version of the changes to the Treaty on European Union made by the Reform Treaty can be found at www.bath.ac.uk/rgw22 and all the articles referred to below are the articles of the TEU post-Reform Treaty amendments unless otherwise indicated.

From Constitutional Treaty to Reform Treaty

The EU Heads of State and Government reached agreement on the Reform Treaty (RT), the successor text to the Constitutional Treaty, in Lisbon on 19 October 2007. The text of the RT is based heavily upon the text of the Constitutional Treaty. However, a key difference from the Constitutional Treaty is that the Reform Treaty will not replace the existing founding Treaties and the Treaty on European Union. Rather, the Reform Treaty is a set of amendments to the Treaty establishing the European Communities (to be renamed the Treaty on the Functioning of the European Union—TFEU) and The Treaty on European Union (TEU). The latter is heavily amended by the RT with 25 of the 62 amendments to the TEU pertaining to the CFSP and ESDP provisions of the existing Treaty. The overwhelming majority of the changes that were previously proposed in the Constitutional Treaty for the CFSP/ESDP have been retained in the RT.

Amendments to the Treaty on European Union

The changes to the CFSP/ESDP provisions of the TEU in the RT can be broken down into two main types: those that amend the CFSP/ESDP within the structure of the EU’s policy universe; and those amendments that have consequences for the decision-making and implementation of the CFSP/ESDP. Each of these sets of changes will be examined in turn.

Remodelling the wider foreign policy

A key change to the existing arrangements of the CFSP/ESDP within the EU’s panoply of foreign policy is the “rebranding” of all aspects of the EU’s foreign policy and external relations under the new heading of “External Action”. This has implications for decision-making explored below. In terms of the Treaties the changes are that the old Title V of the TEU is replaced by two new chapters. The first of these chapters covers “General Provisions on the Union’s External Action” (and contains two new articles 10a and 10b that draw some wording from the old TEU article 11) and is an entirely new set of principles and general objectives for the wider External Action area and understood as covering the CFSP/ESDP; a new part V of the TFEU entitled “External Action by the Union” (and which draws together the old EC Treaty provisions covering the Common Commercial Policy, Cooperation with third countries and humanitarian aid, restrictive measures, international agreements, relations with international organisations and third countries and Union delegations and the solidarity clause); and “external aspects of its other policy areas”. 
The second of the two new chapters contains the “specific provisions on the common foreign and security policy”. The new CFSP chapter runs from articles 10c-31 (as opposed to 11–28 for the existing TEU). The CFSP chapter is also divided into two sections: “Common Provisions” and “Provisions on the Common Security and Defence Policy”. The consequence of this division (and the moving and re-ordering of treaty articles) is that the ESDP/CSDP provisions, and which are greatly expanded, are now separated out more than was the case previously. And the provisions dealing with expenditure matters are moved into the first chapter of the Treaty. Those dealing with enhanced cooperation are also removed (and now covered by a new Article 10 for the TEU that covers enhanced cooperation across all the Union’s policy areas). Provisions covering agreements with third parties and international organisations are also greatly streamlined (Article 22).

External action provisions impacting on the CFSP/ESDP

It should also be noted that a number of other changes introduced that have implications for foreign policy but not contained within the CFSP/ESDP sections of RT. These include the grant of legal personality to the EU (article 32 of the revised TEU) and the creation of the position of President of the European Council. The latter only appears once in the CFSP chapter under article 13 on the basis that “If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union’s policy in the face of such developments.” Article 9b of the revised TEU that provides for the creation of the President of the European Council states that:

The President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy. (Article 9b(6))

The degree of working harmony (or prejudice) established in the relationship between the first incumbent President and the HR remains to be seen. Much may depend on the personality of the two post-holders and the European Council President has the much less clearly defined job description in the revised TEU.

Changes to decision-making

The second set of changes to the TEU by the RT are those amendments that have consequences for the decision-making and implementation of the CFSP/ESDP.

Remaining distinctive

Although there are changes to arrangements for the decision-making and implementation of the CFSP/ESDP the underlying principle of a distinctive decision-making regime for the policy area is retained. The CFSP/ESDP remains a distinctive “pillar” in that the roles of the Commission, European Court of Justice and European Parliament are very heavily circumscribed (and explicitly indicated in a revised Article 11 and in a new Article 240a of TFEU explicitly spelling out that the ECJ has no jurisdiction over the CFSP provisions). Most of the existing references to the Commission are removed (eg existing Article 14) and Commission initiatives on CFSP matters are to be directed through the HR (Article 16). The European Parliament is also enjoined to increase its annual debate on the CFSP to twice per annum and to expand this debate to encompass the ESDP (Article 21).

Seeking a common approach

There is, however, a substantively new article (revised Article 16 now renumbered Article 17a) making it incumbent on member states to seek a “common approach” on matters of foreign and security policy and to be pursued by member states through their diplomatic representation in third countries and in international organisations. It also places greater obligations on Member States to ensure that any policies that may be pursued and “affect the Union’s interests” require consultation either in the European Council or Council and member states are required to show mutual solidarity. Whether this Article is a “paper tiger” provision remains to be seen but there is no provision for formal sanctions on a member state that does not comply. Member States that are members of the UN Security Council are also tasked with using the HR to represent collective policy in the UNSC where the Union has defined a position (Article 19).

Limited revisions to procedures of decision making

Unanimity remains the norm in decision-making except where otherwise explicitly provided for (in article 17.2) and there is the addition of one new area in which member states may take decisions by a qualified majority. This is for where the Council is adopting a decision defining a Union action or position, on the basis of a proposal “which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or
that of the High Representative”. The provision that previously allowed for majority voting in the implementation of Common Strategies is retained in a revised form (to cover the replacement arrangement noted above) and by still permitting implementation of actions or provisions by voting. There is also now a provision allowing the European Council to (unanimously) adopt a decision allowing for the extension of areas covered by majority voting.

Constructive abstention is retained in Article 17 but with the change that the existing blocking minority of one third of member states now also needs to comprise at least one third of the population of the Union. The “Emergency Brake” is also retained for member states opposed to the move to a decision to be taken on the basis of a majority vote. The HR is given the role to seek a solution for the state concerned before the issue would be referred to the European Council.

The existing institutional hierarchy of the CFSP is retained with the European Council (unanimously) setting broad objectives. The change to the implementation is that the HR is now given a much more prominent role. Common Strategies (and which, in recent years, have become a redundant device) have been removed from the Treaty. The European Council does, however, still retain the role to take formal “decisions” to “identify the strategic interests and objectives of the Union” (Article 10b and Article 13).

Joint Actions and Common Positions are reworked within the RT and with the reference now to adopt “decisions” taken to facilitate “actions” to be undertaken and “positions” to be held by the EU and its member states (Articles 12, 14, 15).

High Representative
The most significant set of changes to decision-making concern the revamped role of the High Representative. The “new” High Representative of the Union for Foreign Affairs and Security Policy has already attracted attention as the post-holder will also simultaneously “double-hat” as a Vice-President of the Commission (RT Article 9e). The High Representative will be a personification, and the animus, of the new gathering together of all aspects of External Action, formally responsible for its consistency across the Treaties and institutions (RT Article 9e(4) ) and clearly key to achieving the ambition of greater synergy across all aspects of External Action. The HR is appointed by the European Council (under majority voting provisions) for the same five year term as the Commission and subject to the European Parliament vote of consent on the incoming college of Commissioners. The HR will replace the Presidency as the key animating force of the CFSP (Article 16). Consequently a number of changes to the TEU concern the powers and responsibilities of the High Representative and place the post holder at the centre of coordinating (including within international organizations and conferences under Article 19), directing and implementing the CFSP.

A new article (13b) sets out strengthened responsibilities and powers for the HR and which include the chairing of the (new) Foreign Affairs Council (and nominating the chair of the PSC under Declaration 3 of the RT), representing the Union with third parties and within international organizations and conferences and providing for support through the new European External Action Service (EEAS). The HR also takes on the responsibility (previously exercised by the Council) for proposing and managing Special Representatives (Article 18), the facility to task the PSC with work (Article 23) and replacing the Presidency in representing the CFSP to the European Parliament (Article 21).

External Action Service and Union delegations
One of the more eye-catching innovations of the RT is the introduction of the European External Action Service (EEAS) tasked with assisting the HR (Article 13(3) ). The EEAS is intended as the “28th” diplomatic service of the EU and, under the RT provisions, intended to be staffed by officials from the General Secretariat of the Council, the Commission and staff seconded from the diplomatic services of the Member States. The exact organization and modus operandi of EEAS is to be determined by the Council acting on the basis of a proposal from the HR and after there has been consultation of the European Parliament and “the consent” of the Commission. Under Declaration 22 of the RT preparatory work on the EEAS is to commence after the RT is signed and so before ratification has been concluded. The current European Commission delegations in third countries and international organizations are to be re-titled Union delegations and placed under the authority of the HR (TFEU article 188q) but explicit provision is not made for them to become a part of the EEAS.

New provisions on financing
There is an important change to the arrangements for funding expenditure for the CFSP. In addition to the existing provisions for charging administrative and operating expenditure to the Union budget there are new provisions covering circumstances in which the EU may wish to have rapid access to the Union budget, in particular for matters covered by ESDP articles 27(1) and 28), and if not charged to the Union budget then chargeable to a start-up fund to be financed by the member states. The arrangements to govern both of these circumstances are to be determined by the Council in due course (Article 26(3) ) and on the basis of a proposal from the HR.
CHANGES TO THE ESDP

The RT changes to the TEU provision dealing the common defence policy represent a significant proportion of the new articles introduced. Article 17 of the TEU that, feeling increasingly threadbare, governed the ESDP is expanded to create a new section of the TEU and contained within new Treaty articles 27–31. These new articles provide for five main changes to the ESDP: to expand the aims and ambitions of the ESDP; to expand the range of Petersberg tasks; to provide for the creation of the European Defence Agency; to introduce permanent structured cooperation; and to introduce sub-contracting to “coalitions of the able and willing” member states.

The aims and ambitions of the ESDP are much more expansively outlined in a greatly expanded Article 17(1) and contained in a new Article 27(1)-(7). Notably there is considerable attention given to the member states committing to progressively enhance their military capabilities. Commitments to the Atlantic Alliance remain in the Treaty—and with a stronger reference to NATO as the “foundation for collective defence”. The remaining reference to the WEU is removed and there is the introduction of a very soft WEU article V-type guarantee and which reads “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter . . .”.

The Petersberg tasks are greatly expanded, from what was formerly contained in 17(2), in a new Article (28) to now read as follows: “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

The European Defence Agency is formally introduced to the Treaty, under Article 27(3), and with Article 30 detailing the aims and ambitions for the Agency. The provisions also make clear that membership of the Agency is on an “opt-in” basis and that sub-groupings of member states are envisioned for joint projects.

Articles 27(6) and 30 provide for permanent structured cooperation among member states (and also with arrangements for its functioning specified in an additional RT Protocol no.4). The decision for the establishment of permanent structure cooperation is to be that for the full Council under a qualified majority. The decision for the establishment of permanent structure cooperation is to be that for the full Council under a qualified majority. There are also provisions provided for the expansion of such a group (on the basis of a qualified majority of those already engaged in structured cooperation) and provisions for suspending a member for failing to fulfill obligations on the same decision-making basis. The governing arrangements for permanent structured cooperation do not convey the impression of streamline decision-making and there may be a repeat of the experience of enhanced cooperation with the CFSP which has been a device of insignificance.

The provisions facilitating “coalitions of the able and willing” member states under articles 27(5) and 29 are a potentially more interesting innovation especially (and in contrast to those on permanent structured cooperation) because they are much more light-touch. It is a decision of the Council to authorize such a grouping and for the group to liaise with the HR on management arrangements for the task in-hand.

CONCLUDING COMMENTS

The RT revamps, rather than revolutionises, the existing arrangements for the CFSP/ESDP. A key determinant of the effect of the changes introduced will be whether the future occupants of the position of HR are able to fully utilise the additional powers that now accrue to the position.

The ambition is for the ratification of the Reform Treaty to be complete for entry into force of the revised TEU and TFEU treaties on 1st January 2009. The member states have negotiated the new Treaty with the express intention of overcoming the ratification problems associated with the Constitutional Treaty (as illustrated by changing the original name of the HR away from the “Union Minister for Foreign Affairs”). And with an eye to potential ratification difficulties, two new Declarations (nos 30 and 31) are attached to the RT and provide political cover for governments that wish to convey the impression that nothing in the RT hinders their existing ability to define or implement national foreign policy. Whether the RT will enhance the CFSP/ESDP waits to be seen.

November 2007
Witnesses: Mr Graham Avery, Senior Member, St. Antony’s College, University of Oxford; Secretary General, Trans-European Policy Studies Association; Senior Adviser, European Policy Centre, Brussels; Honorary Director General, European Commission; European Commission official, 1973–2006; Professor Christopher Hill, Director, Centre of International Studies, University of Cambridge; former Chair, Department of International Relations, LSE; and Richard G. Whitman, Professor of Politics, Department of European Studies and Modern Languages, University of Bath; former Head, European Programme, Chatham House, gave evidence.

Chairman: Gentlemen, good afternoon, and thank you for coming to see us. As you know, we are looking at the foreign policy aspects of the EU reform treaty, and we shall be taking evidence over the coming weeks from other witnesses, including the Foreign Secretary in December, before the intergovernmental conference. Will any members of the public please switch off their mobile phones? I do not want interruptions. Perhaps the witnesses will introduce themselves briefly, and we will then start the session.

Professor Hill: My name is Christopher Hill, and I am what I think of as a foreign policy analyst. That is, I am interested in foreign policy decision making on a comparative basis with an historical slant. The European Union’s attempt to create a collective foreign policy over the years is of particular interest to me, as are the foreign policies of individual member states.

Mr Avery: I worked for 33 years in the European Commission in Brussels, and my last post there before I retired was preparing the foreign policy aspects of the constitutional treaty, so I have seen the work from the inside. At an earlier stage, I was a junior member of the British team negotiating for membership of the European Communities, and I was private secretary to a British Minister, so I have served on both sides of the Channel. As I retired from the European Commission 18 months ago, I do not represent it, and I want to make it clear that the views that I express here are my personal views, and not the official line of the organisation for which I worked.

Professor Whitman: I am professor of politics at the university of Bath, and an associate fellow of Chatham House, where I was previously head of the European programme, so I moved from a think tank to an academic environment. I have had an interest in the foreign policy of the European Union and individual member states, and particularly in how they react and interrelate with the EU’s foreign policy, over the past decade. Equally, over 37 years, there has been a steady, if incremental, form of progress, mostly at institutional level, and I think that that must be seen in the context of the enlargement process. If, for example, you had been attempting to create a common foreign policy solely on the part of the original six, you would almost certainly have made greater progress by now than you have. Every enlargement round has inevitably created a challenge for the attempt to co-ordinate separate national foreign policies because the process is intergovernmental and remains so. The process and the outputs are only what the member states want them to be.

That is not to say that it is always going to be like that or that there are not choices in the system that might enable it to become self-transcending, to jump onto a new level—as the French say it, to have a saut qualitatif. There have been elements introduced into the system over the years that could have led to that sort of saut qualitative, such as, in theory, qualified majority voting and what is called Brusselisation, the tendency to increasingly move activities from the member state capitals revolving around the presidency to Brussels itself. Academics also talk about Europeanisation in foreign policy. That is to say that although there are no formal legal requirements to converge their policies—it is a voluntary process—through the process of socialisation, common action, common institutions and the logic of events, member states might gradually move from a situation of great diversity to one of less diversity. That might eventually lead to speaking with one voice all of the time on big issues. Any half-serious observer can see that the EU does not speak with a single voice on all important issues all of the time, or possibly most of the time. Nonetheless, historically that is a formidably interesting development.

Mr Avery: I would say that the European Union is on the way towards having a foreign policy, but it is only partly on the way—maybe halfway, maybe not even halfway. The Maastricht treaty announced a common foreign and security policy and invented the second pillar, the intergovernmental pillar of the external relations of the EU. The Amsterdam treaty introduced a new figure, the High Representative, Mr Solana, who has been very effective in helping the common foreign and security policy to have flesh and reality. This new treaty is another step forward. It aims to eliminate some of the duplication that exists in Brussels, and the multiplicity of voices that exist elsewhere in the world. You will detect from my evidence, Mr Chairman, that I am in favour of the new treaty and generally in favour of the EU and I would like to say that I find it quite worrying that the debate in this country focuses so much on the question of whether the European Union’s conduct
of foreign policy can hinder British national interests. As a pragmatist, I see many ways in which the United Kingdom can act more effectively in international affairs to pursue its interests by acting through and with its European partners, and I think that this treaty will help.

Professor Whitman: I do not want to add much more to what Professor Hill has said, but I think the question that arises is: what is our benchmark for success of the EU in foreign policy terms? That takes us to the question of how we define foreign policy, because clearly the Union, and the Community before it, has been rather more successful in some aspects of its foreign economic policy than in some aspects of its common foreign and security policy.

The key thing about this process, which Professor Hill touched on, is that there is a duality to it. It is both about how far the member states are able to cast a set of agreements among themselves to have collective foreign policy positions on particular issues, but at the same time—I would suggest it has been rather less good at this—it is about taking those positions forward and trying to implement them in their relationships with third countries and through international organisations. Probably in that area the EU has got better in the last few years, but it is certainly not as good as one might expect, certainly in terms of some of the resources and energy that are put in by member states, to make the common foreign and security policy in particular successful.

Q412 Chairman: On the specifics of this reform treaty, how in practice do you think that it offers a more effective way to develop foreign policy in the EU than the existing arrangements? We are told—you used the phrase, Mr Avery—that duplication would be removed. Clearly there is a shift from some of the Community areas towards a more intergovernmental approach with some of these changes. How will that make it more effective?

Professor Hill: My view is that it could make it less effective over the long run, because there are problems that might arise from the role of the High Representative and his double-hatting capacity. I have always been seen by my colleagues as somebody who has taken a rather cautious view of the whole process, because I have emphasised the gap between capabilities and expectations that has existed in EU foreign policy making. In other words, every new development in the whole system, whether that is St. Malo or the High Representative, tends to lead to a sudden revolution of hopes that the EU will become a more effective actor in the system.

Those expectations can be internal or external. Sometimes the EU does well in meeting them and certain innovations have proved modestly successful. In this instance, there is certainly a case for trying to avoid the inherent tension that there is between the Commissioner for External Relations and the Common Foreign and Security Policy. The idea of a European foreign policy is supposed to be held in, especially in the area of so-called soft power, in which the EU does not dispose of the kind of hard power of the United States, for example. Instead it disposes of things to do with accession, commercial policy, development aid and so on—carrots rather than sticks. Those policies need to be coherent, and there has been talk of consistency and coherence as a desideratum in EU foreign policy going back at least to the Single European Act 1986, and possibly the Genscher-Colombo plan and the London report of 1981.

Inevitably, when there is a system of diverse institutions and separate pillars, which the current reform treaty attempts to go beyond, there will be an inherent system of checks and balances. The American system is supposed to laud checks and balances as a way of controlling excess in foreign policy making. However, I do not think that many people would see it in those terms in Europe, because it is not linked closely to the democratic dimension—it is purely a bureaucratic and policy-making issue, and one of great duplication. Mr Solana and Mr Patten worked well together for example, and the argument would be that if those different roles were put together in a single individual, the degree of coherence would be increased.

Q413 Chairman: Does anyone wish to add to that? Mr Avery: Plainly one thing that does not change in the treaty is that there is still a clear difference at the decision-making level in the Council between the first pillar and the second—the Community mode and the inter-governmental mode. The reform treaty does not change that aspect. It is clear that the respective responsibilities of the institutions in Brussels and of Brussels and the member states are not changed by this treaty.

What will change is that there will be a more efficient system upstream and downstream of the decision making—in formulating and developing the policies and presenting proposals to the Council, and in executing the policies and in representing the European Union in the rest of the world. That means that we will first eliminate some of the duplication between the two agencies in Brussels on either side of the Rue de la Loi—Commission and Council—and secondly, it will simplify the multiplicity of voices by which the EU expresses itself outside.

Let me say a word about duplication. It is very difficult in real life to make a categorical distinction between what is first pillar and what is second pillar. I can give two examples of activities that are, in principle, first pillar Community activities, but in which the Commission has played a very important role in foreign policy, and done it rather well. I am referring to enlargement policy—the successful enlargement for Central and Eastern Europe, the ongoing effort for reform in the Balkans, and the Europeanisation of Turkey. Secondly, there is neighbourhood policy—handling the problems in the countries that lie between us and Russia. At present these two areas of policy, which I believe are a priority for the UK Government because they include questions like Kosovo and Russia, are handled both by the Commission—and by different Commissioners in the Commission—and by the Council and Mr Solana. The two teams get along well in general, but there is a certain rivalry, competition and overlap, and it would be far
more effective to combine the energies and talents in what I would call a joined-up approach to foreign policy.

Professor Whitman: Perhaps I could add that the changes as proposed in the reform treaty represent something like a revamp rather than a revolution of the CFSP. That is partly for reasons that have already been picked up on in the role of the High Representative but also, as has been indicated, the essential quality of the CFSP in terms of its “intergovernmentalness”, if we can call it that, remains unchanged.

Q414 Mr Horam: I want to return to a point that Mr Avery made earlier. He said, rightly, that a lot of comment in the UK has been rather negative in this area. How do you see a stronger EU foreign policy benefiting the UK?

Mr Avery: In my perception of most of the things that are going on in the world, there are not many international problems where the United Kingdom acting alone is going to have much influence. In many of the problems which are a priority for British foreign policy acting with the European partners and trying to define a European common interest is likely to be a much more effective way, also of effecting British interests.

Let me take the example of Russia. Russia is a case where, manifestly, the United Kingdom and the other member states maintain bilateral relations and have bilateral problems—Russian émigrés killed in London and things like that that have nothing to do with the European Union. But at the same time there is a very big area of activity where European positions on questions concerning Russia are the only way effectively to handle the Russians. The Russians want trade; they want access; they want membership of the World Trade Organisation, and these are all areas where the best way to inflect and handle Russia in the way we want is with a European common position.

Professor Hill: May I add something to that? I think that if the CFSP did not exist, the UK would probably want to invent something like it on an informal basis. We all know that in the world even superpowers cannot do without allies of some kind; they have to work in some multilateral framework. The only question then is whether you want informal multilateralism with shifting coalitions, or certain structures that give you a basis to build up what the French call the communauté de vue—a kind of common philosophy of foreign policy—and maybe use common instruments on a steady basis. It is paradoxical that some member states have actually acquired a more confident and independent foreign policy through the CFSP. Ireland clearly did not have much of a foreign policy before it joined the European Community; Italy and Germany, which were both deeply inhibited by the consequences of world war two during the cold war—admittedly, the coincidence of the end of the cold war and the CFSP arriving was helpful in this respect—have become rather more assertive in their national foreign policy in the past 15 years than they were before. To some extent, the CFSP and the EU generally give them a safe framework within which to express themselves because they will not then be accused of nationalism.

Q415 Mr Horam: That is how it helps those countries, but how does it help the UK?

Professor Hill: Well, if you think, for example, of policy towards Iran if we assume that it is useful even within a kind of agreed western position to have some sort of division of labour between carrot and stick, nice guy and hard guy and so on, it is probably much more effective to have the EU three backed, broadly speaking, by the chorus of the other 24 than for the UK to try to do it alone.

Those of us of a certain age grew up with the notion of the decline of British power as a result of the end of empire, the economic problems of the ’60s and ’70s, and so on. It is not only the EU that has stopped that process of decline, or even turned it around, but the EU has provided a certain platform. I say that not as a federalist at all, or even as a great enthusiast for the principle of foreign policy integration, per se. I tend to take a more instrumental view of matters: if something works, it is good, and if it does not work, make sure that you do not get caught up in the trap. However, there are undoubtedly ways in which the UK has found the CFSP useful—and not just the CFSP, as Graham Avery has said. The biggest example of a successful foreign policy that most people cite is enlargement. Now enlargement is not CFSP; it must be seen in a much broader framework, which has both pluses and minuses from the point of view of thinking about decision making.

Q416 Mr Horam: But the European countries could have got to this stronger foreign policy posture through political will and by co-operating informally. Is it your opinion that we have got to a stage now where there needs to be institutional change of sort proposed to achieve a stronger foreign policy?

Professor Hill: My view is that institutional change has too often been a substitute for change at the level of policy and a willingness to grasp the nettle of difficult decisions on high politics and international relations. Whenever there is a problem in European Union foreign policy, the instinct is to say, “Let’s invent some new procedure”. Many years ago, William Wallace coined the phrase, “Procedure as a substitute for policy,” and there is still something in that idea, but that does not mean that certain procedural innovations cannot be of considerable importance.

If I may just have 30 seconds more, my view of the people who say, “This is all just technical innovation, it is really just rationalising what is already going on, there is nothing in it and it is just an efficiency gain,” is that they are wrong. I think that there are certain small-C constitutional issues at stake here. Equally, those people who say that this treaty is a bomb under national sovereignty and foreign policy and that the idea of an independent
British foreign policy is about to disappear are just as misguided. I think that those two extreme positions are both untenable.

Q417 Mr Horam: Professor Whitman, do you have any view on this subject?

Professor Whitman: Thank you for asking that question, because I think it cuts right to the heart of deciding whether it is worthwhile participating in the CFSP process itself. It also raises the question whether you could arrange things in an entirely different way and get better outcomes than those you currently get.

It is clear that an awful lot of time, energy and effort has gone into reworking the institutions, time after time, particularly one looks at what one might call arcane ways of taking decisions that allow member states to opt out or to suggest that there are peculiarities or particularities of a collective policy that they do not want to be associated with, which have added up to absolutely nothing. So I think that your point about political will is absolutely spot on; if the member states do not have the will to achieve foreign policy collectively, you will get absolutely nowhere. To reiterate the point that Professor Hill made, historically a lot of effort has gone into the procedure rather than the policy.

At the same time, I think that the system that we have at the moment is a system that bears the heavy imprint of successive British Governments and British diplomats in terms of both the predecessor system—European political co-operation—and the system that we have now, the common foreign and security policy. We have arrived at the present system because more informal arrangements did not seem to deliver. That means that there has obviously been a move to make more binding arrangements, for example in decision making.

Q418 Mr Horam: So you think that these institutional changes are necessary?

Professor Whitman: The current institutional changes?

Q419 Mr Horam: No, the ones proposed in the reform treaty.

Professor Whitman: I think that the CFSP could carry on working quite happily without the changes that are in that treaty. Whether it could operate more successfully in the future is another matter. For example, let us consider the position of the High Representative, which is obviously a key change; certainly, revamping the powers of that individual is a key change. Whether those new powers for that individual or office will make a difference will depend, first, on who occupies the office and whether they have the capacity and the wherewithal to use their powers; and, secondly, on whether member states will allow them to build an empire that they can use for the purposes of making European foreign policy more effective, rather than building an empire for the purpose of building an empire.

Q420 Mr Keetch: Gentlemen, you have all described how treaties and agreements have emerged over years. Mr Avery, you described yourself as one of the architects of the foreign policy element of the now defunct constitution. My $64,000 question is whether there is anything in foreign policy terms, either in outcomes or in structures, that is essentially different between the proposed constitution and this treaty. If the answer is no, simply say no. If the answer is yes, perhaps you will explain what it is.

Mr Avery: For reasons of modesty, I must say that I was not an architect of the treaty. But I have described it as architecture because that seems to be a useful metaphor.

The reply to your question in my analysis is that there are two differences between the reform treaty and the constitutional treaty. First, the Minister for Foreign Affairs is no longer called a Minister. I personally think that that is a good change. It was an error to call that person a Minister. The new title is less euphonious, and it is difficult to remember what it is, as it is so long, but the use of the title “Minister” implied that the European Union is modelling itself and its institutions on a state. It is not a state. It is something sui generis and different.

The second difference is a number of declarations, with which I guess you are familiar, that define the scope of national sovereignty and the roles of the European institutions. Those declarations did not exist in the constitutional treaty, but they do now. Professor Whitman: Those are the changes from the text of the constitutional treaty in terms of the additions of the declarations and the name change. The reform treaty is also much more difficult to read. Obviously, because it is a set of amendments to the existing treaties—particularly, in the case of CFSP, the treaty on European Union—trying to get a handle on whether things have changed does require very close and careful reading and the referencing of one text across to the other. But beyond the odd full stop and comma, there are no other changes from those to which reference has just been made.

Professor Hill: What my colleagues say is obviously true. In political terms, I am sure that the Committee does not need reminding that the reason why such concessions have been made to the UK and others, as well as on foreign policy, has presumably been because calculations have been made in other capitals that it gives the best chance of getting the UK’s adherence to the reform treaty, perhaps without a referendum. I agree that it would have been much more effective to have a clear document. The whole language of the constitution was daft coming from the Convention. One would not have started from here.

Q421 Mr Keetch: So let us be clear: apart from a name change and not calling someone a Minister, but calling them something else which we cannot remember, and a few declarations, there is effectively no difference. The outcome of the common European security foreign policy elements of the
treaty and how it affects the UK will be no different than the outcome of the constitution would have been.

**Professor Whitman:** The texts are similar, but whether the outcomes are different is a slightly different question. Having the declarations in the treaty is obviously intended to result in a different outcome, certainly in terms of a political debate about whether this is a different document from the one that preceded it. However, in terms of the text of the treaty itself, there is no substantive difference in terms of addition of new provisions.

**Q422 Chairman:** When you refer to declarations, are you referring specifically to the declaration put in by the British Government relating to the membership of the UN Security Council?

**Professor Whitman:** No, I am thinking particularly about the declarations that are currently numbered 30 and 31.

**Q423 Chairman:** Which are?

**Professor Whitman:** The first one is helpfully entitled the “Declaration concerning the common foreign and security policy” and the second one is called the “Declaration concerning the common foreign and security policy”. Essentially, they are both intended to point out that nothing within the reform treaty is supposed to undermine national and foreign policy.

**Q424 Chairman:** You all agree that that is the only difference between the constitution and this treaty?

**Mr Avery indicated assent.**

**Professor Hill indicated assent.**

**Professor Whitman indicated assent.**

**Chairman:** Thank you. Gisela Stuart will continue on the same area, followed by John Stanley and David Heathcoat-Amory.

**Q425 Ms Stuart:** I want to pick up on something that Mr Avery said. I think that we have all agreed that, in order to carry out foreign policy, you require three things: institutional framework, political will, and capability. The EU has an unhealthy tendency to increase its institutional structures; it actually does its best to undermine their capabilities to act.

As I understand it, Mr Avery was suggesting that we will strengthen, for example, our relationship with Russia. However, the practical experience is that, when national interests conflict with those of the EU, the national ones are alive and kicking. I have not come across a single country so far which has stepped back from its national interests for the greater good. Examples of that include Poland or Germany signing its gas deal.

That brings me on to the fact that, historically, the United Kingdom has always seen its role in the EU as such that it has not liked to be governed or dominated by large countries. It used to be the case that the Germans and the French would agree on something and Britain would not object. However, we have recently seen the national interests of large countries happening to coincide—France, Germany and Britain happily agree on Iran—but I would not suggest that that is the development of a European foreign policy. It is fairly old-fashioned domination by large powers.

First, have we seen so far, or are we seeing, any real evidence of the emergence of a definition of what European Union interests might be in the wider world? Secondly, as we become institutionally confident, but unconfident or incapable in our capabilities, are we in danger of threatening NATO, because all European powers are completely useless without the hard power of the big brother who delivers the stick when the carrot does not work? The third question is this: do you not find it deeply upsetting that following a process that was started to bring the European Union closer to its people, we are heralding one of its great successes, five years later, as having changed the language back so that no one can understand it or read the thing?

**Chairman:** There were a lot of questions there; hopefully the answers will be relatively brief.

**Mr Purchase:** A note would be okay.

**Mr Keetch:** I asked if he could get us a note.

**Professor Hill:** It is difficult for academics anyway; I do not know about Commission staff. The argument about interest is familiar. It is clear that the whole point of a nation state is to have a national interest. It is simply a tautology: while you have a nation state and a Government, you must have some notion of a national interest. The question is how you define that. Plenty of people would argue that the very existence of the EU, which must have an external face, whatever the organisation is for that, gradually starts to redefine the national interest. As I said earlier, there might be smaller differences between those than there might have been in another world, without that institutional structure and that historical experience. You are absolutely right that when push comes to shove on big policies, as we saw on Iraq, things scatter.

I was in Moscow six weeks or so ago, and the Russians were enjoying the idea that they could easily play on the differences among the EU member states. Surely the natural response to that is that we should learn to be more “solidaristic”. We should take a longer view on this if we want to have any influence on Russia. Of course, that then raises your second question about the threat to NATO: is solidarity not best expressed in a more western and a wider international framework? However, we then come up against the argument that plenty of people in Europe think that American foreign policy has been something with which they would not wish to associate themselves in recent years, but they do not want to be naked in the conference chamber either. They would like some form of shelter, which the EU provides—maybe the Commonwealth and other institutions do as well. It is good to have the choice. Personally, I do not think that NATO has been seriously threatened at all. Plenty of people thought that it would—and should—disappear after 1991, but it has not. It has proved to be remarkably strong. In many ways, the battle over combined joint task forces and so on was won by NATO. The argument involving Turkey is an example. The EU has some
access to NATO assets, but those are pretty limited and controlled ultimately by the Americans. I do not think that that is a serious issue.

I am sorry if this is too long an answer, but an EU foreign policy has a rationale only if you think that American leadership should sometimes not be followed. If you were willing to follow American leadership 100% of the time, you would not need an EU foreign policy. I do not think that American leadership has to be followed automatically, ipso facto.

On the democratic deficit, I will say only that unfortunately even this Committee has not managed to assert its power very effectively over national foreign policy in recent history. In every nation state and every international organisation there is a serious democratic deficit.

Chairman: I think that that debate is for another day.

Mr Avery: I would like to pick up two points that Gisela Stuart mentioned. First, she referred to the traditional situation in Europe and the great power syndrome. My analysis of the present situation is slightly different. One of the characteristics of the EU system is that there is no hegemony. Who is in charge in European foreign policy is a very complicated question to which there is no simple answer. The magical and important thing about the EU system is that it keeps the big member states together and, at the same time, reassures the smaller member states that their interests will not be run over.

On the question of interest, one of the most difficult things in European foreign policy is defining what the common European interest is. It is not different from national interests, but is a synthesis of them. You are perfectly correct to say that when it is not possible to synthesise them, that does not exist. One of the things that becomes quite evident in the conduct of foreign policy is that a precondition to having an effective influence on an interlocutor is that the Europeans speak together with one voice, for example in the case of Iran and Kosovo. Some of our interlocutors much prefer us to speak in divided ways.

Finally, the challenge of the EU foreign policy system—and of the new system that this treaty would bring—for the British, both collectively and individually, is to persuade others what is the European interest in the way in which the French have. They have defined European interests in a way that is accommodating to France. That is something that the British, with their extraordinarily successful tradition of foreign policy and diplomacy, are very well equipped to do.

Professor Whitman: I agree entirely with that last point. There is a problem with looking just at this document. It is impossible for a reasonably intelligent individual to sit down and read it, whereas they could read the constitutional treaty. A reasonably intelligent individual probably would not want to sit down and read the constitutional treaty, but they could do so.

To bring together the points about decision making and implementation, the problem with the EU foreign policy making system is that in the way it is constructed, it operates in a similar way to Lego. It is made up of little building blocks that are added together. There are little building blocks of areas in which there is no major contestation between the member states, areas where they have easy fights, and areas where they have no problem. If you ever watch kids playing with Lego, they tend not to build the thing that is on the box—the aeroplane, train or whatever—but lump all the bricks together and create some horrible amorphous mess. That is exactly what we have with the CFSP. All the little bricks are added together, but they are not structured in a way that bears much weight in terms of having a clear set of principles that organise foreign policy. That does not allow third parties, in particular, to get a good handle on what we stand for collectively. The security strategy has changed that a little bit, but it is not enough, and I think that that is our problem.

Chairman: Perhaps we could go on to a discussion about Transformers as well.

Q426 Sir John Stanley: May I follow Paul Keetch’s question? Just to complete your answer, can you confirm for the record that the declarations to which you referred are not legally binding?

Mr Avery: I am not a lawyer, but from my acquaintance with such treaties, the legal dispositions are in the text of the treaty, and the declarations are interpretative.

Q427 Sir John Stanley: They may possibly bear on interpretations, but my question is a direct one: will you confirm—if you do not think you can, we need to get a lawyer if necessary; but I do not think there is much doubt about this—that the declarations are not legally binding?

Mr Avery: They are not legal instruments.

Sir John Stanley: Thank you.

Q428 Mr Heathcoat-Amory: During the Convention on the Future of Europe, the invasion of Iraq occurred. The point was made that all the institution building in the world could not have prevented the difference of opinion that arose among member states. Can we return to the point that what Europe lacks is political agreement on big issues and small? A recent example is our failure to convince other member states to isolate President Mugabe, who will attend the EU-Africa summit despite our objections. No institution building will prevent that, so why are we committing ourselves to a legal structure that will bind us—possibly—in ways that we will find disagreeable, when we should be finding allies and making alliances with those who think like us, as we always have done?

Professor Hill: I do not think we are committing ourselves to any different form of structure than we have been doing since at least the Maastricht treaty and possibly before. That provided a framework within which co-operation should be encouraged and could take place. The fact that it does not happen shows in some ways the weakness of the power of the institutions and legal commitments in the text, because member states, which do not need
Mr Heathcoat-Amory: May I just pick you up on one thing that you said—that it will not be binding in any sense—and refer you to the actual text? You are right that common actions are replaced by decisions defining actions. To me, that is just playing with words, but the new treaty also says that member states “shall comply with the Union’s actions in this area.” So, there is a legal treaty requirement to comply with an action. I agree that that is probably taken by unanimity, but let us suppose that we have a change of Government and the new Government do not wish to continue down a certain path, but wish to go with the United States, perhaps. Do you not think that we will be bound by treaty law to something that might become disagreeable?

Professor Hill: It depends whether you think the law is self-enforcing. There is no effective enforcement mechanism in the system as outlined under this treaty or any previous treaty for any divergence from a common foreign policy line. There is an attempt to exhort, to use the language of law, but as you say, only once a decision has been taken by unanimity. To some extent there is a double lock: there is unanimity in the first place and then there is the inability to enforce any action against delinquent behaviour. We all know that there has been plenty of delinquent behaviour—what in the trade is called defections from a common position. We saw differences over the recognition of Macedonia; it had not got to the point of a common position but the Greeks simply refused to go along with it and then there was a political argument. This is politics; foreign policy is still very much politics.

I am not a lawyer and it is not for me to pontificate about it, but law, in this sense, is rather different from what happens in the domestic realm and it is pretty different from what goes on in pillar I and the common commercial policy where we have signed up to a single competence. At the moment we have multiple competences. The things that Graham Averyst has been discussing were an attempt not to restrict the number of competences but simply to reduce the cacophony of separate voices in diplomacy.

Mr Avery: May I pick up Mr Heathcoat-Amory’s reference to Iraq? Iraq was a terrible failure of foreign policy individually and collectively on the part of the Europeans because they split. My impression was that one of the lessons that was taken by the European member states, including the United Kingdom, was that next time, whatever next time is, we must try much harder not to be pulled apart in the way that happened.

Vis-à-vis Iraq, the fundamental objectives of the Europeans were the same. Foreign Secretary Straw said as much: that one of the lessons of the debacle was to try to find more actively common interests and common strategies. I submit to you the thesis that in order to do that the creation of the new European External Action Service should help in defining better and more effectively what are the common interests that the member states of the European Union can effectively pursue, particularly since the service will consist not only of people from the European institutions but people from national diplomacy who understand very well what the national interests and national measures are.

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declaratory in terms of setting out the collective view about a situation in a third country on a certain issue.

Professor Hill: The problem with a change of Government also exists simply at the national level. If a Government sign up to something and another Government comes in and wants to withdraw from the European Union, for example, it is free to do so. That is the theory of sovereignty.

Chairman: Can we move on? Malcolm Moss, please.

Q431 Mr Moss: Professor Hill mentioned some of the failures of European foreign policy—I think that Macedonia was cited—and some successes, such as the creation of protectorates in the Balkans. Professor Whitman talked about Lego building blocks being assembled in a fairly chaotic manner. It is obvious that there are historical problems with European foreign policy. Will the reform treaty address all those problems, or will it leave many of them unaddressed? If so, which ones?

Professor Hill: I think that it will leave unaddressed the fundamental problem that has been alluded to—national interest—because it cannot currently be addressed, unless we wish to have a profound transformation in the nature of the foreign policy system. If enough member states were willing to sign up to a system that genuinely communitarised foreign policy, that could conceivably create the kind of discipline that would lead to member states falling into line—as they do, broadly speaking, in the common commercial policy—but there is no will that I can see to do so.

Some member states would no doubt like to see a proper federation, and a proper federation could not exist without a single federal foreign policy, and the converse, but we are light years from that. We are probably further away from that possibility than we were at the time of Maastricht, when there were plenty of hopes. There have been various times when the Belgians, Italians and so on have thought that there would be a great move forward, but they are much less optimistic about it now.

There are practical problems of the kind that we have mostly been discussing. If we have a High Representative—Mr Solana; most people think that he has done a pretty good job within the confines of his terms of reference—we must face up to the question of what resources he should have. At the moment, he does not have many: he has some special representatives, he has some help and he obviously has the council secretariat, and a policy unit, both rather smaller than the Commission's resources. Is that OK? Do we want to leave it at that, or do we want to leave him swinging in the wind?

Mr Avery: The new treaty does not affect the substance or the objectives of foreign policy, which is why I call it architecture. It is not about the decoration; it is about the structures. It is a relatively marginal adaptation and absolutely not a fundamental reform of the structures for foreign policy.

You mentioned the events that took place in the Balkans when Yugoslavia broke up. There were some tragic errors and mistakes. Without being unduly optimistic, it seems to me that we have put ourselves in a better position to handle the potential risks and problems in the Balkans than was the case 15 years ago. Certainly, the international community in general expects Europeans to deal with the problems in our own backyard, not the Americans or NATO.

Professor Whitman: To answer the question in terms of decision making and changes within the treaty and whether they will improve the quality; if you look back on what we have had in previous treaties—constructive abstention, forms of enhanced co-operation or limited introduction of the qualified majority vote—none of those have made any real difference to the quality of decision making. The quality of aspects of implementation is another matter, and the question whether the High Representative can improve the flow rate of decision making with the enhanced powers is an interesting one that we could perhaps take up later.

Q432 Mr Hamilton: The role of the High Representative is fairly clearly set out in the reform treaty, is it not? Could any or all of you tell the Committee whether you think that that role can be realistically fulfilled?

Professor Hill: The fact that there was rowing back on the title of the High Representative was a political way of taking the dynamite out of the situation. It is also a recognition of realities, in the sense that there is no way in which the High Representative disposes of the resources of even the national Foreign Minister of a member state, and we must put it in the context that Foreign Ministers of individual member states have suffered various challenges from other people getting on to their turf. Almost every Department actually has external relations these days and we know what happened in this country, in terms of No. 10 getting involved in foreign policy making—we are suffering the consequences.

My view is that we should value the expertise of specialist diplomats, and Mr Solana undoubtedly is a highly experienced specialist diplomat, somebody who was Secretary-General of NATO and so on, and very difficult to replace in lots of ways. However, we also need some kind of mechanism for creating co-ordination between the inevitably different personnel involved in foreign policy making these days, given that almost all policy is foreign policy to some degree. A person like Mr Solana can only hope, I think, to have a gradually increasing profile in parallel with particularly the major member states.

Over time, one would expect that, because of limited resources, the smaller member states among the 27 might be happy to take their lead from not just the big three. As Mrs. Stuart says, they are concerned about the directorate of the big boys throwing their weight around, so in many ways a Solana figure can be a counterweight to that, or some kind of guarantee against the excessive hegemony of the bigger countries. But also, the bigger countries are very unlikely to be agreed 100% of the time and it is Solana's job, or the High Representative’s job, to try to help them come to an agreement if that is going
to be in the collective interest, which normally one assumes that it will be. If he has the resources available to him that exist in the Commission and the delegations and so on, that will make his life easier to some degree, but it will also give him, as Mr Avery has pointed out in his written work, some pretty big headaches—management headaches. I am not sure that I would like to take on that role. Not that that is ever going to happen.

**Q433 Mr Hamilton:** So, can the role be reasonably fulfilled? From what you are saying, you would need a considerable extra resource to allow him to counter-balance the larger nation states within the EU.

**Professor Hill:** He will undoubtedly need a team, and not just of specialist diplomats in the field or of working group advisers, desk officers, but of politicos—people who are like him, who are effectively political but working within the framework established by the Council of Ministers. That is the challenge, I think.

**Chairman:** I think that we will have a vote in three minutes, so it would be useful to get answers on this question from the other two before then. If there is a vote at 4pm we will break for 15 minutes, and we will break for half an hour if there are two votes. Hopefully there will only be one, then we will come back and continue.

**Mr Avery:** Yes, it is a hell of a big job but I do not think that it is impossible. Objectively, I do not think that it is more difficult than being President of the European Commission, which is diabolically complicated. This new personality will have the so-called two hats: the common foreign and security policy hat, which is rather well handled already by Mr Solana and the perhaps more difficult role of being Vice-President of the Commission and coordinating the internal work of the Commission, a function that in my opinion is very badly needed. In addition, he has the third hat of being President of the Council. I have to say that in my analysis, that is one of the most complicated aspects of this. If the new person is to submit proposals to the Council, both with his common foreign and policy security policy hat and his Commission hat, he will also be presiding over the Council that takes decisions on them. That is psychologically and practically quite a tough proposition, so I think that the problem with the third hat has been underestimated.

**Professor Whitman:** From what we have heard from the other witnesses, this job will result in a breach of the working time directive and this individual is going to have to work pretty hard because they are taking the job of the presidency, as well as the job of the vice-president of the Commission. There will also be the political dynamic of how this individual fits with the new President of the European Council, and the responsibilities that they have for aspects of representation of the European Union’s foreign policy with third countries and the President of the Commission, who presumably will not want to see themselves out of the limelight in the way that this re-vamped job could be. I think that it is a big ask.

**Mr Avery:** May I add that he can only do it if he has an effective service working for him? Perhaps we can discuss that later.

**Chairman:** We will come on to that in the next part of the sitting, after the break. I am conscious that there will be a Division in about 10 seconds, so I think that it is sensible to break before I get a new question in. We will be back in 15 minutes if there is one vote and 30 minutes if there are two, and I think that the bell is just about to go.

**Sitting suspended for a Division in the House.**

On resuming—

**Q434 Chairman:** I would like to pick up where we left off, on the question from Fabian Hamilton about the High Representative. We had been referring to Mr Solana and his role. What is your understanding of the appointment procedure for this new High Representative, and how do you think that that procedure is going to work out?

**Professor Hill:** It is the—

**Chairman:** Sorry. We will start with Professor Whitman.

**Professor Whitman:** In effect, the High Representative will have to be approved by the Council, and they will also have to go through the same process as the College of Commissioners in that they will have to be approved by the Parliament. I guess that what lies behind the question is a consideration of what kind of individual one might choose for the job, rather than simply the formal process of how one chooses the occupant for the position. That is an absolutely fascinating question, because clearly the European Union fell on its feet when it chose Javier Solana as the first occupant of the old High Representative job. It picked up somebody who has done a good job, both in picking the fights that he decided to involve himself in on behalf of the EU, and through being simply a very capable individual in terms of the experience that he brought to the job.

There will be a succession difficulty, because obviously whoever replaces Solana must have the qualities that Solana had, but must also be an individual who must take on this very different job, particularly when one considers where they will sit in the institutional architecture, bridging both the Council and the Commission, and also, in a way, making the Council in their own image, by taking on the presidency responsibilities that they will have. So, the job has a formidable job description. Indeed, there was not much of a job description before Solana took the job.

At the same time, there will also be a market for somebody to be President of the European Council, so there are two plum jobs, plus the President of the Commission and the other members of the College of Commissioners. So, there needs to be a collection of very well qualified individuals, preferably not Spanish individuals for the CFSP job, and preferably not individuals from a larger member state, in terms of divvying up.

**Mr Avery:** I would like to pick up on the tribute that Professor Whitman paid to Javier Solana. I would also like to say that Mr Solana was quite lucky to
have a counterpart of the quality of Chris Patten on the other side of the road when he began his functions. That was a very important beginning, with the existence of good relations with the Commission.

As far as I understand it, the procedure for the nomination of the new High Representative is not radically different from the present procedure, but, of course, it becomes more complicated in so far as he is a Vice-President of the Commission. The timetable is a little complicated, because if this treaty comes into force, as is planned, on 1 January 2009, the High Representative/Vice-President will plunge into a European Commission which still has 10 months of life left. If it happens to be a prolongation of Mr Solana, who has a Spanish passport, then the present Spanish Commissioner will have to leave and his portfolio, which is economic and monetary affairs, will have to be reallocated. There could be what might be called a transitional question for 10 months. I believe that there was an elaborate and highly negotiated form of words which stated that the new figure, the High Representative Vice-President, would, on 1 January 2009, be subject to some appropriate procedures of consultation with the European Parliament. However, when it comes to the new Commission, which would normally take office on 1 November 2009, it seems normal that in so far as he wears his Vice-President hat, he will have to go through the same hearings and procedures as other members of the Commission.

By the way, it is evident that some time in 2009, there will be a big question of allocating three jobs: President of the Commission, President of the European Council and that of Mr Solana, or his successor.

**Professor Hill:** I would add only that although there are many people in Europe who have expertise in the diplomatic “pol-mil” sort of area, there is only a small group who could be candidates for this kind of job, for the reasons that my colleagues have outlined. They would have to have political weight, managerial capability, experience of at least one side—one hat, as it were—and external credibility.

Names such as Carl Bildt and Joschka Fischer are bandied around—it has to be someone of that sort of level, but there is not a huge number of them. Will you give it to somebody who has outstanding personal capabilities and comes from a small member state? Would you risk causing problems by giving the job to one of the big three? Those are the political considerations.

The last important element, which undoubtedly came into play with the appointment of Mr Solana, is that he or she must be somebody who the Americans are willing to take seriously. That does not mean that they have a seat at the table, but we all know that in European foreign policy making, the United States has a certain privileged position as an important ally. If it chooses not to take this person seriously, it will make his or her job much more difficult.

**Mr Avery:** There is also the gender question. Certainly men should not occupy all three of these positions. Finally, I think that it would be well received if one of these big posts went to somebody from a new member state—one of the twelve states that joined the European Union more recently. Those are other political considerations that will come into the grand game.

**Q435 Mr Horam:** The Government have portrayed the new role of the High Representative as a creature of the member states. I notice, Mr Avery, that in your interesting paper you say, “There is a suspicion within the Commission that the arrival of the new Vice-President will enhance the influence of the Council and member states, promoting the intergovernmental method in foreign affairs to the detriment of the Community method.” Do you think that the Government’s description is right, and do you think that your opinion is valid—that this will shift the balance towards the intergovernmental, member-state approach to foreign policy?

**Mr Avery:** The fears within the European Commission, which I mentioned in my article, are fears that I personally think were not very well founded. As I said earlier, nothing changes in the decision-making procedures. What changes is the formation and execution of policy. As to what the result will be—whether it pulls in the intergovernmental direction, or the Community direction—I find that extremely difficult to forecast. It remains to see who the characters are and how they play the part.

**Q436 Ms Stuart:** May I first take you back to why there is perceived to be a problem? Why have we created this new position? The problem was that the High Representative was doing the foreign policy, but the Community itself has tools and aid, and all those things require co-ordination. You are absolutely right that Solana was not only extremely capable, but, to my mind, one of the very few people who forgot his nationality. You did not think that he was a Spanish representative, but someone who represented the Union. Mr Avery was right to point out the third hat that people have forgotten about. Do you think that we have ended up creating a creature that, by compromise after compromise, will be not only unable to address the original problem of co-ordination, but will end up having one foot in every place?

What particularly worries me is that he will be Vice-President of the Commission and the only Commissioner who cannot be sacked by the Commission President. The European Parliament suddenly has a foot in the whole row, which originally it was not supposed to have. This is extremely ill-defined. Have we created a role that is even more dysfunctional—whoever has it—than what we tried to address by creating the position?

**Mr Avery:** I do not much like the expression, “creature of the member states”, but I understand it in the sense that the new High Representative, with both his hats, will report to the Council. The decisions will continue to be taken in the Council of Ministers. It is an interesting reflection that if you take the role of the Commission at the present time, it does not have any power in foreign affairs. It
manages policies and conducts negotiations according to mandates given by the Council, and it takes initiatives to develop policy, but those are initiatives for decision by the Council.

The role of the High Representative at the present time is rather similar to that, except that his field of action is common foreign and security policy and the decision-making mode is different. One of the practical problems when you work in the system, as I did, is to distinguish between the field of common foreign and security policy and the field of Community instruments. With development aid that is relatively simple, but on the questions of enlargement and neighbourhood policy that I mentioned earlier, it is much more complex.

It might be difficult, but it is not impossible, for one individual to present and develop strategies in these areas, provided he has an effective service helping him. The present situation is sub-optimal because there are two separate agencies on two sides of the Rue de la Loi that both come up with initiatives which are sometimes overlapping. I must choose my words carefully here. There is a degree of competition—even rivalry—which is normal in organisations. I do not reproach the individuals, but highly talented people spend a certain amount of their time worrying about how things will fly, or play, on the other side of the pillar.

Professor Whitman: What the job has done is to solve one problem and create another. The problem that is solved is that associated with the rotating presidency, by having an individual who takes on that role. The uncertainties that come with the old system of rotation are intended to disappear. However, that creates the problem of a job that is extremely difficult to execute because we have retained the old pillar structure. Pillar 1 and pillar 2 are still there. We may now call these things external action, but the only thing that brings them together is a bit of shuffling around in the treaties and a new bit that has been tucked into what was title V, which sets out what the ambitions are for external action in general, and the promise that there will be more resources to assist the new High Representative in the job that is asked of them.

The member states have quite a responsibility to make a success of the position. It is not just a question of whether the individual concerned is the best individual for the job. There will have to be a bit of shoulder to the wheel, not just in terms of selecting an individual who is capable, but also in making sure that the job works. It will obviously have an impact on the foreign policy making system itself if there is an individual who cannot attend to the Council or CFSP bit of the job because the external relations side is taking so much time, energy and effort.

Professor Hill: We almost have no choice; it is the law of large numbers. The more you enlarge the Community the greater are the pressures for rationalisation. How are we going to cope with this? It will not run itself. There is a tendency to try to counterbalance enlargement with some sort of centralisation and streamlining. It is also the law of unintended consequences. I am sure you remember that the Convention was really supposed to deal with the consequences of enlargement but it ended up concentrating on foreign policy. Most of the provisions which have been talked about as innovations relate to foreign policy. That in itself speaks not just about the perceived need to streamline, but about the fact that the Union still has quite considerable substantive ambitions to make a difference in world politics. It thinks, “That is what we have really got to address. The outside world wants us to speak with one voice and if we want to influence everything, we have got to do that.” We are almost forced into the more unified approach to highly complex decision making. In this case, once we said that the system is too big to have the rotating presidency, a lot followed from the understanding that the rotating presidency was no longer viable in a union of 25 or 27 states. Of course, there are powerful arguments for taking that view. It will still survive in some form but not in its foreign policy forms.

Q437 Mr Heathcoat-Amory: It is well known that the British Government did not like the double-hatting of the new High Representative and tried to amend it during the Convention. Also, they did not like some of the language describing the role of the High Representative including, I believe, the description that he or she “shall conduct” the Union’s common foreign and security policy. Do you believe that the fact that this individual will be a Vice-President of the Commission and therefore presumably bound at least by the culture of the Commission that it shall not take instruction from nation states and so on, will undermine the proclaimed intergovernmental nature of foreign policy in practice?

Professor Whitman: I think it is really a case of waiting and seeing. Existing members of the College of Commissioners, although they swear their oath, are effective conduits of national ideas, even though they are servants of the Union. That situation will obviously continue into the future. On the institutional side it obviously muddies the waters in terms of having one institution straddling this chasm—no, chasm is not a proper representation, so let us say one institution standing on two pillars and trying to straddle the two. We simply do not know whether the Commission side of the job can be combined with the foreign policy side. The foreign policy side of the job is what the High Representative is doing now, plus the stuff that the presidency was doing in the past. The Commission side of the job is obviously what already exists in terms of the commissioners doing the work that they do on external relations. A lot will depend on the support infrastructure that is there for the individual concerned rather than the question of precisely where they sit in the institutional order.

Q438 Mr Heathcoat-Amory: Is it not rather alarming that we are about to sign a treaty but we do not know what will happen?

Professor Whitman: It happens with plenty of treaties, does it not?
Q439 Mr Heathcoat-Amory: It would not happen with any treaty that I signed. I want things nailed down because this is for ever: there is no way of amending it.

Ms Stuart: You did sign Maastricht.

Mr Heathcoat-Amory: I didn’t, actually. I must correct the hon. Lady. I am clean on that one. I had a number of opposite numbers who did sign it, but I did not. Surely, treaties are to give precision, clarity and certainty to the public about who is going to take the decisions in their name. You seem to be saying that there is large degree of ambiguity about exactly how this is going to pan out.

Professor Whitman: No, I think that it is clear in terms of what the High Representative’s responsibilities are in the area of the common foreign security policy. I think that it is unclear whether one individual will be able to cope with the responsibilities of operating on both the CFSP side and the Commission side. I do not think that any treaty that we could provide a clear indication of whether that job will be possible once it has been road tested. There are plenty of other positions in the Union that both good and bad people have done, and we have given jobs that are manageable and not particularly manageable. One of the striking things about the treaty, particularly when it comes to the presidency, is how little there really is in it about the responsibilities of the presidency, yet we see how much presidencies have done over time.

Mr Avery: Mr Heathcoat-Amory mentioned the Commission and its culture. I should like to come back on that. To me, there is a very important job that needs to be done in the European Commission: to co-ordinate and manage better its efforts and activities in foreign affairs. At present, there are four Commissioners dealing with foreign affairs in one way or another: trade, development, enlargement and European neighbourhood policy and the rest. In the last Commission, it was accepted that despite the fact that Chris Patten was not a Vice-President, he was a co-ordinator. In the present Commission, the co-ordinator is the President, but with all respect to the talents of José Manuel Barroso, he has so many things to do that he does not have enough time to handle foreign affairs. All that I am saying is that there is a necessary task: to get the Commission’s act together better in the field of foreign affairs.

Secondly, you are perfectly correct to say that Commissioners and Vice-Presidents take an oath in the Court of Justice in Luxembourg that they will not take instructions. I am not quite sure what the deontological position of High Representative Solana is, but it seems to me that he, too, would undermine his role if he took explicit instructions from an individual member state, particularly the one from which he comes.

My last point is simply that the activity of both the Commission and the Council secretariat apparatus consists of making proposals to the Council. The Council remains the decision-making body under the new treaty. The execution and management of those policies will be delegated under guidelines that are, again, decided by the Council. I do not see a big potential conflict. What I see is an improvement.

Let me put my point this way. A Foreign Minister in the Council gets foreign affairs proposals from the Commission on this and from Mr Solana on the other—sometimes joint proposals and sometimes separate proposals. It is rather incoherent. The purpose of the changes in architecture in the treaty is to ensure that the proposals introduced are better joined up and more coherent. In my opinion, when the Council sees this better preparation of policies and strategies, it will say, “Why didn’t we do this sooner?”

Professor Hill: I disagree with Mr Avery and Mr Heathcoat-Amory in terms of seeing a difference between the formal description and the policy-making practice. Most political scientists would say that you have to start with the formal description but then probe beneath it to see what actually happens. Clearly, it is an intergovernmental process—the CFSP—and, even in many other aspects, the Council finally disposes. But it is also true that because foreign policy extends well beyond the CFSP, as I said earlier, the Commission has had an important day-to-day role—quite rightly, and in many subtle ways—in shaping policy. That is quite appropriate. We all know that national civil servants in member states do the same. It is a discretionary role. The Commission is extremely important in enlargement policy, for example—in taking Agenda 2000 forward. The British Government happened to think that that was all right, so they went along with it and did not make a big fuss. In my view, there should have been a bigger debate about it, but there was not. That was the way of things.

Equally, although I would agree that there are things in the reform treaty that I would describe as potential grenades—they could go off if there is the will to push them forward in future, as with the External Action Service, for example—all that the law does is create possibilities and choices. Clearly there is still an absolute intergovernmental control of the main lines of foreign and external policy, so there is no danger of member states being subordinate to some kind of communitarisation, either through the changing role of the High Representative and Vice-President or through his role in chairing the Council.

As a political scientist, you might say, “Well, the question is how this will be interpreted in practice over a period of time.” That is because there is uncertainty. When we started the European security and defence policy after the St. Malo agreement, a lot of people said that it was the end of NATO and so on. That has not turned out to be the case, but it could be—perhaps 50 years down the road we will have a European army and all the rest of it and NATO will fade away. However, there are a lot of political and legal choices to be made on that road.

Chairman: I think that we need to move on. We have touched on the European Council presidency. We will take questions on that and then come on to the External Action Service.

Q440 Mr Horam: We have said that the new role of the High Representative is a very big job. We talked about the three hats, the difficulties and the sort of
personality that we need to fill it. At the same time, as we know, we are changing the presidency of the European Council, which will last for two and half years and will be an individual rather than a rotating thing. That means that there are two big jobs. Are we going to have two Mr Europes? Is that not a danger? And if so, how do we deal with it?

**Professor Hill:** We are going to have three—the President of the Commission, the new two-and-a-half-year President and the High Representative. In a way, it is a recipe for classic turf battles. That is what has not been thought through so far. As far as I can see, from the treaty, the new President is not supposed to have any effective powers or even resources, but then surely how could he or she do their job and resist the external dimension? We know that all the Heads of Government at the national level get involved in foreign policy whatever they think starting out.

Q441 Mr Horam: So it is going to be a kind of No. 10 versus Foreign Office battle in a European Union context?

**Professor Hill:** Of course.

**Professor Whitman:** There is a resources issue. We do not know exactly how the new President of the European Council will be supported or what resources will flow in their direction, as opposed to the direction of the new High Representative. If you are worried about the content of the treaty in describing the job of the High Representative, you should be even more worried about what the role and responsibilities of the President of Council will be, because there is virtually nothing in there on it. Also, there is virtually nothing on foreign policy. You get one little mention under the common foreign and security policy provisions in the treaty, then another under article 9 where it sets out that they have a big responsibility for representing the EU at “his or her level”—whatever that means. So I think that it will come down again to the question of the relationship between the personalities involved—particularly in the case of the President of the European Council. Will they have enough to do, or will they have enough time to make mischief in the foreign policy area?

**Mr Avery:** I think that the foreign affairs triangle will require very good personal relations and regular meetings.

Q442 Chairman: On the basis of what we know so far, which is not very much, how is the External Action Service going to work? How will it be resourced and what will its shape and structure be?

**Professor Hill:** Mr Avery knows a lot more about that.

**Mr Avery:** On the question of its structure, all of that remains to be decided. The question of its resources it is a little bit clearer because the new treaty, like the constitutional treaty, says that it will be composed of people from the Council secretariat, the European Commission and by those seconded from national diplomatic services. It does not say that they will be equally in three parts: that is another question about the proportions that are envisaged. In the talks with member states that I attended two or three years ago, all the member states insisted that they wanted to have a good share of the people in the new service, but when they were asked, “How many do you envisage?”, they suddenly went dumb, because of course foreign ministries have scarce resources, too. One question to which there is no reply is how many of this composite body would come from national diplomatic services. One can estimate the numbers coming from the Council secretariat and the Commission. The personnel who presently work for High Representative Solana number about 350—of all grades and ranks. Within the Commission, the Directorate-General for External Relations, which is headed by Benita Ferrero-Waldner, has about 750 persons.

Finally, one point that we have not mentioned so far is the creation of the Union Delegations to represent the European Union in non-member countries. It seems to be generally agreed that those Delegations will be based on the existing network of Commission Delegations, which will acquire a new, double-headed status and new personnel, who also come from member states' diplomacies. As an order of magnitude, the staff employed by the Commission’s Delegations throughout the world number about 5,000 persons, of whom 1,000 are Brussels-based, and 4,000 are locally employed of various kinds. That gives you an idea of the number of persons potentially involved.

Q443 Chairman: And in addition to that, people will be seconded from national Foreign Ministries or other Departments?

**Mr Avery:** That is correct. Another question is whether there should be national quotas. Again, in the discussions that took place, every member state insisted that there should be a geographical balance, but not national quotas. That is a normal characteristic of European institutions. It is necessary and normal to maintain a balance between the national origins of the members, and that will apply to the new service—without having specific quotas.

What is unknown, as I said at the beginning, is how many member states’ diplomatic services will be ready or willing to send people. Will they send their brightest and their best, or will they send those whom they are quite happy to send? Those questions will have to be addressed.

Q444 Chairman: A recent article in *The Economist* said that the level of interest and influence from the UK people in Brussels has declined, and that it is not a good career move to spend your time there. Do you think this will improve the career prospects of people seconded from the UK, or will they be going to a backwater?

**Mr Avery:** I have talked to my friends and acquaintances in different diplomatic services about this, and attitudes vary. If you take someone from a smaller country, such as Denmark, then being head of the European Union’s Delegation in Tokyo is probably more attractive than being Danish ambassador in Tokyo, so the new system is quite
People have been talking about the Foreign Affairs Committee: Evidence 21 November 2007 Mr Graham Avery, Professor Christopher Hill and Richard G Whitman

Chairman: I am conscious of time, and we have a number of other areas to cover. Andrew Mackinlay.

Professor Whitman: May I make a couple of observations? First, the reform treaty is unclear whether the Union delegations in third countries are part of the External Action Service, so there is a lack of clarity there, which would hope will become clearer once the member states start to get to work. Secondly, there are some on-the-ground questions to work through, particularly on Union delegations and their relationship to other member states that have diplomatic representation in those third countries. For example, if the Union wants to present a démarche to a Government, at the moment it is the presidency that does that in a third country on behalf of the member states. If it is not the presidency, an arrangement is worked out. Will the Union delegation or its head take on that responsibility in the future, or will there be other arrangements in place?

From top to bottom, right from what service one has in place in Brussels to the relationships with representation in third countries and how they function, there is an awful lot to be done. It is not surprising that the member states attached to the reform treaty that they would get to work once the treaty was signed as opposed to wait for it to be ratified. There is an awful lot of detail to be worked through.

Professor Hill: There is a tremendous variety of third states in which the EU will be represented. The Americans have been notorious for not wanting to take much notice of a delegation in Washington and preferring to deal with not just the embassy of the presidency country but the embassy of the countries it regards as significant, and that might well continue. With the creation of the two-and-a-half-year presidency, there is a serious issue about who is going to speak for the EU in important third-country capitals of smaller countries. As I understand it, in many respects some of the Union delegations are already treated as though they were embassies of some kind, because many small countries are simply not represented.

Looking at the historical pattern—one of my students has been working on it and has written something on it with Richard Whitman—it is interesting that the new member states have increased their representation around the world as part of discovering independence. Those that were under the Soviet yoke have suddenly wanted and needed more embassies around the world. Against that there are financial pressures, because it is expensive. I know that the Irish graph has gone up and down as Ireland has had the money to be able to handle more embassies in the world.

Finally, if I were an MP, I would concentrate on the External Action Service as the key innovation, not for what it will do at the moment in changing the arrangements but for the potential that it has. If it really is to become a European diplomatic service in the future, as Mr Avery refers to it as in his piece, what will be its purpose in relation to the member states' diplomatic services? Is it to be assumed that there will be a natural rationalisation and that member states will no longer need their own services and will be happy to be represented and for political reporting to come through the collective system, or would it be simply to give us the possibility of making that choice further down the road? If we look back over 30 or 40 years, we see clearly that everything has been done by unanimity, but we have none the less come quite a long way from the world in which there was no CFSP at all. We have not always been aware of that.

But even without this, I do not think that public opinion is aware, for example, that there is probably a young German or French diplomat serving in the Foreign Office at this very moment. There have been such secondments and exchanges, without the institutions of the Union being involved, through bilateral arrangements between quite a few member states.

Q445 Chairman: But there are also Australians and people from other countries.

Professor Hill: Indeed.

Q446 Ms Stuart: Would it be true to say that the lack of detail on the External Action Service is a reflection of the fact that it was the hobby-horse of one particular member state to have it in the treaty—the largest member state in the Union at the moment—and that the rest were simply fairly relaxed and not too bothered about it happening and what it would evolve into?

Mr Avery: I was not in at the birth of the idea—perhaps you were closer to it than me—so I do not know about the origin of it. It has a poor name that gives an appalling acronym but, as to who proposed it, I do not know.

Q447 Ms Stuart: No. It was Joschka Fischer’s baby. It was a German insistence, and that was why it was in and out, in and out. If you follow its history, it kept falling off the edge and then being back in again. Unless something happened, I have no sense of any other countries having much commitment to run with this at the moment.

Professor Hill: People have been talking about the idea of European diplomatic co-operation and rationalisation for decades, but it has not come to this point of formalisation before.

Chairman: I am conscious of time, and we have a number of other areas to cover. Andrew Mackinlay,
Q448 Andrew Mackinlay: In listening to the response that was given to the Chairman, it occurred to me that the issue was not where people come from, because any man or woman would have to apply to serve by way of an external advertisement either from the Council or from a national Foreign Office. The point is that, as British parliamentarians, we must ensure that applicants have a road back. Some of the best and brightest of the British Foreign Office, to whom reference has been made, might apply to the external service and serve at the European Union. We need to be satisfied that the British Foreign Office will not block their return, because that would affect ambition and so on, which might be a concern, particularly given that in recent years the Foreign Office has been downsizing and allowing a lot of diplomats to retire early. The road back is as important as open competition. Mr Avery: That is a very good point. I have noticed that the precise terms of service are of considerable interest to diplomats with whom I have spoken. They want the same pay as people in European institutions, they want a return ticket, and they do not want any system of, so to speak, first and second-class citizens within the service—personnel should be equal regardless of origin.

Chairman: Professor Whitman, you were smiling.

Professor Whitman: Perhaps I may talk first about red lines generally, and then red lines specifically in the context of reform treaty. Red lines, putting down markers and using rhetoric as a device for negotiation are part of the normal panoply of devices used when one is negotiating with third countries. Most states have a position that they declare publicly and one that they are willing to accept privately in terms of their ambition for a particular set of negotiations. If one takes that general set of observations and applies it to the reform treaty, we have the expression of the idea that there were a number of issues that the current Government felt uncomfortable with and on which, particularly in this foreign policy area, they had put down some markers.

In terms of negotiating outcomes for what we have here, and from what you have heard from us this afternoon, what we had before in terms of the constitutional treaty in the foreign and security policy area and what we have now are not vastly different, beyond some tweaks in naming and the insertion of these declarations that, really, are reiterations of principles that have underpinned the common foreign and security policy over time. A separate question is whether this is detrimental to our own national diplomacy and particularly our bilateral relationships with other member states. The way in which these issues were presented to our partners caused—shall we say?—some disquiet. It was not necessarily the best way of making the case.

Professor Hill: I think that “red line” is simply a phrase one uses in negotiations, like “a line in the sand”. It attracts attention and is politically effective. It is totally separate from opt-outs and notions that there are areas that the British Government have negotiated, giving them particular derogations or rights, such as the opt-out from the Euro—or Denmark’s, on defence—and all the rest of it. That is a totally separate matter. However, you are right. Frankly, I doubt whether the Prime Minister or the Foreign Secretary want to give the impression that red lines mean that British foreign policy is completely untrammelled by the influence of its European allies or, indeed, by anyone else in the international system. That is obviously wrong. You cannot live in the modern world without having your foreign policy influenced by others, nor should you. It is that kind of solipsism and isolationism that often leads to hubris, as we know.
I do not buy the whole argument that we can live in a happy world of effective multilateralism where there will never be any conflict, and so on, which the European Security Strategy likes sometimes to project as a scenario. However, we need to take into account the views of other members of the international system, particularly those who are more or less like-minded. Whatever differences we have with our European partners or, indeed, with the United States, we have a lot of things in common, as well. It is just part of the give and take of foreign policy.

Mr Avery: I remark that the foreign policy of states and international organisations, by the nature of foreign policy, is very trammeled. In the case of the United Kingdom, it is perfectly clear—it is the object of one of these declarations—that the new treaty does not create legal trammeles for the United Kingdom's conduct of its own foreign policy. But the question is, where are the fields in which you wish to act on your own? As far as red lines are concerned, I do not profess to interpret exactly what it means, but it is an expression that comes from the vocabulary of confrontation and demarcation, rather than cooperation, and I do not think that it has improved the image of the United Kingdom as a partner in the European Union as a result.

Q450 Sir John Stanley: Professor Hill, you seem to be broadly agreeing with my view, which is that, basically, the talk of red lines is a rhetorical device divorced from the reality, which is that British foreign policy for a considerable period, certainly since Maastricht, has not been able to be conducted regardless of our EU partners and is, to a degree, trammeled by them. That being the case, given that the previous Prime Minister, Mr Blair, said to the Liaison Committee earlier this year, “We will not agree to something which displaces the role of British foreign policy and our foreign minister,” would you not agree that that does not match the reality of the present? For a considerable period now, British foreign policy has been heavily influenced and, in part, determined by the EU common position.

Professor Hill: It is for you, Sir John, and, indeed, every other citizen to take a view on how one interprets the various structures and sets of influences that are brought to bear on an independent British foreign policy. Personally, I regard NATO as probably the most trammeled set of influences, out of all the institutions in which we operate, but the EU has certainly been an increasingly important framework for shaping definitions of our own interests and giving us, from time to time, important resources.

If you remember the Falkland Islands war of 1982, we were very keen to get the support of our European allies and we did so for a month, until Ireland and Italy defected from the sanctions policy. Argentina was very shocked that we had managed to get common agreement in the Security Council, or at the General Assembly, from our European allies, but it did not stop us from doing what we wanted to do. If there was to be a war again with Argentina—God forbid—there is no way in which the present set of arrangements could have any significant influence in preventing us from acting independently. Lack of resources and the pressure from the United States, as we saw in 1982, with the division of opinion between Jeane Kirkpatrick and Secretary of State Haig, was another matter. That nearly did undermine us, but in the end it also saved us.

Q451 Mr Heathcoat-Amory: The Government’s position is that important decisions will be made unanimously, and there is provision for majority voting, some of which is taken forward from the existing treaties—that is implementing decisions—and there is a new one, that proposals by the High Representative will be voted on by majority voting if the Council requests that he bring forward a proposal. There is an interesting passerelle clause with which you will be familiar, whereby the European Council may, by unanimity, decide that, in other cases, majority voting shall apply—that is new article 17.

In our earlier exchanges, I think that Professor Hill said that this is not really a legal structure that binds us. Professor Whitman said that foreign policy decisions will be time-limited, but surely, if a temporary European Council decides to extend majority voting in accordance with this article, that is permanent and will bind future national Governments? Am I right about that?

Professor Hill: Given that such a decision is by unanimity in the first place, Britain will have bought into it, by definition. You are worried about the long term consequences for future Governments and so on.

Q452 Mr Heathcoat-Amory: I am certainly puzzled by your earlier comments that we are not really entering into a binding legal framework. I remember you rather implying that this was all a developing series of alliances and that we will see how it works out in practice and all the rest of it, but it is plain to me that the passerelle clause, which is unambiguous and quite short—which makes a change—would alter decision-making to a qualified majority basis permanently, because there is no way of altering that back again except by unanimity, so the ratchet would operate here. I wonder if that is your understanding of it?

Professor Hill: It is not my personal understanding. Professor Whitman: The clause does say unanimity, and so the Government would be entering into an agreement, in the first place, to extend the area in which qualified majority voting would be exercised. If you look at it in the context of that article, you see all the areas in which QMV is spelt out as being possible, in terms of decision-making, rather than in reality, where it is not used very much. You have there very clearly the QMV areas—ones that are connected to the implementation of policy. As that article sits, I do not think that the intent is that you could move away from unanimity in the policy area in general. I certainly do not think that that is implied and I am sure that if a member state, the
commissioner or any other institutional actors tried to pursue that argument, they would not find much purchase.

Q453 Chairman: I will take us for another five minutes and then we will conclude. What effect if any, will the Union’s acquisition of legal personality have on the conduct of foreign policy?

Mr Avery: On that I pass, Mr Chairman. I am not sufficiently legally capable to give you an idea.

Q454 Chairman: Anyone else?

Professor Hill: I am certainly not legally competent either, but I think that from a political scientist’s point of view, it is interesting that there has been a push for legal personality. When Mr Amato chaired the working group on that in the Convention, he was very keen to push the matter on. That always makes me ask why.

Another one of our researchers has written a piece that says that we already have functional legal personality—the EU is recognised by third parties in many respects, and this is just a tidying-up exercise. I would doubt that, and I might therefore be more of the view that law matters because it creates new possibilities. At the moment we have a complex mix covering when we sign agreements, when we are represented in the Quartet or whatever, and therefore the instinct to tidy up, which we see with the High Representative, is quite strong. Legal personality seems to go along with that. We want to say that the EU has the right to sign agreements, and we cannot be bothered with this kind of multiple presence in international organisations.

It is interesting that in the UN Security Council, there is one clause which says that member states will request the Security Council to hear the High Representative on a matter of agreed policy—that is a bit of a change. Mr Solana already speaks at the Security Council by invitation, and of course the Presidency does as well. I suppose the British and the French are not going to step back and let him do it for them.

Chairman: We were in New York a few weeks ago. We have already had discussions on the matter.

Q455 Andrew Mackinlay (Thurrock) (Lab): I understand that the treaty refers to the Copenhagen criteria for the first time—it comes with that condition, it reinforces it. I want to bounce this off you—what is the political significance of that? Is it a way of sending an advance signal to Turkey and those who support Turkey’s candidacy that this really is, dare I use it, a red line? What do you say on the matter? Is it insignificant or should we read it as being much more important? Does it have ramifications for Turkey?

Mr Avery: It is significant because it demonstrates a certain determination on the part of the European Union to apply the criteria for membership rigorously. There have been some cases of in history in which those criteria were not applied with sufficient rigour. Precisely what it implies for Turkey or individual Balkan countries remains to be seen.

It also reflected the fact that in the general discussion about the constitutional treaty, there was a certain disquiet about the consequences of enlargement in general. In operational terms, the fact that it is in the treaty—rather than as it was, in the conclusions of the European Council—does not make a vast difference, but the political implications are there.

Q456 Chairman: May I ask one final question? What is the impact of the reform treaty on the security and defence policy?

Professor Whitman: If you look at the changes that are introduced into the treaty, this is an area in which you actually see the most going on. You have had what was a single article now expanded and obviously moved to the end, and it now appears as a separate section of the treaty on the European Union from how it appeared previously.

If one puts the question of the High Representative and the External Action Service to one side, this is, to my mind, where there is a lot more going on. There are, I think, at least five major changes that take place as a consequence, and I will cover those in 20 seconds if I may.

The first is that they actually expand the ambitions of the ESDP from what it was previously. I think there is within the preamble to that section a lot more ambition than there was previously. Secondly, there is an expansion of the range of the Petersberg tasks. They were fairly scanty in terms of what they were understood to be but they have been fleshed out. There is now an awful lot more ambition for the EU itself: the creation of the European Defence Agency, which has already proceeded, and creating the permanent structured cooperation. That is likely to go absolutely nowhere because the way it has been set up means that the decision-making process is how one creates, joins and leaves, which means that most people will just walk away from it.

Lastly, for me, one of the most interesting bits about the changes is that there is a clause that allows foreign security policy subcontracting to what I would call coalitions of the able and willing, which is a very interesting development that puts the onus back on member states to have the capabilities and the willingness to put them at the disposal of the EU, which fits with things like the battle groups and so on. The ESDP is one of the areas in which more has been happening: there have been more interesting developments, certainly in terms of policy implementation, than we have seen in the CFSP for the last few years.

Q457 Chairman: Do either of you want to add to that?

Professor Hill: I agree that it is an interesting area. With 18 of the missions, we can see that the European Union has finally been doing practical things, although most of them are very small. I do not think, as Richard says, that the provisions for structured cooperation and so on will lead to very much. The truth is that in the area of security, defence and crisis management—all the grey areas between foreign policy and the military area in which the EU has finally started to put its foot in the
water—only variable geometry or coalitions of the willing will really describe the future because not all member states are up to it in terms of their capabilities and not all will want to take on various dangers at any given time. I cannot see anything permanent going ahead without the UK, which is a key player in this area.

Mr Avery: I am going to pass on that point but I want to make two small contributions to the work of the Committee. In 2004–05—

Chairman: If I lose Mr Heathcoat-Amory, I lose the quorum.

Mr Avery: He will like my second remark, too. First, two interesting documents were produced in 2004–05 by Mr Solana and Mr Barroso with first ideas about the European External Action Service. I know Brigid Fowler has these documents and I think you should look at them. They pose more questions than they answer but they are important for your reflections.

Secondly, one of the less noticed elements in this reformed treaty is that it abolishes the European Community, therefore we will have to find another name for the so-called Community method, which some people like and others dislike, because the European Community will no longer exist after 1 January 2009.

Chairman: Gentlemen, thank you for giving us extremely wide-ranging and detailed answers in some very interesting and complex areas. If there is anything you wish to send us in writing, we would be happy to receive it.
Wednesday 5 December 2007

Members present:

Mike Gapes (Chairman)
Mr Fabian Hamilton
Rt Hon Mr David Heathcoat-Amory
Mr John Horam
Mr Eric Illsley
Andrew Mackinlay
Mr Malcolm Moss
Sandra Osborne
Rt Hon Sir John Stanley
Ms Gisela Stuart
Richard Younger-Ross

Memorandum from the Rt Hon Lord Owen CH

DRAFT REFORM TREATY

1. THE LONG TITLE OF THE BILL

The last European Union Bill was introduced to “Make provision in connection with the Treaty signed at Rome on 29 October 2004 establishing a Constitution for Europe and to require a referendum to be held about it”. Despite the promise to hold it regardless of referendums due in other countries, it never had its Second Reading because of the outcome of the referendums in France and The Netherlands. Part 3 contained the provisions for holding a referendum in England and Gibraltar, including the question to be asked (in English and Welsh).

I, together with a large majority of the people of Britain, would like the long title of the proposed Draft Treaty, to continue to have provision for a referendum. As Foreign Secretary, soon after the 1975 referendum, I can attest to the value of having the country united behind our European policy, a unity which was broadly maintained until the ratification process of the Maastricht Treaty in the autumn of 1992 after the May General Election.

One idea which I suggest the Select Committee might like to consider is whether there might be merit in a referendum containing two questions. The first, as recently suggested by the Liberal Democrats, would be:

“Should the United Kingdom negotiate its withdrawal from the European Union?”

The second question would fulfill the 2005 General Election Manifesto commitment given by the Labour, Conservative and Liberal Democrat parties.

“On the assumption that the United Kingdom remains a Member of the European Union, should it approve the Reform Treaty?”

If there were two questions, this would reduce the risk that the answer to any question on the Reform Treaty would be treated as an answer to the question of continued membership of the European Union. It is clear that this risk is of great concern to the Government and to those who believe we should now accept the Reform Treaty, and they believe it would be the objective of the sceptics that the two issues should be conflated in public consciousness. By having two questions posed the issues are clearly separated.

2. THE SCOPE OF THE REFORM TREATY

The final draft version is still not available. But for those UK citizens opposed to the 2004 draft Treaty on the basis that there should be no further integration there will be little comfort in the 2007 draft Treaty. It remains a massive step towards further integration, particularly since it dismantles the intergovernmental pillars which were the foundation of the Maastricht Treaty. What intrigued me about the 2004 Bill was the extent to which this Bill ring-fenced the Common Foreign and Security Policy. I note this because there is more scope in terms of protecting the UK from encroachment by what I suppose we must now call the “Union method”, or the European Court, than is sometimes realized. Any new Bill, I suggest, should extend this approach.

The 2004 and 2007 draft Treaties are substantially the same. Yet it would be wrong to say that there are no changes of benefit to the UK and some of these I have long argued for.

As required by paragraphs 3 and 4 of the Mandate agreed by the Heads of Government in June 2007, the term “Constitution” will not be used, the title of “Union Minister for Foreign Affairs” will not be used, the familiar names of European Community legislative instruments will remain and there will no reference to symbols such as a flag and anthem. “Primacy” will under a Declaration be confined to
codifying the case law of the ECJ (which does not extend to the second pillar). The Opinion of the Legal Service of the Council is annexed to the Final Act within Declaration No. 27 concerning primacy and confirms that there will be no change in the existence of the principle or in the existing case law of the Court of Justice. There are clearer guarantees of continuation of the specific character of the Common Foreign and Security Policy. Declaration No. 30 concerning the common foreign an security policy underlines that the new provisions “do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their nationals representation in third countries and international organisations”. Declaration No. 31 also underlines that the provisions on the common foreign and security policy will not affect the legal basis, powers and responsibilities of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations, including the UN Security Council. The mechanisms for enhancing the controlling power of national parliaments are somewhat stronger. There will be no comprehensive restructuring of the Treaties which will help understanding—at least by those familiar with the existing Treaties.

On defence, “permanent structured cooperation”, has been clarified somewhat. There are some clarifications of the provisions on competences. Although there will be a single body—the European Union—with a single legal personality, it is clearer that it will be capable of acting internally and of concluding international agreements under different procedures and with differing legal effects.

There are clarifications of the powers on sanctions, with particular reference to the Kadi and Yusuf cases, now on appeal from the Court of First Instance with judgment awaited from the Court of Justice.

3. CRITICISM OF THE REFORM TREATY

A major criticism which has NOT been met concerns problems that may arise over the dual mandate of the High Representative of the Union for Foreign Affairs and Security Policy—divided loyalties to the Commission and the Council remain. It is however made clear in the new Article 9e that the High Representative is to carry out the Union’s common foreign and security policy “as mandated by the Council”.

The new provision which gives to the Charter on Fundamental Rights equal legal status with the Treaties and the proposed Protocol is legally unsatisfactory and not watertight from the point of view of the United Kingdom.

There are also no changes which deal with criticisms of the provisions on the President of the European Council. In particular, the wording which allows the appointment of someone who is not a Head of Government. Nevertheless, the wording allows the Council to elect one of its own Heads of Government and they could, under this wording, introduce a rotating Presidency every 2.5 years chosen from a Head of Government within an agreed grouping of EU countries. The political will to do this does not exist now. But if, as I believe likely, the experiment of introducing someone from outside does not work well it should be made clear that this can be done in the wording of the UK legislation. Also there should be a specific mechanism for regularly informing the UK Parliament about the size and development of the External Action Service and the arrangements for any staff support for the President of the Council.

The MOST SERIOUS omission is that it will still be possible for the President of the Commission to be double-hatted so that they have the powers of the President of the European Council and this can be taken by a qualified majority vote. Potentially, if that one single decision were to be taken, the EU would, in effect, come very close to unifying itself into a nation state. On this issue the UK MUST ensure that it cannot legally happen and it is perfectly reasonable to insist that this matter is put beyond doubt.

The Netherlands Government wrote to the Netherlands Parliament on 31 March, 2004, “The Government also shares the opinion that the possibility should be kept that in future the President of the Commission can also be the President of the European Council. The texts before us leave this possibility open.” The Netherlands legal department has added to this advice that the then article 21.3 “The President of the European Council may not hold a national mandate” should be read explicitly as only excluding NATIONAL mandates and not other, ie European, mandates. The new Article 9b requires that “The President of the European Council shall not hold a national office”, but does not expressly exclude the concurrent holding of another European office.

In Peter Norman’s book, The Accidental Constitution, there is a good account of what happened behind the scenes and of the perception behind the drafting of these texts. The author describes [p 279] how on Thursday 5 June the Praesidium “also agreed the European Council President could hold office in another EU institution.” As influential a figure as Amato is described on p 334 as having the view that the “Union must come at some time to having a joint president of the Commission and the European Council.” The United Kingdom Government have stated that this is not a practical possibility—but in this case they should confirm their view by way of a further interpretative declaration on signature of the new Treaty and warn in the clearest possible terms that any attempt to do this would be considered a fundamental breach of trust within the EU.
The Draft Reform Treaty has NOT resolved the contradictions on common defence in the 2004 draft Treaty establishing a Constitution for Europe. The draft of the Reform Treaty as at 5 October 2007 has in Article 11(a), paragraph 1, “the progressive framing of a common defence policy that might lead to a common defence.” And in Article 27(b), renumbered paragraph 2, which takes over the wording of Article 17, reads “The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.” The use of “might” and “will” can only lead to obfuscation. It MUST be resolved in the UK drafting to mean “might lead”.

Never since 1957 have there been reservations added, post-negotiation, to any Community or Union Treaty and I do not believe that in the case of this Treaty any UK reservation not a matter of a negotiated opt-out clause, would be accepted as valid. But Parliament can do much, within the Bill to implement the Reform Treaty, to protect the UK from further encroachment and ensure a Parliamentary braking mechanism so that further integration will require primary legislation. This is in accord with the Prime Minister’s stated belief that further integration should be put on hold for a five year period.

4. A UK Parliamentary Brake

The European Assembly (Elections) Act 1978, for which I was responsible, established the precedent. Its provisions will be in any new Bill on the Reform Treaty—though it has now changed its name in the European Parliamentary Elections Act 2002. What Parliament did in 1978 was to ensure that in future no British Minister could in any European forum commit to enhancing the powers of the then Assembly, now Parliament, without prior primary legislation in the Westminster Parliament. That Parliamentary braking mechanism should now be systematically introduced in the Reform Treaty Bill to cover all of the most sensitive political questions that concern the British people. There are also ways to inhibit any future European Court judgments. The British Parliament should include in the wording of the Bill to give effect to the Reform Treaty, the following:

1. The supremacy of European Community law given effect in the UK by the 1972 Act never covered the Intergovernmental Pillars. Now that the structural separation of the common foreign and security policy will be less clear, it should continue to be clear at least in UK legislation that it retains its separate legal character. This was done in the European Union Bill introduced to give effect to the Treaty establishing a Constitution for Europe. The Declaration affecting “primacy” is an important addition to the Reform Treaty. But since it reflects existing case law it means inter alia that the ECJ cannot extend its powers to cover what was the second pillar of CFSP. This needs to be clarified by UK parliamentary drafting. In addition, no British Minister should be able to accept any new authority for the ECJ over CFSP without prior UK primary legislation.

2. The flexible framework in the Treaty allowing for the dynamic development of the EU law, what is often referred to as “living law” is a potentially dangerous provision. It is perfectly within the UK’s constitutional rights to subject any further changes in these areas, however modest they might appear, to UK primary legislation. This particularly applies to new Article 17 extending qualified majority voting.

3. The application of the Community method to CJHA/CFSS is from now on to be across-the-board. Yet only 15 years ago Member States insisted on an intergovernmental approach to these sensitive issues. The present position of a UK opt out should be subject to a parliamentary brake so only if there has been primary UK legislative approval can it be given up.

4. I agree with the House of Commons European Scrutiny Committee that the Protocol on the Charter of Fundamental Rights will not prevent EU labour laws taking force in Britain. This is an unacceptable situation. It should be made clear that the whole Charter of Fundamental Rights, not just Title 4, will only be applicable and justiciable in the UK after specific authorization under UK primary legislation.

5. Conclusion

In a referendum all of these matters will have to be weighed by the individual citizen and the changes assessed against the undoubted reality that for the UK to reject this Reform Treaty on its own, given what has happened over the last six years, would be a serious political blow to the unity of the EU at a very difficult time for the world economy.

1 Lord Owen’s underlining
2 Lord Owen’s underlining.
Were such changes to be added to the Bill I personally would, despite my deep-seated reluctance to support this ill-conceived Reform Treaty, be prepared to vote YES to a referendum to approve the Treaty in 2008 and I think that could also in a well conducted cross party campaign become the judgment of the British people. If these changes are not made by this Government and there is no referendum, it would be legitimate for a newly elected successor government to pursue detailed delineation of these matters within the EU and include them in UK legislation within two years of taking office.

27 November 2007


Q458 Chairman: If you have mobile a phone, can you put it on silent or switch it off? I had to throw a member of the public out a week ago, so you have been warned. It is pour encourager les autres.

Lord Owen, thank you for coming today to give us evidence on our inquiry into foreign policy aspects of the European Reform/Lisbon Treaty. Obviously, you are very experienced at appearing before Committees of the House at various times, and we very much value the fact that you have given up your time to come and see us today—we welcome that. Given your experience as Foreign Secretary, what is your assessment of the European Union as a foreign policy actor today, compared with the time when you were Foreign Secretary?

Lord Owen: When I was Foreign Secretary, we were just moving into what was called political cooperation, and it was very early days in even discussing foreign policy. We were very involved in getting a community position on African questions, and that did not present very much difficulty when it came to things like South Africa and sanctions and the question of Namibian independence, and the rest of the Community—in those days there were nine—were very helpful over Zimbabwe, or Rhodesia as it was then called. We also got a bit involved in the conventional arms limitation talks. That was a new area for us to get involved in, and it was positive, really. One has to remember that in those days there was very good structured co-operation in relation to Berlin among what were then called the Quadripartite countries—the US, the UK, France and Germany—and so there was a constant dialogue going on. It did not always refer to Berlin, but that was why it came into existence, and it was a very effective mechanism. Unfortunately, it has lapsed considerably since 1996, although I hope it will be revived.

Q459 Chairman: The current emphasis on institutional reform in the European Union is obviously taking up a great deal of time. Do you feel that that is the best way to strengthen the foreign policy of the European Union?

Lord Owen: No, I think the best way is practical success on the ground. It worries me, because almost everybody who has been a European Union Special Representative—and I was an honorary one, in effect, having been a joint chairman of the International Conference on the Former Yugoslavia for nearly three years—knows that often, when we went to Brussels to report to the Council on Foreign Relations, the issue was the press release that was going to be put out at the end of the meeting. An endless conversation would go on about this press release which, frankly, very few people read, and there would not be enough conversation about the thinking behind the very complicated issues we were dealing with.

I have been much struck by the fact that the European Union spends so much time on institutional development and press relations, while all this time public support for the European Union has considerably lessened. I think there are real lessons to be learned, but I do not know how you stop it. We have now almost reached the stage where it is impossible for the Heads of Government to meet at the European Council without producing a massive public press comment at the end. I look forward to the day when they go, meet and talk, and issue nothing to the press.

Q460 Mr Horam: Going back to first principles, do you think that the world would be a better place if there was more coherent European foreign policy?

Lord Owen: Yes, given the substantial complexities of the world, it is better, in many world forums—not least the United Nations—if a group of countries, particularly if they are neighbours, come with a fair measure of consensus and, if possible, total agreement, so I have always been a strong supporter of the Common Market, the European Community, and now the European Union. I have always believed that the EU can evolve only slowly, over time, and that it must not pretend: pretension is one of its biggest problems, as is pretension. Reaching agreement is a positive gain.

Q461 Mr Horam: And that will be of benefit to the UK as well as to the European countries as a whole?

Lord Owen: I think that it will be, if it is a genuine agreement. Within that, of course, there has to be give and take. Sometimes you put up with things that you are not wildly enthusiastic about for a broader gain in other areas. It is of value to the UK, and we can show that in many respects. For example, I very much doubt whether we would have had the degree of co-operation that we had from France during the Falklands war if we had not been members of the European Union, or European Community as it then was. Mitterrand, sensing solidarity, went out of his way and paid a certain price for making information about French military equipment—the Super Etendard and the missiles—available to us, which he must have known could result in an economic backlash.
Q462 Mr Horam: Do you think that it is important that we have a more coherent European policy in view of the UK’s position in the world? As we look forward into the 21st century, the world is increasingly dominated what one might call “substantial powers”, whether it is America, which is the only superpower, or China, Russia or the Middle Eastern states. Given the UK’s position, do you think that we benefit from having a wider European voice, which might include the UK in many instances?

Lord Owen: Yes, but I do not think that this is terribly new. Bevin was trying to get that within NATO in the late 1940s. We have always wanted to take into NATO a measure of agreement on foreign policy among European members. NATO’s virtue was that it was a structured form of co-operation, which also involved the United States and Canada, as well as other countries outside the European Union. I see no disadvantages in that, but the European Union has this inability to recognise that, for some of us—I hope that this remains the UK’s position—the main forum for collective defence is NATO, and that that is the prime element of our defence effort, and it should remain so. I am not one who would ever diminish the influence of NATO, and I never thought that it would be diminished when the Berlin wall fell. I am pretty staggered that it has gone out of area as quickly as it has, so that you are embarked within the framework of NATO on really comprehensive foreign policy issues, particularly, for instance, Afghanistan.

Q463 Mr Horam: Coming back to the treaty, you seem to be in favour of it, although you suggested various improvements in your evidence, which were very interesting. Leaving that aside, and taking the treaty as it is, if it were ratified in its present form, how do you think that it would improve the European Union as a foreign policy performer in the world?

Lord Owen: I am very doubtful that it would make any improvements, and it may even be damaging. There are a lot of problems in the treaty in relation to foreign affairs. I am extremely annoyed that these issues have not been fought for and there does not seem to have been a bottom line on many of these questions. I could go through all the areas that I think are incorrect, but I will start with the European Council.

The phraseology suggests that the role played by the new President of the European Council in foreign affairs could be the dominant question and that the High Representative would operate as a sort of Foreign Minister to the President of the European Council. It is only two lines, but that is one way of interpreting it. Either he or she will build up considerable staff to match the areas of staff created under the diplomatic service of the High Representative in the External Action Service, or we will find them working very harmoniously together. These roles have not been carefully assessed, and I am against the creation of a President of the European Council who is not a sitting Head of Government. I am fundamentally against the whole role, which was never thought through, and was produced without any serious discussion, when there was a very real alternative, which was to group the different European Union countries, and to retain the notion of a presidency owned by the member states. Countries would be in groups of three or four, and a larger country would act as President of the Council for 18 months to two years. That very reasonable measure of continuity is almost accepted, as the new outside figure is going to be there for two and a half years, renewable.

The fundamental problem with foreign policy stems from the completely inadequate description of the role of the President of the European Council, if that post continues to be held by someone who comes in completely from outside. That then goes right down to serious problems which have not been explored, such as how you double-hat the High Representative. Furthermore, there are serious questions about the High Representative chairing all meetings of Foreign Ministers. Allied to that is the provision that any proposal that the High Representative puts on the table should be subject, from the moment they do so, to qualified majority voting. To argue that there is always a veto is wrong: there is an appeal to the European Council. We are gradually being salami’d into the Commissionising of European foreign policy, and we had better face up to it. Can we manage to live with it? Just, but I do ask myself, when do we say no, when are there limits? I find it very refreshing that the other day, when the Prime Minister of Holland went to the European Council, he used these words: “There must be clear limits to the EU powers. Only then can we allay the anxiety surrounding issues of sovereignty.” For a Dutch Prime Minister to say that so boldly is a massive change in attitude in the European Community.

I have yet to be convinced that anyone, and particularly anyone from the UK—and I have said this under both Conservative and Labour Governments—is ready to have clearly defined limits, and say, “This far, but no further.” In this treaty, I must confess that we have reached the absolute maximum of how much we can concede on foreign policy. Any further erosion would be destructive to the concept of an independent foreign policy, in which member states come together by agreement to reach a consensus on foreign policy.

Q464 Sandra Osborne: On that basis, with those fundamental problems as you see it in relation to foreign policy, would you oppose the treaty?

Lord Owen: Well, I am a believer in the European Union, and to oppose this treaty is a pretty serious issue—you would have to face some pretty serious backlash. The present Prime Minister has inherited a situation in which all the fundamental negotiation was done by the previous Prime Minister, who was perfectly prepared to sign up to the initial 2004 constitution, which I think would have been utterly disastrous. I argued it through with him in correspondence on many of these questions, and I have letters from him absolutely assuring me that we would not do certain things which we later did.
I shall try to spell this out. I would not be prepared to vote for the treaty unless the sort of parliamentary brake for which I argue in my memorandum is put in place. I want to make it clear that I do not believe a parliamentary brake is a matter of one single vote in Parliament. We are all parliamentarians and know perfectly well what happens in these situations. The only real brake is the one that I helped to put in place in 1977: no Minister could increase the powers of the European Parliament—or Assembly, as it then was—without prior primary legislation in the UK. That is what you need: if you want a brake, it is not a matter of one vote in the House of Commons. If you decide to set limits, you have to have a high threshold.

As we all know, there is pressure on parliamentary time and so forth. Primary legislation, with proper scrutiny, going through the full procedures, is a serious brake. You cannot go further—nobody can bind any Parliament—and you cannot ask for anything bigger. If Parliament votes for it through its full procedure, we are all democrats and we accept that—it is our procedure—but one vote in the House of Commons is insufficient. Although I welcome the present Prime Minister’s clarification of qualified majority voting in other areas and his arguing that there should be a pause on further integration for five years, I am highly sceptical that that will happen unless we put in a real, serious parliamentary brake.

My attitude to how I vote depends on how the House of Commons scrutinises the Bill when it goes through, what parliamentary brakes and inhibitions it puts in, and how firmly it draws the line on the present proposals. If it did that, with extreme reluctance I would campaign for the treaty in any referendum, on the basis that that is better than the alternative, which is rejecting it again.

Q465 Sandra Osborne: Could I take you back to your initial comment that the EU often seems to be all talk and no practical action? That is a concern that many people share. Given that you are a supporter, what do you think of the Government’s line, if you like, that we need to get the treaty and continual discussions about constitutional matters out of the way, so we can get on with delivering, which would increase the EU’s credibility among the people?

Lord Owen: I really hope and believe that that will be done, and it is a sentiment of which I thoroughly approve, but I have long experience of this, both inside and outside the European Union, and unfortunately my experience is that it is a relentless machine, because there are other people who do not accept any limits. I perfectly understand their democratic right, and they genuinely want to reach a situation where there is a single European foreign policy, accepting that “common” means “by consensus” and is intergovernmental, and that “single” means one that stems in all its authority from the European Union.

Behind that is the other aspect in my memorandum which raises a major concern. We know that very substantial figures in the European Union plan on merging the President of the European Council and the President of the Commission. I cannot stress enough that that is their agenda. Unless we face up to that agenda and block it, it will happen. We can block it, but we have not done so. It is there in the wording of the current treaty and the interpretation, unless we are very careful, will be left to the European Court of Justice. One of the ways you can block it is to establish that the ECJ has no jurisdiction on the issue of whether you can double-hat the President of the European Council and the President of the European Commission, because it deals with a fundamental aspect of CFSP that is outside the ECJ’s role.

It is that type of tortuous logic that you will all have to go through—I hope you will go through it—when Parliament scrutinises this. We have been told that you are going to have a lot of time, and I think that there is enough legislative imagination and courage in the House of Commons to put these blocks in the way. You cannot do it by going back and changing the treaty, unfortunately—we have signed up to it—so you have to do it a different way. You could also do it through a British constitution—by having a written constitution. At the moment, they have to have a Bill in order to take this treaty through, and that is the best, most available vehicle.

Q466 Sir John Stanley: I was interested in your answer to John Horam, in which you said that, in your judgment, the treaty before us reaches the absolute limits of the extent to which foreign policy can be taken into the EU. The problem, which you will certainly recognise because you have just used a phrase about the EU being a relentless machine, is that the boundary set by the treaty is not a static boundary; it is basically a moving train.

Against that background, perhaps I might refer you to what I believe are two really crucial provisions: the new common approach article and the mutual solidarity article. We have had a memorandum from Professor Richard Whitman at the University of Bath. He says: ‘That is an essential, essentially new article—revised article 16 now renumbered article 17a—making it incumbent on member states to seek a “common approach” on matters of foreign and security policy and to be pursued by member states through their diplomatic representation in third countries and in international organisations. It also places greater obligations on member states to ensure that any policies that may be pursued and “affect the Union’s interests” require consultation either in the European Council or Council and member states are required to show mutual solidarity.” Against those two provisions, coupled with the new personnel—the High Representative and the External Action Service—and the powers given to them, do you not agree that in time, the boundary of EU involvement in takeover of foreign policy is inescapably going to become greater?

Lord Owen: I quite agree, and in addition to those articles, I would say that there is some serious creep built into the provisions on terrorism which allow you to prevent terrorism. In the past, the European Commission has used—and perhaps the High
Representative will now also use—the word “prevent” as a locus to build up a whole aspect of anti-terrorist activity, taking it away from being, as it is at the moment, a nation state responsibility and intergovernmental. It is one thing to say that you will respond to terrorism—the wording that they have is “on invitation”—and quite another to have this word “prevent”. There is further creep in the whole relationship to common defence. We have always had “might” before, and we now have “will” and “might” in the same treaty. Again, I believe that is the sort of issue that you have the opportunity to put a British imprimatur on. We cannot put into law two phrases which are mutually exclusive. We have to have a definition and we should revert to “might”.

There are other areas, in my view, that we need to watch very carefully, and essentially that will be a question of how this diplomatic service develops. You have the usual technique: you have a statement that the Government attach a lot of influence to—it is certainly better than not having it—which is that the Government will remain e...ectively as it has been. On top of that, we have all these other additions, which are being re-designed against it. Let us take the example of the UN. It was not an accident when the present Minister of State in the House of Lords, Lord Malloch-Brown, said not many years ago—admittedly, he was wearing a different hat, as this was the UN—that he believed that the sooner the independent positions of France and Britain as permanent members of the Security Council were got rid of and the EU had a single representative, the better. There are a whole range of provisions in connection with the UN that are basically aimed at reducing overnight our freedom to make a decision. Many of the people who draft these things do not know how decisions are taken. Things have changed. I used to be woken up at 3 o’clock in the morning to decide how to vote in the Security Council. The permanent representative was on the phone and said, “Within my terms of reference I got the following, and we have now reached a point where—”, and I would decide then and there. I did not have time to ring the Prime Minister or go to Cabinet; I had to decide.

There are countless times in foreign policy where the circumstances are so fraught that you have to make decisions quickly, yet this wording is deliberately designed to stop you having that freedom. People will say, “Now thank goodness we have got the ECJ—I think—out of foreign policy”. I say “I think” because I am not absolutely sure. But you need to look again with a microscope at this business of having primacy redefined on case law.

Q468 Sir John Stanley: It is almost a rerun of the ill-fated opt-out of the social chapter being circumvented by the health and safety competence.

Lord Owen: Yes. I reject the word sceptic about me, but I sometimes wonder whether I can go on doing so much longer. I am not a sceptic about this group, but I think that we must stop feeling ashamed of setting limits. That is what we signed up to. We did not sign up to this endless movement, this endless creep. I do not know how you stop it. The Foreign Office will not stop it, that is for sure. They will always argue why this does not create a precedent, and why you should do this. There are exceptions, thank goodness, within the diplomatic service, who understand the creep argument, but broadly, as an organisation, it does not understand it. The involvement of Ministers is then required, but so many of these Ministers change.

It is very hard to see where this intellectual astringency and toughness will come from. The one Department that has it is the Treasury. In their own area, they are usually the first to spot the little wording changes, the comma in the wrong place. They are alert to it and bright enough to see it, and usually the Chancellor or other Ministers follow that line. But the erosion is within the system. Remember, the biggest erosion ever was when the then Prime Minister effectively conceded the euro without realising it. Despite the fact that she was warned, in very perceptive and clear terms by the Chancellor, Nigel Lawson, Margaret Thatcher chose, as I am sure she regrets, to take the advice of the Foreign Office against that of the Treasury. The Treasury saw absolutely the logical steps that would lead to the eurozone.

Q467 Sir John Stanley: On that last point, what is your area of doubt about whether the ECJ is actually out of foreign policy?

Lord Owen: Well, it is really about the definition of foreign policy; there are aspects of security and home affairs, for example. It was not an accident in the Maastricht Treaty that there was provision for intergovernmental pillars. I believe that it was absolutely right that home security was such a pillar, because it is closely linked to foreign policy. In the world of international terrorism it is very hard to make this distinction. I personally would have preferred to keep the intergovernmental, pillarad structure of the Maastricht Treaty. It is very worrying that it has been eroded. It has been substantially replaced in the new treaty, and that is to the credit of the British Government, who I am sure have been the ones who mainly negotiated it. In a clever way, despite getting rid of the pillars, they have almost created another pillar for foreign policy. However, the home security side, and the role of the European Court of Justice in that, have been conceded; so that is the way that they will come round and back into this issue, unless we are very careful.

Q470 Mr Hamilton: May I just pick you up on something that you said, Lord Owen? If I remember rightly, you said that we should stand up for our own interests, for those of the United Kingdom, and draw a line and say, “Thus far, and no further.” You are talking about our own national interest.

Lord Owen: No. I am not. I want to make that quite clear. I am not a sceptic, I am a genuine European.

Q470 Mr Hamilton: Can you clarify that point, then?
Lord Owen: I really do believe that it is in the interests of Europe for us to have these things. It is thoroughly beneficial to Europe that, largely as a result of historical accident—we all accept that—France and Britain have places in the UN Security Council. I say that despite the fact that we differed on Iraq: in many ways that was a sign that it was a genuine representation of viewpoints from the European people. I therefore feel very strongly that we are arguing a European case.

The public disillusionment is not shared just in Britain. When given the opportunity, country after country votes against some of these things. That is why, given that all three political parties—the Liberal Democrats, the Conservatives and Labour—told the electorate in the 2005 election that there would be a referendum, it is vital that there should be one. The disillusionment that will come from this will be horrendous. We have not yet begun to realise the backlash that we will unleash in this country. We have seen the problems, and we must be brave enough to go out there, fight for it and argue for it. I believe that you could sell this treaty to the British public. If the Government put it through, created more party support for it—as was done in 1975—for better, for worse, with all its problems, I think that you could get support for it. If you back off and refuse to go and get that support, we will pay a price.

In my memorandum, I say that I was the immediate beneficiary of the 1975 referendum, and it was a dramatic change to speak in Europe with a country that was behind you. That more or less stayed the same until 1992. We have now had 15 years in which, broadly speaking, Governments have made commitments in Europe that have not carried the conviction of the British people. There is a price to pay for that.

Q471 Mr Hamilton: Would you not argue that this treaty is somewhat different from the referendum of 1975, in that although, as you point out, all three parties promised a referendum on the constitution, such a referendum would be used as a stick with which to beat the sitting Government?

Lord Owen: I really do not believe so.

Q472 Mr Hamilton: You do not believe that it would be used to argue the case for withdrawal from the European Union?

Lord Owen: I have suggested in my memorandum that we should have two questions. There should be a question on withdrawal, and a question on the treaty. I think that it is better to get the point clearly made now that we are not going to withdraw, and then we have to negotiate within that framework. On the Reform Treaty, if you have these parliamentary brakes and you really do delineate all these areas, it would be tight, but I think that you could win it. I do not think that it would be in the interests of many parts of the Conservative party to see this as a whipped vote. They will not even get that majority. We know that these issues cut across party political lines and have done ever since the early '60s. I lived with this issue being divisive across the Labour party all my political life when I was a member of that party—and then I soon discovered that it was divisive within the Social Democratic party, too.

Q473 Mr Hamilton: Can I bring you back to your memorandum, which you mention? In that, you say that the Reform Treaty remains a massive step towards further integration, particularly, as you have already said, since it dismantles the intergovernmental pillars, which were the foundation of the Maastricht Treaty. Can I ask you to elucidate further why you think that the Reform Treaty would represent such a massive step towards further integration?

Lord Owen: I do not want to go too much over this, unless other people want to pick up the detail, but I think that the creation of the new post of President of the European Council, who is not a Head of Government and who is not elected, is tantamount to getting a new institute. I believe that they will build up their staff and they will build up their authority, and you will find that, before long, they will be challenging the Commission, at which point everybody will say, “Yes, I told you, it was bound to be conflicting; we always warned you about this; therefore, the only thing to do is to double-hat them.” That is exactly the argument that we have had over the High Representative and the External Commissioner. So I think that is one very major thing.

There has been a really substantial number of areas—60 or so—where majority voting has been increased. In some cases, I would support that; I do not want the absence of all majority voting. Majority voting is a little easier for countries sometimes to cope with, but I do not think that it should be extended into foreign policy, and I do not believe that a proposition should be subject to qualified majority voting, merely because it has come from an official, which effectively is what the High Representative is. I cannot understand how that has been agreed, and I would like to see how we can deal with it. You can appeal, so one way is that Britain appeals, routinely, on every single case that this is invoked in—it becomes automatic, and you do it, which, yes, is obstructive—until they then do not use that provision. That is one of the ways that you block.

If you look at the language on health—nobody in their political life has been more concerned than I have been in my political life about legislation for children, and I understand why there is tremendous pressure to get some cross-border children’s legislation—I think that it is ill-conceived, and I think that we should rely on the normal consensus and obvious co-operation across member states. I think that it is an absurdity to use that approach. You use that and you are into children’s law, and before you know where you are, you are into another area of law. There are some other aspects, including education and higher education. We are beginning to see that moving into being. I believe that the Government are far too involved in universities anyhow—I speak as the Chancellor of Liverpool University—and the
idea of the EU coming into higher education is absolutely intolerable. Then we see public spending, transport, energy policy; in all those areas, there is creep. Unless you are very careful about these things, I think you will run into serious problems.

Q474 Mr Hamilton: Is that why you think that the dismantling of the pillar structure that we have had previously under Maastricht represents a further step towards integration?

Lord Owen: Yes. I am an unashamed supporter of Maastricht, and I think that it was an extremely successful negotiation. The intergovernmental structure was, in fact, proposed by a French diplomat. I believe that it was a very sensible arrangement, and I could never quite understand why so much hatred was expressed about Maastricht from a British point of view; I can see why there were other aspects. Once we had our opt-out on the euro, I was broadly content with it, but I think that we will regret the dismantling of it. It was always hated by those who wanted ever-increasing integration. They disliked the whole structure of Maastricht. The extraordinary thing is that the opposition to Maastricht has almost legitimised getting rid of the pillars—that was not the intention, but that has been one of the consequences. Anyhow, we are there now, and we have to live with it—at least, I think that we have to live with it, because I wish to continue to be a constructive member of the European Union.

Q475 Mr Moss: In your article for The Sunday Times back in June, Lord Owen, you said: “I am in no position today . . . to judge how real are the safeguards or other matters that Blair claims to have negotiated. All I know is that similar hypes in the past has been shown within days to be false.” Does the Reform Treaty at this remove meet the Government’s red line on foreign affairs?

Lord Owen: I do not think that it does, no. However, on the business of it, the former Prime Minister came back and told us that he had secured an opt-out, and then the Minister for Europe within, I think, a month, was disowning that whole thing. It is extraordinary. One of the reasons that they like finishing at 3 o’clock in the morning is that they can spin the next day’s press, so you then get another victory for Britain in these talks. I am much too long back and told us that he had secured an opt-out, and then the Minister for Europe within, I think, a month, was disowning that whole thing. It is extraordinary. One of the reasons that they like finishing at 3 o’clock in the morning is that they can spin the next day’s press, so you then get another victory for Britain in these talks. I am much too long in the tooth to believe that I know what has happened for at least two or three weeks, and it is usually two or three months before you really realise what lies in the interstices. This present thing is a complete act of plunder—highwayman techniques—on the British public. Angela Merkel presented her thing only a couple of days before to Governments, let alone to us. We still do not have a proper treaty. You are talking about a treaty in which I think the wording can still be changed. This treaty is extraordinarily complex. We have reverted to using the old treaty, which I personally think is a good idea, but it makes it very difficult to find out exactly what has happened. I am beginning to think that I understand it, but I am certainly not there yet.

Q476 Mr Moss: So is the Government’s assertion about the red lines that they claim to have got into the treaty meaningful in the sense of maintaining an independent foreign and security policy?

Lord Owen: I do not think that it is meaningless. As I said, I do not believe that this treaty is exactly the same as the one that was rejected by the French and Dutch public. I believe that it is very substantially the same, but some of the changes are about things that I have argued for, for a long time. What stops a British Foreign Secretary from saying that we will not allow President of the European Council provisions to be included unless it is made clear that there can be no double-hatting?

The British Government say that the safeguard that they are now relying on is that it says that the President of the Commission’s is a full-time job. Of course it is: it will be even more full-time if he also becomes the President of the European Council. I have put the legal advice to the Dutch Parliament, as in my memo, to the previous British Prime Minister for the last three years. They have not been able to refute it. Whatever the Dutch are or are not, their country is famed for its knowledge of international law. When they advise their Parliament that it still allows double-hatting and there are no substantive changes in the draft, you realise that these people are fighting for something that matters to them. Good for them. I do not object that they should fight for it, but I want to see us fight back. What will happen if we get that merger and we fail in our argument that the ECJ has nothing to do with it? Let us assume that whoever is in government says no when they come up with this provision. It is carried on a qualified majority vote, which can be done on the appointment. It is appealed through the ECJ, and the ECJ supports it. What do we do? At that moment, I honestly defy anybody to deny that, if you merge the roles of the Commission President and the European Council President, you are effectively one country. It is that important, and it has been completely and comprehensively ignored. The House of Lords has no power over these things at all, but I think that you have got to try, if you can, to do something about that provision. I am not quite sure how you can do it, other than to get the ECJ out of any area relating to the European Council. The European Council President is given foreign and security powers and therefore, on past jurisprudence and case law, is outside the reference of the ECJ under the provisions.

Q477 Chairman: You have referred to the ECJ. At present, it has jurisdiction over EU sanctions policies. What impact do you think the treaty will have on that?

Lord Owen: I think that you have put your finger on yet another area where there would be creep. Sanctions have hitherto been more or less a foreign policy initiative. Obviously, you have to get agreement inside Governments, and sometimes, when it has economic implications, the issues are fought inside Governments, but if you start getting into this, there is the rationale of why you have applied sanctions, which are usually foreign policy
actions, and that is another area where you will see foreign policy constraints coming on us quite seriously.

Q478 Chairman: It has been argued that one of the reasons why we need to change the structure is that there is a disjunction between the intergovernmental and the community areas of the existing provisions. It has been argued that that is a major weakness of the way the European Union currently operates. Do you think that it is a major weakness?

Lord Owen: No.

Q479 Chairman: You are saying the opposite, aren't you?

Lord Owen: There are problems. The External Commissioner's role in some of the areas of overseas development and on some of the questions on the applications of sanctions policy could, and sometimes has, conflicted with the role of the High Representative. When Chris Patten was the External Commissioner, he and Javier Solana—who is an extremely good High Representative, and my criticism of the post is not a criticism of him—got on very well, but there were differences of opinion. I am not a great believer in mergers. Sometimes I have to have differences of opinion, and the idea that simply merging everything will resolve the problems seems crazy to me. This is all work in progress.

We are effectively accepting a European diplomatic service without any knowledge of how big it will be and how it will be financed. We do not know how many of these people are also going to work under the Commissioner, as Commission staff, whether they are going to be kept separate or whether they will all be put into the same pot. Sometimes, since the intergovernmental process and the Commission are quite separate, as we have always accepted in treaties, there is an idea that double-hatting will solve the problem, but I do not think that that is the case. I would actually welcome more clarity in the role and accept that there will be some disagreements.

I see the logic behind merging the two roles, but it is also linked to the idea that you can have a Commission of only 11 or 12 people. I am more and more convinced, and I have changed my mind on this. When I was working in Yugoslavia, I believed that there was value in every member state having a Commissioner position, and I thought that the way to deal with such a large Commission would be similar to how we do so in British Government—to have senior and junior Ministers or Commissioners, working in teams.

Q480 Mr Heathcoat-Amory: Lord Owen, you have referred to the desire of a lot of member states to have an integrated single policy—a desire shared by the Commission. They will regard the High Representative as their agent to achieve that: this will be their man—or woman. That person will be appointed by qualified majority, so we will not be able to prevent someone we disagree with. He will be a Vice-President of the Commission and will have the External Action Service behind him, so there will be a tremendous dynamic to give effect to this single policy.

I am interested in what you said earlier about the need for checks, and whether these can be in a treaty, which I think you do not find, or in our own legislation. Will you say a little more about what we as parliamentarians can do at this very late hour to build in some check on this person, to take this example? All we now have is a Bill coming before the House next year; the treaty is all over and we cannot amend it, as you have said. So what can we do to build in this firewall, or check, to ensure that the High Representative is genuinely the agent of an intergovernmental process, which you and I both support, rather than a Commissioner or official, giving almost unlimited scope to this integrated foreign policy?

Lord Owen: I will touch on it a little by saying that I think that there is merit in the House putting into the legislation provisions for annual reports on the External Action Service and both the budget and the numbers, so that you can review it. I have not thought of an exact mechanism, but the tougher and more detailed it is, the better. Again, you could demand that they report back to, perhaps, a Select Committee and build in Select Committee scrutiny, but with the power, like the Danes have done, that they cannot agree without coming to you and making a report about what they intend to do and having got your agreement. The Foreign Office hates this, because it means delay, but that is exactly what we want. So I think that you should look at all the provisions in any other parliamentary system for scrutiny that builds in delay and inhibits Ministers from making decisions at 3 o’clock in the morning. I think those two areas of activity need to be covered in terms of both personnel counts and finance. That would be one provision.

It is not yet clear to me what the wording means about him chairing the Council of Foreign Ministers. It does not say every Council of Foreign Ministers. Why can we not say that he would chair meetings of the Council of Foreign Ministers in areas where he had already had delegated to him an executive responsibility, but not in the creation of policy, in which case that would be held by one of the trio or quartet for the presidency. I do not know whether there is provision for this, but it might help if I put to you what I have actually argued in the past, and that is the way you can split up the presidencies.

Q481 Chairman: I see that you have a document. We will take it as a written submission to the Committee.

Lord Owen: My understanding of the wording is that you are not inhibited from appointing as the first President of the European Council an existing Head of Government. You will not get it through, but I think it would be very encouraging if you made that clear, when it goes through the Parliament, that that is a provision. It says that they appoint by qualified majority a President of the European Council. There is no provision that says explicitly that he cannot be
an existing member of the European Council and an existing Head of Government. I think that that needs to be teased out and made clear in our situation, and I think that you can ask for a report to Parliament through the Select Committee procedures before this person is appointed, so that the British Government justifying appointing somebody who is not an existing Head of Government. Let the onus of proof be on them for their own position. I agree, they have only one vote. I think it possible that, if you go systematically through this, putting in checks and balances, making them justify every issue, and it does not work—assume they appoint somebody who is outside, someone like Tony Blair, perhaps, who seems to have wanted this job, or the Danish Prime Minister, and they do a lousy job—after two and a half years, it will be much easier to remount the argument that it should be an existing Head of Government. Equally, we should consider that there are certain areas where the High Representative can chair the Council, but in other areas it can be a Foreign Minister from the trio who are co-ordinating the presidency, since the presidencies still go on. It is bloody-mindedness, of course, but then we cannot amend the treaty.

This is the last opportunity we have. We have more or less been told that there will be no guillotine. A lot of this Bill will, I imagine, be considered on the Floor of the House, and I think that these provisions can be done. The other thing is—and I no longer have any involvement in the controversy of party politics—that the Conservative Opposition have got to consider that what they argue for in the House of Commons they may at some future date be charged with introducing when in government. So they need to look very carefully at what sort of things they could do. One of the issues would be that, even if it is not conceded by this Government, they promise that they will do it as an incoming Government. I think that that is quite an attractive proposition, if I might say so—is in the concept of having two questions in a referendum.

The onus of proof must be on them for their own position. I agree, they have only one vote. I think that that is quite an attractive proposition, if I might say so—is in the concept of having two questions in a referendum. [Interruption.] No, he is not offended: he has not burst into tears, has he?

Listening to you this afternoon, I think that I am broadly where you are—Q483 Andrew Mackinlay: Q483 Andrew Mackinlay: Listening to you this afternoon, I think that I am broadly where you are—Q483 Andrew Mackinlay: Q483 Andrew Mackinlay: pro-European, but concerned about the pace of digestion and about not taking Parliament and, more importantly, the people with us over a score of years or more. Where I think you are slightly potty—if I may say so—is in the concept of having two questions in a referendum. [Interruption.] No, he is not offended: he has not burst into tears, has he?
Lord Owen: I have broad shoulders, and have been called a lot worse than that.

Andrew Mackinlay: We have to pause, and consider whether, if there were a referendum, it might be defeated. Then you have the scenario that you described a moment ago, with appallingly bad blood in the European Union, total frustration in the United Kingdom, and after some sulking there would have to be some form of renegotiation, because we know that these things have to be addressed. Perhaps Prime Minister Cameron will go off and say that he has renegotiated—"a fundamental renegotiation of terms" was the phrase. He comes back and says, "Parliament, I want you to pass this." The logic—the argument for a referendum—also applies in that case. Once you concede on this, you could have referendum after referendum. That is what I feel, and I would like to hear your views on this. The next Prime Minister may make what he would claim to be a successful stab at this. Some friends of mine will probably say, "You still haven't been successful. We want a referendum on that too." There is no end to it. A better position would be that we have it written in statute that there will be a time scale—say, before 2012—for a referendum on our membership of the European Union, so you and I can argue the positive aspects, and it is make-your-mind-up time for the British people. That would be done outside of the context of the treaty, for the reasons that I have given.

Lord Owen: I am sure that it has been put forward with the best of intentions, but I do not think that it is the issue. The issue is the Reform Treaty. If you had a referendum on an issue on which all three major parties are on one side—very few people would argue the case against—that would be rather dangerous for the European cause, because the only option for voters to show their dissent about what was going on would be to vote against it, and you would find that you had a much higher vote, whereas if you allow some of the people who are fed up, but who have no intention of coming out of the EU, to vote against a reform treaty—which they will—they can express themselves in that way. In the first referendum, I suspect that you would have a very small vote. It might be as high as 20% or maybe even higher. If you have a referendum on its own, I think that the vote would go up to 35%, maybe more. These figures are off the top of my head. If you have two votes, you will easily win the first, but it will be tough to win the second. You will then focus on the real issues and not threaten voters with being kicked out of the European Union but tell them that we cannot do much better than this. I have tried to identify that strategy because I think that it is more realistic.

We are in the Wilson Room. I lived through all this. I was very much in favour of the referendum. I nominally resigned from the Labour Front Bench on the issue, but actually that was not the case, and I spent most of my time trying to convince Roy Jenkins that we should have a referendum. For all the cynicism about Harold Wilson and the terms—and I used to have that cynicism—when I became Europe Minister in 1976, I was heard to say, “I rather think old Harold was right about the terms.” Once or twice, I tried to pretend that I had not said it, but I did say it. The terms were indeed lousy, in particular on the financial contribution.

History rarely repeats itself. I do not think that with a new Conservative Government in, say, 2009–10, it will be like renegotiation. At first it was a much bigger issue—whether you were in or out. The Community genuinely wanted us in, and many countries such as Holland and others put a lot of political capital into overcoming the French veto. We also had a friend in Helmut Schmidt—he liked Callaghan and had a good relationship with Wilson, and was ready to help them out. Maybe there will be powerful Governments again—perhaps a German Government—ready to help out an incoming Conservative Government. I would avoid the word, “renegotiation”, but there are areas that would be greatly improved by delineation. It would be an interesting development if we were to appoint an existing European Head of Government as President of the European Council in, say, two and half years’ time, and if we were to curtail, through agreement with the Foreign Ministers, the High Representative’s activity.

I agree that it is perfectly legitimate to say, “You’ve not given us what we want. You have fettered us around so much that we are not going to allow a European policy to develop.” I understand that we are meant to have a European policy on Russia, but nobody has been able to define what the policy is. It is a bit of a joke. I absolutely agree, however, that there will come a moment when you will have a policy and there will be a special representative who will exercise this role and demand majority voting. Most people have been told that there is no majority voting on foreign policy, because it comes in round the backside, but it is there.

On your question, there is a role for referendums. People say you cannot turn things around: the Spanish turned round a referendum on NATO that looked dreadful at one stage. The Irish turned round a referendum on abortion. There was a period six months before the 1975 referendum, when it looked as if we were going to lose that, too. Therefore, I am not defeatist. When there is all-party consensus, that is different, but when there is a division that goes across parties, referendums are very helpful. We would not be where we are now in Northern Ireland without the referendum provision. I remember opposing it when Ted Heath announced it, but it actually proved to be a very important building block.

What is there to fear if Gordon Brown says, “Look, I have nothing to do with this treaty really. I’ve done my best and argued the case against it, but I accept we’re going to have to hold a referendum, and we’ll go out and win it, and it won’t be just me winning it—it will be the Conservative party and the Liberal party, too, and we will all put our back behind it, and we’ll try and do it.” All I have said today, as a rather reluctant soldier—that is all I will be—is that I will sign up to try and win it, provided all the other safeguards are built in.
There is a lot to learn from the Danes. They used to be very ashamed—and I think they have become slightly ashamed again—about all their reservations and parliamentary procedures and so on, but I think we should model ourselves on that and tighten it up; if we made it respectable, we might find that a lot of countries would follow. I do not know what has happened today on the temporary vote, but if Germany and Britain acting together can be overridden on such an issue it is a pretty good indicator of what is going to happen for the future.

Q484 Andrew Mackinlay: I listened carefully to your exchange with David Heathcoat-Amory, and to your point about the possibility at some stage, by stealth, of a merger of the Presidency of the Council and the Presidency of the Commission. If we are persuaded by your point, which I broadly am, we will have to find the modalities of including that in the legislation—literally: there is a Bill coming round on the track in a few week’s time. Do you feel that we ought to prepare a schedule for amending it in the House, so that it would take into account a number of scenarios that you and others could add to it, saying that if there is ever an attempt to merge, it will come before the House of Commons?

Q485 Ms Stuart: I remember a draft existing until about 3 am, which had a complete clause saying that the President of the Commission shall not be the President of the Council. That was removed at 4 am on the basis that that was a self-evident truth that did not require to be spelled out. What you describe about the vagueness of the language being extremely deliberate is true for anybody who has sat through the years of this developing. It is interesting that you seem to be in a position where, rather than saying what this treaty delineates, its language is so vague that the only way to deal with it is to change parliamentary processes to have greater scrutiny. That is about the only space that we could act in. Am I right in thinking that?

Q486 Ms Stuart: So the way to approach it that would pass through Parliament, is not just to require undertakings from the Foreign and Commonwealth Office and the Prime Minister in terms of the treaty, but for there to be parallel undertakings of changes here at Westminster in scrutiny and in primary legislation. Would you say that those things would have to happen in parallel?

Q487 Ms Stuart: For ease of reference, could you summarise why you think that article 213 of the Treaty on the functioning of the European Union is not a sufficient safeguard? The matter has, quite rightly, been consistently raised with the Government and their current answer is that this article bars members of the Commission from engaging in any other occupation. The Government regard this as an adequate safeguard that the Commission and the Presidency of the European Council will not be merged.
Lord Owen: This is slightly new wording is it not? I have not had a legal view on this. I do not know whether the Dutch would withdraw their comments to their Parliament in the light of this. Personally, I do not think that it would be difficult to get the European Court of Justice to say that this is not a new post, it is part of a continuum of what they are doing already. It is a mechanistic decision by the Council, a political choice, and not one for it to refuse. Furthermore, it would argue that if that had been the intention, it would have been ruled out in the main provision regarding the European President. Provided that we mark it up seriously—the European Union is not exactly bound by law, and there are enough sensible people around the Council to not push it because they would know that any British Government would consider this to be a massive issue. However, it means that you have to extract all the wording that has been given—why it is, why it is not—and as far as possible, put it into the legislation.

Q488 Ms Stuart: May I press you a little on something you said before? If I understand correctly, one of the reasons why you think the ECJ may have a foot in foreign policy is due to the definition of foreign policy. How would you regard what is effectively the treble-hatting of the High Representative? He is Vice-President of the Commission, he has a role in the Council and is also the Chair of Council meetings. Is that potentially another way in which the ECJ may have a role in defining and adjudicating on foreign policy?

Lord Owen: It is argued that this is inoffensive, because the Secretary-General of NATO, by tradition, chairs most of the meetings—whoever holds the presidency gives over the Chair. It is not quite the parallel that they claim. From what I remember, the President takes the Chair for a formal moment, and then passes it on. Technically, the presidency chairs the meetings. I do not want to sound as if I am against Solana. He knows the two roles, he has been Secretary-General of NATO. There are some areas in which the complexities of dealing with a detailed negotiation—Quartet business for example, or EU negotiations with Iran—mean that it might be helpful to have him in the Chair. When there is a issue of contention between member states and what the high-representative’s office proposes, I think that it is absolutely deplorable that he or she should be in the Chair. That is why you should recover this. The language is not clear.

None of this has been worked out, none of this has had any research, there has been no effort to look at how you could have better kept the presidency. Everybody said that it is outrageous that it rotates every six months. Since it is obvious that you could have changed that, why are these people doing it? I believe that it is because they are continually positioning authority in the build up of the Commission. More and more they are pulling these things away from intergovernmentalism. They get rid of the pillar—they continue to say that it is common foreign and security policy, but they bring in qualified majority voting by the back door. I remember that it was Douglas Hurd who conceded on this business of policy. He said, “Oh well, we don’t want to get into having to reach agreement on what flag we put on a vehicle, or something like that.” But that was never their intention—their intention was to use it for substantive questions.

Q489 Ms Stuart: You were quite right when you said that rejection of the treaty would create a considerable amount of bad will in Europe, given that they felt that they had made concessions to us. The original idea of the permanent President of the Council was one of the very few UK priorities, so they see it very much as a creature of the UK’s wish and desire. It is often argued that the new President strengthens the member states, whereas I would suggest another interpretation, which is that it strengthens the institutions of the member states and that in the absence of a clear separation of powers, in effect we will have a weakening of the individual states.

Lord Owen: It might do. The honest answer is that it depends on the personality of the person involved. You are right that this proposition came from the previous Prime Minister. There have never been any pieces of paper from it; it was never worked through, and it was never advocated in a document from the Foreign Office. It came as a suggestion from No 10. It was always considered by people who first heard it as his retirement job; perhaps he would not want to do it now. The European Union is a very complicated organisation and it takes a lot of time to understand it and what is behind it. One has to be very careful about making these innovations, but you were right in that, because it is seen as a British innovation, it is very difficult for us to get it back. I am a complete realist and know perfectly well that they are going to appoint somebody who is not a Head of Government the first time around. I rather hope the thing is a disaster and they appoint somebody who is so intent on their own agenda that they push it to the exclusion of all else and get airs and graces that are way above them, and that the Heads of Government start to resent this character stomping around the world, claiming to be the person who talks to the President of the United States. It is all part of this whole belief that Europe has to have the number for Henry Kissinger to ring. I always thought it was the most ludicrous position of all—Henry Kissinger only ever wanted the telephone number of somebody to ring to find out whether they agreed with him; if they did not agree with him, he would then ring around and try to find somebody else who did, and rally a group. It is an absurdity.

The answer to it all is that this could work well; it might work to strengthen the intergovernmental nature of foreign policy. If you had somebody who was very considerate of member states, who went round genuinely trying to rally a consensus and saw themselves as purely the spokesman of the European Union where there was already unanimity and was
Q490 Chairman: Is the High Representative job doable by one individual?

Lord Owen: I do not think it is and I am very glad you asked me this question. Let us take the example of Javier Solana, who has done extraordinarily well. Take the example, too, of Mediterranean and the break-up and all the problems that he faced. He went in and spent weeks and weeks of his time building a consensus in and around the different parties in that area bordering on Kosovo and Albania, and he did an extraordinarily good job. He also has taken on the issue of the Quartet. Of course, he has a representative there, but he has to master the detail of Quartet business. He is on top of that, and has taken on the detailed negotiations for the three—now, there is the US, as well—as Iran. These take a lot of time. When America says, “Right, we will let Javier Solana deal with Iran,” they are not saying that he can appoint a special representative to do it. They are asking him to do it. They are using his authority and his prestige for that role, and quite rightly so. It is in a way flattering to us, and is ample demonstration that with his heavy experience, he can speak for everybody.

Javier Solana already refuses, more or less, to be Secretary-General and tries to get rid of that responsibility. If we want that type of role for him—if he is now going to be in charge of all the Commission’s external activities and embassies around the world, to have all the problems of attending as a Vice-President of the Commission and of being a regular member of the Commission, as well as attending the European Council—I have serious doubts as to whether one person can do it. You have put your finger on it once again, Mr Chairman. There is a fundamental illogicality to all this. For example, we have special representatives now, doing all these different roles.

When I was dealing with Yugoslavia, I used to send detailed memorandums back after every negotiation. E-mails would go out sometimes late into the night. I knew perfectly well that France, Britain and Germany did not really need them; they knew what was happening and could brief their ambassadors in Geneva. But the smaller countries found it extremely helpful. That is one of the great roles of the High Representative—small countries can feel part of the process and be serviced, and have someone in whom they can be confident. I am a great believer in the role of High Representative, but I think that we are putting far too much on to that person.

Chairman: I am conscious that you must leave in four minutes, Lord Owen, and we will not keep you beyond that point. I bring in Richard Younger-Ross for the final question.

Q491 Richard Younger-Ross: My apologies for not being here at the beginning of your answers. I was trying to persuade the Minister with responsibility for water to cut water charges in Devon and Cornwall—an area that I know you know very well. You said earlier that, on the balance of the argument, you would be reluctant to vote against the Reform Treaty. If you felt that there was virtually no scrutiny of our Ministers and what they say by this House, would your view on that change?

Lord Owen: Yes, definitely. I made it quite clear that it is contingent on our going right to the maximum by not doubling but more than quadrupling the level of scrutiny, really paying attention to delineating the words of the treaty, and explaining to Parliament what we were given at each and every juncture and why we have conceded. One could simply go through those parts of the treaty that the British Government previously refused to accept—there were masses of the stuff—why they were satisfied to concede ground, and what assurances they were given. Perhaps all those could be written in to the Committee stages and then somehow enshrined in the legislation.

Q492 Richard Younger-Ross: Would you be surprised if I were to say that, when the former Foreign Secretary gave evidence to the European Scrutiny Committee and to this Committee, she denied that there had been any discussions and would not engage with either Committee at the earlier stages, back in May, when we discussing the Reform Treaty?

Lord Owen: I really do not know about that sort of thing. I am out of that, thankfully. I have not followed the proceedings quite as carefully as I should have.

Q493 Richard Younger-Ross: I put it to you that the amount of scrutiny by this House is minimal.

Lord Owen: You missed my answer earlier on, but it is in my memorandum. I can only tell you that when we had had the referendum in 1975, it was being demanded that we stop the business of MPs representing us in the European Parliament and that we have a direct election procedure for MEPs. I was never very keen on that. I always thought that it was a thoroughly good thing that we were double-headed, and that we brought the House of Commons into the European Parliament. I thought that excluding Westminster MPs was a bad move, but I felt obliged, because we had committed to take this step on entering the EC.

I took that legislation through and in it—as I have already said to the Committee: I do not think that you were there—you cannot increase the powers of the European Parliament without primary legislation. That is on the statute book now. I urge you to fight this one. The Prime Minister said that he will give you a vote. One vote is not enough. Primary legislation is what you need. That is a real inhibition, and serious scrutiny that we all understand and know how to do. Build in as much Select Committee scrutiny as you can. Build in as much prior authorisation as you can. But above all, make it clear...
that primary legislation is needed. There should be no qualified majority voting on any area at all without primary legislation. There should be no extension of competencies without primary legislation.

Chairman: Thank you for coming this afternoon and for answering all our questions. We found this to be a very useful session and it will inform us as we produce a report in the next few weeks on the foreign policy aspects of the treaty.

Lord Owen: Thank you, Mr Chairman.

Supplementary submission by Rt Hon the Lord Owen, CH

A Council Decision of 1 January 2007 set out the order in which the Member States shall hold the Presidency of the Council from 1 January 2007 as follows:

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<th>Country</th>
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<tr>
<td>Germany</td>
<td>January-June 2007</td>
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<td>Portugal</td>
<td>July-December 2007</td>
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<td>Slovenia</td>
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<td>Finland</td>
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<td>[Croatia (likely by then)]</td>
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I have worked the Presidencies into groupings of either three or four. The Head of Government from the underlined country in each trio or quartet would hold the Presidency of the European Council for the 18 month or two year period of the trio/quartet programme. The trio or quartet partners would establish the pattern of EU meetings in each other’s countries, spreading them across the 18 month/two year period and also which country would chair particular Ministerial Council meetings. In this way the six-month rotation period, which is much too short, of the European Presidency would be ended.

5 December 2007
**Wednesday 12 December 2007**

Members present:

Mike Gapes (Chairman)

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<td>Rt Hon Sir John Stanley</td>
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Memorandum submitted by the Secretary of State for Foreign and Commonwealth Affairs

PROSPECTS FOR THE EUROPEAN COUNCIL, BRUSSELS, 14 DECEMBER 2007, AND FOREIGN POLICY ASPECTS OF THE REFORM TREATY

**December European Council**

1. We expect the December European Council to include discussion of the mandate for a Reflection Group, and the adoption by the Council of a Declaration on Globalisation. Other issues that will feature include Justice and Home Affairs; a renewed commitment to the Lisbon Strategy for Jobs and Growth; energy and climate; and external relations—particularly Kosovo and Iran. Kosovo’s status now needs to be resolved urgently. The EU will need to signal at this week’s European Council, its determination to play a leading role in bringing the status process through to completion and in implementing a settlement. We will also be looking to the European Council to take a strong line on Iran, with this reflected in its conclusions.

**Reflection Group and Declaration on Globalisation**

2. The Presidency will expect to secure agreement on both at the European Council. Our view is that, with the signing of the Lisbon Treaty on 13 December, the EU should not contemplate any further institutional change for a lengthy period. The EU’s focus should now be outward-looking and forward-looking, with this being reflected in both the mandate of the Reflection Group and in the wording of the Declaration on Globalisation.

**Other Issues**

3. On JHA we would expect the Council largely to endorse work already underway. We would welcome commitment in the Conclusions on the strengthening of police and judicial co-operation, and a renewed focus on implementing the EU Counter-terrorism strategy.

4. On climate and energy we want the December Council to emphasise the EU’s commitment to an ambitious response to climate change, and our determination to accelerate the transition to a high growth low carbon economy.

5. On the Millennium Development Goals, we will seek a mandate at the December European Council from Heads for the Commission to produce an action plan that outlines progress towards the Millennium Development Goals, and identify what is needed to accelerate advancement.

6. On External Relations, our priorities will be Iran and Kosovo. On Iran, following the Prime Minister’s Mansion House speech, we will want the European Council to increase the pressure on Iran to comply with the obligation to cease nuclear enrichment activity as mandated by the United Nations Security Council. On Kosovo, we will want the European Council to set out, following the end of the Troika negotiations process on 10 December, the EU’s determination to see Kosovo’s status resolved and to play a leading role in implementing a settlement.

**Foreign Policy Aspects of the Reform Treaty**

7. I understand the Committee would also find useful a summary of the foreign policy aspects of the European Union Reform Treaty before my evidence session on 12 December.

8. The Treaty provides for a new office of High Representative for Foreign Affairs and Security Policy, combining the existing roles of the High Representative for the Common Foreign and Security Policy and the Commissioner for External Relations. The new figure will be appointed by the European Council acting
by Qualified Majority, with the agreement of the President of the Commission. He or she will be responsible for the implementation of the Common Foreign and Security Policy (CFSP) as mandated by the Council, and the coordination of other external policies where the Commission holds the lead (for example trade or enlargement policy). The Treaty specifies that the High Representative shall be not bound by Commission procedure in the exercise of his responsibilities to the Council for the CFSP.

9. The new High Representative will also assume functions currently exercised by the rotating Presidency. These will include chairing the Foreign Affairs Council, conducting dialogue with third countries on behalf of the Union, and representing agreed positions of the Union in international bodies.

10. The High Representative will be supported in the exercise of his functions by an External Action Service composed of the relevant departments of the Council Secretariat and the Commission as well as secondees from the national diplomatic services of the Member States. Decisions on the detailed organisation and function of the External Action Service will be taken by unanimity by the Member States in the Council on a proposal from the new High Representative. The Treaty specifies that the External Action Service will work in cooperation with—not to replace—the diplomatic services of the Member States.

11. Unanimity will remain the norm for decision-making within the Common Foreign and Security Policy. The current provision, which allow for use of Qualified Majority Voting for secondary or implementing decisions, will however be retained in the new Treaty and will be extended to proposals made by the High Representative at the specific and unanimous request of the European Council.

EUROPEAN SECURITY AND DEFENCE POLICY

12. The provisions for European defence in the Reform Treaty meet UK objectives to ensure the development of a flexible, militarily robust and NATO-friendly ESDP. The Reform Treaty preserves the principle of unanimity for ESDP policy decisions and on initiating missions as well as confirming the prerogatives of member states for defence and security issues. “Enhanced Co-operation” will be extended to ESDP, allowing smaller groups of member states to pursue particular ESDP projects. The requirement for a unanimous Council decision will ensure that the mechanism cannot be used against UK interests.

13. The Government also supports a new clause introduced in the European Union Reform Treaty, which reflects Member States’ desire to offer assistance in response to a request from another Member State that has suffered a terrorist attack or natural disaster on their territory.

Foreign and Commonwealth Office
10 December 2007

Witnesses: Rt Hon David Miliband, MP, Secretary of State, and Paul Berman, Legal Adviser, Foreign and Commonwealth Office, gave evidence. Shan Morgan, Director, Europe, and Martin Shearman, Head of CFSP, Europe Directorate, Foreign and Commonwealth Office, were in attendance.

Chairman: Will members of the public please switch off their mobile phones? I do not want any interruptions.

Foreign Secretary, I welcome you and your colleagues. Perhaps you would introduce them.

David Miliband: Good afternoon, Chairman. I am pleased to be here. Shan Morgan is director of our Europe team. Martin Shearman is head of the Common Foreign and Security Policy team—I know that you want to discuss that—and Paul Berman is our legal adviser.

Q494 Chairman: Thank you. Obviously, we shall focus largely on what will presumably be called the Lisbon treaty, but if there is time we hope to touch on some wider issues, including Kosovo. We are doing an inquiry into foreign policy aspects of the Lisbon treaty, and we will publish our report in January.

Do you think in retrospect that the Government’s position during the original negotiations on the ill-fated constitutional treaty was correct? If so, why did the definition of foreign policy red lines change between the original negotiations before the constitutional treaty was agreed and the current position, in which those red lines seem to be much firmer than before?

David Miliband: Do you mean the position that was taken in 2001 and 2002, when the idea of a “constitution” was first mooted? There have been so many versions.

Q495 Chairman: Let me be more specific. In 2004, we signed up to a constitutional treaty, but in 2007 we seem to have a different position on the foreign policy aspects than in 2004.

David Miliband: That is an interesting way of looking at the matter. In foreign policy, the status quo is pretty strongly maintained in the current reform treaty. That was certainly the conclusion of the European Scrutiny Committee. I do not know whether you are highlighting particular changes from the constitutional treaty, but we have been clear all along that the most important red line—that term was not in common use at the time—or foundation is that foreign policy should retain an area of unanimity and that each country should be able to exercise a veto. That has been a consistent
theme of the Government’s policy since our 1997 election manifesto, and one could probably argue that it has been a theme of Governments of both parties since the idea of political co-operation, as it was then called, was first mooted in 1984 and then put into the Single European Act in 1986.

Q496 Chairman: But you would accept that there are differences from the position that the Government agreed in 2004. I thought their case was that the constitutional treaty and the reform treaty were very different.

David Miliband: One can go through the different elements. Some of them are structural, and a feature of the reform treaty is that the Common Foreign and Security Policy should remain a separate pillar, which is one important structural change from the constitutional treaty. Also, obviously, some declarations have been added, but the fundamental point is that the Common Foreign and Security Policy is an area of unanimity and has been a consistent theme of Government policy for much longer.

Q497 Chairman: We will come on to some of the specifics in later questions, but I am dealing with the general matter. Some critics have said that the Government have taken something of a negative approach to the red lines—you have taken a begrudging approach to the treaty—and that has damaged relations with other European partners. How do you respond to that?

David Miliband: The Government have been clear and firm in setting out what we understand to be the national interest. I think that clarity is valued in the European Union, and people know where we stand on the treaty. That does not mean that people agree with us, but they understand our position: the fact that we have stuck to it is respected. I do not think that we have been begrudging or even grudging in the way in which we have gone about the matter: I think that we have been clear and focused. There was a sense of exhaustion about institutional reform at the meeting in Lisbon in October that concluded the discussions on the treaty. Those who were most, and least, enthusiastic for an expansive version of the treaty agreed that we had spent the past six or seven years discussing ourselves and institutional reform, and that that could not be a feature of the next six or seven years. There was unity on that and a certain amount of mutual respect for different positions on that basis.

Q498 Chairman: The argument for the constitutional treaty was always that it would somehow simplify and reconnect the EU with the public. That exercise came to a disastrous end in France and the Netherlands. A witness who appeared before the Committee told us that the proposed structure is almost unintelligible even to a very intelligent person, and others have referred to its great complexity. How have we fulfilled in the Lisbon treaty the ideal or desire to reconnect with the public?

David Miliband: That is a really important and good point. I have never believed that institutional reform is the route to love and respect for the European Union among the peoples of Europe. It is a perfectly logical argument, but it says that the “democratic deficit” is the fundamental problem in the relationship between European institutions and the peoples of Europe, which I have never believed. I believe that a delivery deficit is the fundamental barrier between the European Union and the peoples of Europe, which is why I am passionate about the following point: if the European Union is to show itself to be useful, it need not reform its institutions or become obsessed with institutional reform; rather, it needs to get on with tackling the big issues that people recognise cannot be addressed at national level. That is why the globalisation declaration that will be adopted in Brussels on Friday is important. The Prime Minister has led the way on that, and it is at the heart of the “Global Europe” pamphlet that he and I published. The critical point about the reform treaty is that it brings to an end six or seven years of institutional obsession and allows us to get on and tackle issues such as climate change and energy, international terrorism, migration and trade, which people in all strands of the spectrum recognise as international issues. The key for the European Union is that it shows clearly that it is able to address those issues. People sometimes say, “You can’t address those issues unless you reform the institutions,” but to take the topical example of climate change—the Bali conference is meeting now—if you look at the conclusions of the March 2006 European Council, which offer a genuine leadership role for Europe on climate change issues and international negotiations, you will realise that they have done more to show the relevance of the European Union than any amount of institutional tinkering. The issue is important, but there is division. Both positions are perfectly logical and internally compatible, but people must judge which one they support.

Q499 Mr Horam: I am interested to hear what you say. None the less, you presumably regard that particular bit of institutional tinkering in the treaty as necessary.

David Miliband: Yes. We think the treaty makes some important and good changes, and it is good for that reason, but it also brings to an end a period of—to use your phrase—'institutional tinkering, which I think will be liberating for the European Union.

Q500 Mr Horam: Yes, but it is not just the Government themselves. We can all collapse with exhaustion, as you say, at the end of this—

David Miliband: No, it is a twofold thing. There are good things in the treaty, and it says “enough is enough, let’s get on with the real business.”

Q501 Mr Horam: In weighing these two things—what you might call political will to deliver things on the one hand, and institutional tinkering of this kind on the other—how important is institutional
tinkering? Are we all wasting our time on it? Is it not very important at all? Could we have done all those things without institutional tinkering?

David Miliband: No. I think that the changes that have been proposed are sensible in many ways. The six-monthly rotating presidency is not a very efficient way of running a Union of 27. The reduction in the size of the Commission—

Q502 Mr Horam: I am thinking of the foreign policy aspects of the treaty.

David Miliband: Well, on foreign policy, there are very few changes from the status quo. The European Scrutiny Committee says that “the largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply under the EU Treaty.”

Q503 Mr Horam: You are comparing the constitutional treaty and the present treaty.

David Miliband: No, I am comparing the status quo and the current version.

Q504 Mr Horam: Well, you have a major change. You have the double-hatting of the High Representative. You have the creation of an external service.

David Miliband: We can argue about whether those changes are major or not. All I am saying is that the ESC said that the fundamentals of the status quo are preserved. The double-hatting, or the merger of the two posts into a single post, is a worthwhile reform. However, if you are saying, “Do we need to wait for that reform to address the issues in Kosovo today?” my answer is no, we do not.

Q505 Mr Horam: In your view, what are the concrete ways in which, if we adopt the Lisbon treaty, the UK can realise its goals as regards the EU as an actor on the international stage?

David Miliband: Solely in respect of foreign policy?

Mr Horam: Yes.

David Miliband: Well, let us take as item one in that question the creation of the new High Representative post. We do not have to quibble about whether you call it major: leave the adjective to one side. It is a worthwhile reform.

Q506 Mr Horam: Why?

David Miliband: While it is true that the two people who have been responsible for external relations have, at various points in the last 10 or 15 years, found ways to get on, actually, two people doing one job is not a very sensible way of proceeding. I therefore think that is a sensible rationalisation, and is worthwhile in that respect, and—

Q507 Mr Horam: And?

David Miliband: The External Action Service will bring some streamlining.

Q508 Mr Horam: In effect, it is a question of efficiency, or effectiveness?

David Miliband: I think efficiency and effectiveness will be enhanced by the changes that are brought in. However, in the end, the Common Foreign and Security Policy is going to require a change of outlook on the part of the EU, first, because we are going to have to recognise that threats to our security and prosperity come increasingly from beyond our borders, rather than from within, and, secondly, because of political will, which you rightly referred to, when it comes to questions like Kosovo.

It will be very instructive to see the extent to which Europe learns the lessons—and I would guess that there is a pretty unanimous view on this—of its weaknesses and failings in the 1990s, and whether it can learn from that history. I think that speaks to the political will that you referred to.

Q509 Ms Stuart: Following on from what Mr Horam said, on the foreign affairs and defence side, most of what we want to do we could actually have been done without the treaty, and I just want to use one example: the European Defence Agency. That was an idea which came out of the original constitution, but we set it up anyway, whether the treaty was signed or not. Is there anything in the treaty that we want to achieve, which, because it is intergovernmental and requires unanimity, Heads of Government could have done anyway, without that document?

David Miliband: I think the example John Horam gave of the merger of the two roles obviously requires treaty change. That is something that would not otherwise have happened.

Q510 Ms Stuart: Could not Heads of Government have done that by unanimity anyway?

David Miliband: We can have a legal answer from Paul Berman.

Paul Berman: Double-hatting is excluded, because Commissioners cannot serve in other roles. In order for a Commissioner—in this case the Vice-President—to serve in a function in the Council one has to have treaty change.

Q511 Ms Stuart: Is that double-hatting of an occupation or a function?

Paul Berman: The prohibition on the Commission double-hatting is about not taking instructions from other institutions. If you work for another institution or take instructions from it you need to make provision for that exception. That is what the Treaty of Lisbon does: it explicitly allows the High Representative to take instructions from the Council.

David Miliband: But not the creation of a Tsar, merging the posts of President of the European Council and—[Laughter.]

Chairman: We will have questions on that later.

Q512 Ms Stuart: Can we move on to the overall point that the Chairman raised? I hate to do this to the Foreign Secretary, but may I remind him of a function he had before he became Foreign Secretary, when he was still in No. 10, and was one of the Sherpas to the original Laeken declaration that
started all of this off? Do you think we have ever begun to fulfil the aspirations of what was in the Laeken declaration regarding policy, institutions and delivery?

David Miliband: For the record, I was not a Sherpa for the Laeken declaration. However, a reflection group was established before the Laeken Council of which I was a member. That group produced no conclusions, I am pleased to say, or at least no written conclusions that may come back to haunt me. I remember having this argument during those discussions. The group involved Jacques Delors and Jean-Luc Dehaene, and their argument was that institutional reform is the route to relevance, and respect and admiration for the European Union. My argument was that it was about the delivery deficit, not the democratic deficit.

We have not achieved our goals. If I asked whether you could think of a way for an institution to make itself unpopular, high on that list would be spending six or seven years talking about its internal structures, which are at best opaque and difficult to understand. So you are right: it is a question of political recognition, and opportunities for political progress have been missed because of this great institutional hoo-ha.

Q513 Mr Purchase: I want to move to the politics of this. You mentioned the big thing—delivery. I agree with you absolutely. I also know, however, that the machinery must be in place, regularly maintained and oiled, in order to provide the vehicle on which we do the big things. So I do not regard it as tinkering; I regard it as proper, sensible development of administrative policy in order to deliver what you quite rightly say are the important things. It does seem to me, however, that you have to explain to us how you reconcile support for these big things—the coherence and the concentration that we need in order to get them. How do we reconcile that with our oft-stated intention to maintain an independent foreign policy?

You may tell me that it is just because that is what the Daily Mail and the Sun says, that we are worried about electors and so on, but I puzzle in my own mind about how we can declare ourselves in favour of the big things—I will paraphrase—and yet at the same time say, “But, hang on, we have to be independent.” I do not see how the politics work.

David Miliband: It is absolutely right to raise the point because it goes to the heart of the question of foreign policy in the modern world. How can one have an “independent” foreign policy in an interdependent world? That is the question you are asking, and it is absolutely right to do so. John Horam used the word “tinkering” and that is not a word I would want to associate myself with. We have ended up in difficulties in the past. The answer is that when one comes to efficiency and effectiveness, there are two aspects. One is the oiling, the efficiency of operation; the other is the legitimacy of the operation.

It seems to me that, notwithstanding all that we hear about globalisation and the interdependent world, the site of legitimacy for citizens is the nation. That does not mean that they do not have concerns beyond national borders. It does not mean that they do not want to apply their values beyond national borders. It is, however, to the nation state that people owe and commit a significant part of their sense of identity. I think that any attempt to produce foreign policy that negates that sense of identity would be quite dangerous because it would corrode the sense of legitimacy.

There is no question that you could increase the efficiency of the UN if you had less power for nations, but you would severely corrode the legitimacy of the decisions that were then taken. That is why it is right that the UN has nation states at its heart. It is right that Britain keeps the role it has in the UN at the moment. If you ask whether that involves compromises in the search for consensus, of course the answer is yes. Does that mean that we have to redouble our efforts to find consensus that works? Yes, but I would be wary of believing that there are administrative or “oiling”—to use your phrase—mechanical reforms that got us out of the fact that different countries and different people disagree about foreign policy ends and goals.

Keeping a national foreign policy is important in getting the right blend of legitimacy and efficiency. That is not to say that our foreign policy does not change, now or in the past. I have often said in the last six months that foreign policy used to be about foreigners and that home policy used to be about what we did at home. No more. In an interdependent world, foreign policy is about things that come back to haunt our security and prosperity at home.

Q514 Mr Purchase: That is the whole point. The idea that any country in the world has an independent foreign policy at the present time, save perhaps for America, is a chimera. Why do we not recognise that the great role that we could perform in terms of world peace, prosperity and interdependence, is to come out straightforwardly and say that we are seeking a foreign policy that chimes with the needs of this society and this world that we live in?

David Miliband: I hope we can say that. Perhaps I misunderstood the question. By independent foreign policy, do you mean, should we be able to decide on our own foreign policy as a country? I think the answer is yes. If by independent foreign policy you mean, should we pretend that the outside world does not exist, then obviously the answer is no, we should not do that. We should frame our foreign policy in the context of the real world in which we live, which is a world of interdependence, and a shared planet where issues of resources, security and so on are shared issues, not issues where one can retreat behind a national or regional fortress. I am sorry if I misunderstood.

Q515 Mr Purchase: I was looking for the vision, which, I think, as well as the delivery, will connect Europe to its community.

David Miliband: That is a very fair point. In the midst of discussion of delivery and democracy we have to remember what are the purposes of our
interventions and how we are trying to promote stability in our terms—social justice and equal opportunity—around the world.

**Chairman:** Unfortunately we have to move away from the vision and into the minutiae now. Before we do, we will have a brief intervention from Sandra Osborne.

**Q516 Sandra Osborne:** I am very concerned about public credibility regarding the treaty in the UK. For the first time in 10 years as an MP I have had the subject raised on the doorstep—the only matter with regard to Europe that I have ever had raised in that way. It may well be people who read the *The Sun* and the *Daily Mail*, as Ken was saying. I think that people understand the difference as regards an interrelated foreign policy, but they are continually told that UK sovereignty over foreign policy is going to be taken away, and it is easy to promote that fear. If the Government cannot counter that fear in some way, is that not going to affect credibility further down the line on the big issues that you are talking about? What are the Government going to do about that?

**David Miliband:** The first thing that we can do is to be as open as possible in the way that we answer questions and engage in debate, both in Committees like this and in the House itself. We will have plenty of time to go through the details of the treaty. You and I are in politics. You have got to believe that explanation is our biggest card. Explanation and persuasion is the business that we are in. We do not write headlines and we do not publish newspapers but we do have the power of our arguments.

There is a wider case, which is that the country faces a very big choice. Does it want to look at the world around it and think that it is so complex and fast-moving that we are better off trying to divorce ourselves from it? Or do we recognise that there is not a divorce from issues of economic instability, terrorism and climate change? The critical choice for this country is how we engage with those issues, both bilaterally with other countries and through multilateral institutions like the EU and the UN. I think that second course, of committing ourselves to engage through all the networks that we have is the right thing for the country, but it is a big choice and maybe it speaks to the sort of explanation that you point to. It could possibly be one of the unexpected virtues that could come out of our extended discussion over the next six months of the treaty.

**Q517 Sir John Stanley:** Foreign Secretary, a press article that I am sure you are intimately familiar with, one which I hope is your bedtime reading, is the former President of France, Valéry Giscard d’Estaing’s article in *The Independent* on 13 October headed “The EU treaty is the same as the constitution”. The question I want to put to you, since nobody disputes that, is why, Foreign Secretary, have the British Government not taken the honest path of saying, “We are going to change our policy on a referendum. Even though we had a commitment to it in the general election, we are going to go back on that commitment,” and be honest with the British people about it and defend a decision not to have a referendum even though the treaty is effectively the same? Why, instead, are the Government continuing to perpetuate, frankly, this deceit on the British people by going through the pretence that the treaty now is radically different from the one that was before the Parliament and the British people before the last election? Why have the Government not been honest on this?

**David Miliband:** The Government do not agree with Giscard d’Estaing, that is the simple reason, for very good reasons, which I am happy to rehearse, but which all 27 Heads of Government accepted in June 2007 when they said that the constitutional treaty had been abandoned, and which the Chairman of this Committee referred to in his opening remarks when he talked about the failure of the constitutional process. The truth is, it is the constitution that was abandoned. The constitution sought, for the first time in European history, to re-find the European Union. That project is a perfectly legitimate project for people to believe in, Valéry Giscard d’Estaing believed in it, but the people of Europe, who voted in France and the Netherlands, did not believe in it. So the constitution that was promoted and to which he dedicated several years of his life has been abandoned. That is why we do not believe that we are in the same situation as we were in before those referendum defeats for the constitution.

While it is important, of course, to have respect for Valéry Giscard d’Estaing, you only have to look at the comments of the Danish Prime Minister, not a former Danish Prime Minister, not a Danish Prime Minister who was in power until 1981, 26 years ago, but a Danish Prime Minister who is in power now, whose Council of State and Special Committee of Justice looked at the treaty. The Danish Prime Minister commented yesterday, not in *Le Monde* or anywhere else but in his own Parliament, that they had examined the reform treaty that has been put forward, and—this is the quotation from the Justice Ministry—“It is the Justice Ministry’s conclusion that for Denmark”—a country which has a stronger version of the treaty than we do—“the Lisbon treaty does not transfer new powers.” On this basis, the Justice Ministry concludes that Denmark can ratify the Lisbon treaty by normal procedure.

That is the existing Prime Minister of Denmark, so I hope, Sir John, this is not going to come to you saying that I am dishonest and you are honest. I hope that it can at least be taken forward on the basis that we have different views of the content of the reform treaty. We believe that the reform treaty, for the reasons set out at great length in my letter to the Chairman, is not the same as the constitution. It is perfectly legitimate for you to argue that it is, but I hope that you will accept that it is legitimate for me to argue that it is not.

**Q518 Sir John Stanley:** I simply say to you that Valéry Giscard d’Estaing says in the first sentence of his article: “The difference between the original constitution and the present Lisbon Treaty is one of
approach, not of content.” He continues for the whole of his article to indicate that the essential content is the same.

**David Miliband**: The fact that Valéry Giscard d’Estaing asserts it does not mean that it is right.

**Q519 Sir John Stanley**: Would you accept that, just because you assert the contrary, it is not necessarily right?

**David Miliband**: Exactly. Let me try to make the argument, not just the assertion. I rest my argument on three points. First, in structure, the reform treaty is different from the constitutional treaty. I defy anyone to say to me that collapsing all the pillars—which is what the constitutional treaty does—and maintaining a separate pillar for foreign policy is the same. It is not. So in structure, the reform treaty is different from the constitutional treaty because the reform treaty amends existing texts rather than re-founding the union.

Secondly, in terms of content, the reform treaty is different. It is different in part because of the red lines that have been achieved for this country, which make the treaty different in this country than in other countries. But it is also different for other reasons that we can go into.

Thirdly—and importantly—the reform treaty is different in consequence from the constitutional treaty, because the reform treaty ends the debate about whether Europe is going to have year after year after year of constitutional and institutional reform, or whether we are drawing a line under that period of reform and moving on—as Ken Purchase said—to the big issues. The proof of that third point will be in the declaration that comes out of the European Council on Friday. That will announce the establishment of the Reflection Group, while making it absolutely clear that, for the foreseeable future, institutional reform is off the European agenda rather than on it. So in terms of structure, content and consequence, the reform treaty is different from the constitutional treaty, and I hope you accept that there is not just an assertion of difference, but a founded argument based on three points as to why it is different.

**Q520 Mr Heathcoat-Amory**: The structure of the new treaty is different only in the sense that it retains the two existing treaties and amends them, rather than having a single, consolidated text. But in legal effect and in substance, the new treaty is pretty well identical to the constitutional treaty, as shown by the European Scrutiny Committee’s comparative table. I would like to ask you about one matter of substance, which is identical but has simply been rolled over fully intact from the constitutional treaty, and that is the article that governs majority voting.

The Government claim that foreign and security policy will be inter-governmental, and we will have a veto over important matters. But the new treaty includes the important innovation that when the High Representative makes a proposal, that proposal is voted on by majority voting—so long as the European Council, at one of its four annual meetings, has agreed unanimously to accede to his request to make a proposal. Do you agree with that analysis of majority voting?

**David Miliband**: No, I do not, and I will return to that. But first, it is very significant that David Heathcoat-Amory, who has looked at this issue for some time, should say, I think for the first time, that the structure of the reform treaty is different from the structure of the constitutional treaty. That is what he said today, and we should recognise the importance of that. What he said was that the “legal effect” was, in his words, almost identical, but it was very welcome to hear him say that the structure of the constitutional treaty was different from that of the reform treaty. It is part of the purpose of these meetings to try to establish areas of fact, so I am glad that he picked up that point. So in terms of structure, we are amending existing treaties, not—to use your words—creating a consolidated text. It is not a new re-founding of the European Union. That is important.

Secondly, I do not accept that in legal effect, the reform treaty and the constitutional treaty are the same. You mentioned the ESC report, which is important and it does have a table of derivation at the back. Since you referred to it, I would like to refer to it. You say that it shows that the two treaties are the same. To show you why it does not show that, it relegates to one footnote the whole of the new arrangements on justice and home affairs, which are a significant part of the new treaty but were not in the constitutional treaty. I am just trying to find the footnote number so that you can follow it up. I think that that shows that your assertion about the listing at the back does not add up. You can take it from me—you can trust me, I am a politician—that they have relegated the justice and home affairs points to a footnote in the table at the back. I do not think that that gives due credit to the changes that have been achieved.

In respect of the Common Foreign and Security Policy, the Council of Foreign Ministers acting in unanimity agrees a policy and asks the High Representative to come forward with the implementing policy. It remains the case that implementation of an agreed policy can be done by qualified majority voting, but the policy is set by unanimity.

**Q521 Mr Heathcoat-Amory**: First, you would have heard me say that the structure is different in the debate yesterday if you had not spoken and then left almost immediately. I repeat, and I think by implication that you agree, that in legal effect and substance—which is what people care about—the two treaties are almost identical. In the words of the European Scrutiny Committee, they are “substantially equivalent”.

**David Miliband**: I do not accept that.

**Q522 Mr Heathcoat-Amory**: Excuse me, I am asking a question. Your quarrel is not with me over this issue, but with a Labour-dominated European Scrutiny Committee.
I want to return to the point about qualified majority voting. I am referring to article 17 of the text itself. It is quite clear that when the High Representative asks to make a proposal to the European Council, this country, if it does not agree, will have to veto the request at that point. Otherwise, if it accedes to the request by the High Representative, from then on, majority voting will apply. There is no other way of interpreting article 17(b)(i). Therefore, that is a new and substantial erosion of the unanimity principle. In practice, it means that the UK would have to veto very early on, even a request to present a proposal by the High Representative. That is a very high bar indeed, and unless the Government vetoed it at that point, once the request has been made to the High Representative and once he has brought forward his proposal, according to that article, qualified majority voting applies.

David Miliband: Let me go through those two points. First, I do not accept that the reform treaty and the constitutional treaty are the same. Selective quotation from the ESC report is becoming a parliamentary sport. To be absolutely clear on what it says about the allegation of substantial equivalence, it says: “We consider that, for those countries which have not requested derogations or opt outs from the full range of agreements in the Treaty, it does”—and it refers readers to the table.

Even the ESC says that for the UK, it is not substantially equivalent. Let us be clear about what the ESC says. I know that you are a distinguished member of that Committee. Secondly, the unanimity basis for agreement on foreign affairs is for the policy. It has been the case since 1992—or possibly 1986—that the implementation of policy is a matter for qualified majority voting.

Paul Berman: Since Amsterdam.

David Miliband: Since Amsterdam, sorry. The distinction is between agreeing the policy and implementing it. That is unchanged by this.

Q523 Mr Heathcoat-Amory: No, you are being utterly obtuse. We know that, in the existing treaty, implementing measures are passed by qualified majority voting. I am asking you a different question, on a new article, which concerns the role of the High Representative. When the High Representative asks the Council to present a proposal for action, the European Council can reject that request by unanimity. In other words, we have a veto.

David Miliband: Correct.

Q524 Mr Heathcoat-Amory: But, if the European Council agrees that the High Representative can present his proposal for action, from then on consideration of that proposal would be by majority voting. There is no other explanation. Please ask your advisers to confirm that. My point is that the much-trumpeted veto of the United Kingdom must be asserted very early on, when the High Representative makes his request. He will make it in very reasonable terms. He will say, “I wish to present a proposal for action.” For the British Government at that point to say, “No, we are not going to do that, because we are afraid of what you may bring forward,” is a very demanding set of conditions. If we do not veto at that point, and he does bring forward his proposals to the European Council, from then on majority voting applies. I am asking you to agree what is in the text. It is clear, but the consequences of it are very serious.

David Miliband: In setting out the policy, there is unanimity. In implementing the policy, there is QMV. That applies in terms of both what we inherit from Amsterdam and of what you have described. Policy setting is a matter of unanimity. You and I agree about that.

Mr Heathcoat-Amory: No.

David Miliband: You are saying that we have to decide it “early”. I am saying that we have a veto. If you do not like it, you do not have to vote for it. Both in terms of the post-Amsterdam conditions and what you have quoted, QMV is triggered only once there has been unanimous agreement to do something. We are both saying that. You are saying that there is a veto, but you think that there has to be a high bar for it. I am not disagreeing with you. I am saying that in setting the policy there has to be unanimity, then when it comes to implementing it, there is QMV.

Q525 Mr Heathcoat-Amory: I find it truly alarming that you are not familiar with article 17. It is not “implementing”. It is “when adopting a decision defining a common action or position on a proposal from a High Representative”. The word “implementation” does not occur in that phrase, so do not bring it into the text. Maybe it should have been there, but it is all too late, because it will be signed tomorrow.

David Miliband: No, I am sorry, as I have made clear, in both the inheritance from Amsterdam and the new pieces that you have described, whether the proposal comes from the Council or the High Representative, the initial decision is for a policy. We are agreed on that. There is a subsequent decision to put that policy into practice. Do not use the word “implementation” if you do not want to. That is a matter that will then be decided by QMV.

Q526 Andrew Mackinlay: Even if you are correct about the fact that the treaty is not the constitution, there is a political problem, because the perception of a substantial number of the electorate is that it is the same. That is a dilemma for legislators here, particularly but not exclusively Labour Members, who signed up to a manifesto saying that there would be a referendum. I believe it to be a majority, but even if it is not, a substantial proportion of the electorate believe that they are one and the same thing. That cannot be dismissed. It is a reality and a matter of honour. I was not the architect of the manifesto—I do not know if you were—but we signed up to this, and the perception is that it is one and the same thing. We cannot ignore that, can we?

David Miliband: You are right that nothing should be “dismissed”. Some people may perceive that they are the same, but I am not sure. I think that Sandra...
was saying earlier that a lot of people do not have a strong view about it. Some people think it is similar, some people think it is different. In the end, all of us, whether Labour, Tory or Lib Dem, will have to take a view, firstly on the content of the treaty and whether it should trigger a referendum because of that content, and secondly on whether you feel the treaty is sufficiently different from the constitution that you stood on. Regarding the first issue, I think that we agree that something with far-reaching constitutional consequences should be subject to a referendum, joining the euro for example.

Q527 Andrew Mackinlay: There is one option, is there not, that would satisfy some legislators—not just Labour, but some Labour Members—which is a commitment to have a referendum between now and, say, 2012, reaffirming our membership of the European Union. Do you totally dismiss that?

David Miliband: I do not agree with it, but “dismiss” suggests tossing it aside. That is the Lib Dem—

Q528 Andrew Mackinlay: Some people were saying it in your own party before the Lib Dems, so it is a continuing church, albeit underground and persecuted from time to time. Some have been saying it. It does not matter who it came from; it is a sensible idea, is it not?

David Miliband: It is a position that has now been adopted by the Lib Dems. We made our choice in 1974. If we were to have a significant constitutional change there would be a case for a referendum, but one of the things that we would all agree on, and which I have heard you talk about, is the importance of restoring respect for Parliament. Let us make Parliament the place where we decide things. That is what we are elected for. Let us then face the consequences of whether the electorate agree or disagree with us. I think it was Mrs. Thatcher who quoted Clement Attlee as saying that referendums are the refuge of those who are either demagogues or feel that they have lost the argument. We should take responsibility for the decisions we take in Parliament and then let the electorate decide.

Q529 Richard Younger-Ross: It would be very well and good for the politicians here to make that decision if they had any say in the treaty or any of its clauses. It was like getting hens’ teeth from your predecessor to get her to admit that there had been any pre-discussions at all on the treaty, let alone what was in those pre-discussions and what the Sherpas were doing at the different meetings. You asserted that the structures are different. My background is in architecture, and I can build you a new house out of bricks or I can go to your existing house and adapt it and build bits out of timber. The structures will be different but they are both still houses, and I assert that this is still a constitution, even though it has a different name and different structure.

David Miliband: But bungalows are different from tower blocks, are they not?

Richard Younger-Ross: I did not say anything about bungalows or tower blocks.

David Miliband: No, but they are both houses.

Richard Younger-Ross: Not by definition.

David Miliband: Maybe you are a theologian or a philosopher, not just an architect. To continue your metaphor, there is a big difference between doing up the paintwork and knocking the whole thing down and rebuilding it.

Q530 Richard Younger-Ross: Coming back to the point about the High Representative, the High Representative now has a Commission hat and can instigate policy. Is that not significant?

David Miliband: It is noteworthy. Obviously the Commission role of the High Representative is quite limited. His or her primary function is to carry out the wishes of the Council of Ministers, but where he or she is performing Commission duties then fair enough. There is a continuation of the right of initiative but you could say that the boot is on the other foot—formally, in this treaty, the Council is the policy originator.

Q531 Richard Younger-Ross: Do not Commissioners normally just wear Ministers down over a number of Council meetings?

David Miliband: I think that Ministers have shown themselves to outlive Commissioners more than Commissioners have outlived Ministers.

Q532 Richard Younger-Ross: With regard to whether this is the same as the constitution or whether it is a reform treaty, I seem to recall that during the early talks the Prime Minister was asked a question in the House about whether they were different, and he said that of course they were different because of the red lines. And he used the red lines as the mark of what the difference was. The red lines are all actually in the original constitution, so if you take the red lines away they are still the same thing.

David Miliband: I do not have the Prime Minister’s quote in front of me, but obviously the red lines are a significant addition. As I said: structure; content; consequence. In terms of content, the red lines are a significant change from the constitution; they are not the same. The material on JHA, which we discussed at our last meeting, is a significant part of that.

Q533 Chairman: May I just take you to this point about parliamentary scrutiny? You made a point that there should be proper parliamentary scrutiny and presumably there ought to be better parliamentary involvement in future on European matters than there is currently. Are the Government considering giving a right of prior vote on any extension of QMV under the passerelle procedure for the Common Foreign and Security Policy?

David Miliband: Yes. The Prime Minister has said that we are.

Q534 Chairman: And when are we likely to know what that will involve?
David Miliband: When we publish the Bill, I think; when our preliminary conclusions are complete.

Q535 Chairman: You are not sure when you are going to publish the Bill yet?
David Miliband: You will not have to wait too long. Let us get the signature, or signatures, out of the way first, then let us move on to publication and then proper scrutiny. To anticipate a point that you might want to make, obviously these matters get discussed in the usual way, but I know that the Government know that you have a timetable for publishing your report and we want to make sure that there is proper time for that. We will not have the Second Reading of the Bill before we get your report.

Q536 Chairman: That is helpful. No doubt we will find out some more later on today, or tomorrow. May I ask you about the implications of the new proposals for enhanced co-operation and what, if any, effect they will have on our policies and on how the Common Foreign and Security Policy works?
David Miliband: There is continuity and change in this.

Q537 Chairman: I am interested in the change.
David Miliband: The change is in respect of what we now all call permanent structured co-operation. Is that what you are talking about?

Q538 Chairman: Yes. There is that, but there is also a solidarity clause. I am interested in the co-operation.
David Miliband: Enhanced co-operation was brought in under previous treaties, for nations to come together to conduct foreign policy work together. Permanent structured co-operation is more on the defence side, on the European Security and Defence Policy side, and it is about capability improvement among EU member states. That is what the reference to permanent structured co-operation is.

Q539 Chairman: In practice, does that have implications for what we do, or is it just a drafting change?
David Miliband: No, I think that it is about the capabilities: that is one of the issues for European defence. This is about enhancing capabilities for European defence; EU-led operations in respect of security in the European neighbourhood. That is different from the solidarity clause, which is about terrorist incidents and whether or not we are committed to helping each other in the event of terrorist incidents. That seems perfectly helpful to us.

Q540 Chairman: Let us probe that a bit further. You have obligations to the EU under the solidarity clause, you also have both your independent foreign policy and your national policies, and they may not be identical. How is that resolved in terms of the solidarity clause?
David Miliband: I think that it would be helpful if I just read out the content of the so-called solidarity clause, because I think that it makes clear the circumstances that we are talking about. It is title 7 article 188R of the treaty on the Future of the European Union. It says: “The Union and its Member States shall act jointly in a spirit of solidarity”—which is presumably why it is called the solidarity clause—“if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States”. That circumscribes pretty clearly the circumstances in which this comes to pass. It is not a bit of foreign policy that emerges after negotiation and debate. This is about terrorist attacks and man-made disasters.

Q541 Chairman: And that is new? It was not in the constitutional treaty?
David Miliband: Correct.

Q542 Chairman: Part of the solidarity clause was in the constitutional treaty and what you have just quoted is new. Is that right?
David Miliband: Sorry, it is new in the sense that it does not exist in the current treaties. It was in the constitutional treaty.
Chairman: Okay. Gisela?
David Miliband: That is right, is it not?

Q543 Ms Stuart: Yes. Would 9/11, which triggered article 5 of NATO, have triggered the solidarity clause?
David Miliband: If it had happened within Europe?
Ms Stuart: Yes.
David Miliband: It certainly meets my definition of a terrorist attack.

Q544 Mr Purchase: Madrid?
David Miliband: Madrid, yes, and I suppose London 7/7.

Q545 Ms Stuart: So what is the argument that the solidarity clause undermines NATO?
David Miliband: Why does it undermine NATO?

Q546 Ms Stuart: This is not one of my frolics. Countries such as Finland were very concerned about this clause. They said that if you want a solidarity clause we can always join NATO. They asked why we were doing this within the EU. Also there is a slight difficulty in that it is not a true solidarity clause in the sense that countries like Ireland or Denmark have quite different positions. We need to be quite clear how we interpret the solidarity clause. The declaration makes the solidarity clause much weaker than it appears because it states that none of its provisions “is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligations towards that Member State”. In other words, a country has clear
obligations but then it interprets them itself. Some people, although not in the UK, have been quite genuinely concerned that it undermines NATO.

David Miliband: I met the Finnish Foreign Minister and he certainly did not raise this as a threatening clause. Obviously it is open to member states to join NATO, but some of them are not members for historic reasons, which it is not worth going into. I do not see the argument—I do not say that you are making it—why a clause like this for the European Union undermines a similar clause that exists in the NATO treaty. I would have thought they were complementary and reflective of the values of the two institutions.

Ms Stuart: So our view is that there is no conflict. Okay.

Mr Hamilton: May I briefly return to something—

David Miliband: I am terribly sorry Fabian, but it has been helpfully pointed out to me that there is a mutual defence clause which may be a source of confusion. Would it help if I read it out as it relates directly to this NATO order? Section 2, paragraph 7 states: “If a Member State is the victim of armed aggression on its territory the other Member State shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Art.51 of the UN Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”. Maybe that reflects the discussions that happened.

Q547 Ms Stuart: That is section 2 of what?

David Miliband: It is section 2 of article 28 A, paragraph 7. Sorry, Fabian?

Q548 Mr Hamilton: May I come back to something that Andrew Mackinlay asked earlier? You quite rightly replied that it is for Parliament to make decisions about treaties. We always have done. On previous treaties such as Maastricht and Nice, those far-reaching decisions were made by Parliament rather than through referendums. The problem is that the previous Prime Minister committed this Government to a referendum and put that to the people in the manifesto.

David Miliband: On the constitution.

Q549 Mr Hamilton: On the constitution. As you rightly say, the problem is that much of the Lisbon treaty is very different from the constitution that was proposed for which we guaranteed a referendum in the manifesto, but, as Andrew Mackinlay said, that is not the public perception. The difficulty that we have—and that we all have in our constituencies, whatever our party—is that it is perceived that the Labour party at the last general election made a commitment to a referendum on a constitution and that we are simply being disingenuous in saying that the Lisbon treaty is so different that we do not need the referendum.

I happen to agree with your point, but we are not getting that across. I wonder what you and the Government will do to make it clear to the electorate that this is different from the constitution on which we guaranteed the referendum.

David Miliband: Let us note first that we must deal with reality rather than perception.

Andrew Mackinlay: The reality is the perception. David Miliband: No, the reality is not the perception—at least, as understood by Fabian and me. The reality is that this is not the constitution. It is very different—to use your phrase. That was point one. It must be the reality.

Secondly, the Committee should not become a Labour party election-planning session in which we are trying to figure out how to explain our policies. I am happy to work with you to figure out the best way to explain matters to your constituents, but we should probably do that in our own bunkers rather than in quite such a public place.

Q550 Mr Purchase: With great respect, that is a different point. We are talking about Parliament making the view clear to the public, and that is being distorted at the moment by parts of the popular press.

David Miliband: We have a responsibility to be clear as possible about the reality. Your investigation is into the reality. I think that Sir John Stanley and I agreed with each other on the matter during our last discussion. The bar for a referendum in a parliamentary democracy should be: does this law affect bringing into being a fundamental constitutional change? I think that that wording was used, although it can be checked. A fundamental constitutional change should be subject to a referendum, and Parliament must play its role. The real question that we face is whether the treaty constitutes a fundamental constitutional change, given all that we know about its contents and about the present? My case to you would be that no objective observer could look at the changes, however worth while in respect of double-hatting, and say that it is a fundamental constitutional change in our constitutional system. Given that, it is a slippery slope then to say that we should have a referendum anyway.

Mr Hamilton: We need to get the message across.

Q551 Ms Stuart: But the previous Prime Minister did not give a reason for granting a referendum that had anything to do with the constitution. I want to know just for the record.

David Miliband: That is true. I think that I said that in this Committee. He said that it would clear the air.

Chairman: I am conscious that many of us have views about what the former Prime Minister said at that time, but let us not get into that.

Q552 Mr Hamilton: Let me get back to the reality. One of the proposals in the treaty is for the establishment of a new European Council President.
We took evidence last week from the former Foreign Secretary, Lord Owen. His view—shared by many, I think—is that a figure such as the European Council President might develop too great a degree of independence, thus undermining the prospect that he or she would be a creature of the member states as envisaged by the Government. How will we ensure that the European Council President does not become too independent of member states?

David Miliband: I read Lord Owen’s evidence. It was very interesting, but I do not think that his view is widely shared. At least, I have not heard anyone else saying it. The President is appointed by 27 Heads of Government to chair meetings and have a role in setting the agenda. All of us here are politicians. We stay close to our electorates. Any Chairman of the European Council who gets too big for their boots and loses touch with the people who appointed them will end up in trouble. A pretty strong lasso is holding back any pretensions that that person may have. They have an important role. They are appointed for two and a half years and they are accountable pretty quickly to their 27-member appointing body.

Q553 Mr Hamilton: Can we be sure that that 30-month term of office, which is pretty brief, will not be dominated by the quest to renew the contract or to find the right person in the first place? There is a danger that there is such a long lead-in time to the appointments that someone could be permanently on an appointments commission. You may or may not want to answer that.

Article 213 of the EU reform treaty states that the President of the European Council cannot also be the President of the European Commission. That is ruled out. Are you confident that that article holds water, and that we will not eventually find the same person doing both those jobs?

David Miliband: Yes.

Q554 Sir John Stanley: Why?

David Miliband: Because the article states clearly: “Members of the Commission may not, during their term of office, engage in any other occupation.” That is plain and simple—they cannot have two jobs.

Q555 Sir John Stanley: Foreign Secretary, do you think that the occupations of the Secretary of State for Defence and that of the Secretary of State for Scotland are the same?

David Miliband: No, the occupations are not the same.

Q556 Sir John Stanley: They are not?

David Miliband: They are two separate jobs.

Q557 Sir John Stanley: That is different from an occupation. They are the identical occupations; they are Cabinet posts.

David Miliband: This is a sort of canard, and I have had an amusing exchange with William Hague about the matter. He wrote to me asking why I had not ruled out the possibility that the two posts could be held by one person. I wrote back saying, “Members of the Commission may not, during their term of office, engage in any other occupation.” That seems plain and simple. Yesterday, he found the word “occupation”, and thought there was a devilish plot to allow that possibility. He had not even read the whole article. Everyone has given me the article—I have got the point, I promise—so I shall read it out. Beyond saying that there is no holding of more than one occupation, the article says that members of the Commission shall “neither seek nor take instruction from any Government or any other body”. In other words, not only is there a double occupational ban, there is a ban on any Commissioner taking instructions from any other body. The Chairman of the Council is there to take instructions from the 27 Heads of Government. That provision is lock, stock, barrel and bolted. All you have to do is read the whole article.

Q558 Sir John Stanley: Foreign Secretary, you said that you had studied Lord Owen’s evidence to the Committee last week. He reported that the Dutch Parliament has received legal advice that is totally contrary to the interpretation that you have just given. Have you seen that advice?

David Miliband: No, I have not.

Q559 Sir John Stanley: He said: “Whatever the Dutch are or are not, their country is famed for its knowledge of international law. When they advise their Parliament that it still allows double-hatting and there are no substantive changes in the draft”—

David Miliband: Let us finish the earlier point. You seemed surprised that I said no. The Dutch evidence that you are quoting is apparently from seven years ago, and deals with the previous constitutional treaty.

Sir John Stanley: Well, from Lord Owen’s evidence it was three years ago—

Paul Berman: It was from the time of the constitutional treaty, so it was three or four years ago.

David Miliband: It related to the constitutional treaty.

Sir John Stanley: Yes, I know.

David Miliband: We do not have a constitutional treaty.

Q560 Sir John Stanley: That is your assertion—others take a different view. Finally, are you saying to the Committee that under no circumstances under the terms of the treaty will the roles of President of the Commission and the President of the Council ever be held by the same person?

David Miliband: That is prohibited by article 213.

What could be clearer? It is prohibited because “Members of the Commission may not engage in any other occupation”. If you are suspicious about the word “occupation”, may I point out the article says: “Members of the Commission shall neither seek nor take instructions from any Government or any other body”? That could not be clearer.
Q561 Mr Moss: Foreign Secretary, several witnesses who have appeared before the Committee have expressed misgivings about the role of the new High Representative, including its practical “do-ability”, given the huge range of responsibilities. How best do you think that the post can be made to work, given the remit of responsibilities and its double-hatted nature?

David Miliband: That is really important and completely fair, because two reasonably substantial jobs are coming together. The most important thing will be discipline on the part of the commissioning body—the Council of Foreign Ministers—about what it wants the High Representative to do, so that it is clear that he or she is there to enact agreed foreign policy. We must be disciplined in the priorities we have and the way in which we move forward.

Q562 Mr Moss: Do you see any problems with this person being the Chair of the Foreign Policy Council, as well as the person who brings proposals to it? If you think of a company, the chairman and the chief executive coming up with the ideas; in this particular case, it is one and the same person.

David Miliband: That is a good point. It is certainly an innovation. From watching the way in which the current High Representative has played his role, I can see that, even though he does not chair the meetings, he is a pretty pivotal figure. It is a balance between commanding confidence and consensus, and initiative. The formalisation of his role as chair of the council enshrines his consensus-building role, given the unanimity requirements of foreign policy. I see circumstances in which that will bring people together in a good way, although I totally accept your point that it is novel.

Q563 Mr Moss: How do you envisage the appointment of the new High Representative, which we presume will take place on 1 January 2009, given the role of the European Parliament?

David Miliband: It is fair to say that the way in which those jobs are given out is not exactly Northcote-Trevelyan. I envisage a lot of chatter, a lot of discussion, and a lot of feeling-out of positions. Whether there will be a job advert in The Economist, I am not sure.

Q564 Mr Moss: The European Parliament has a role, as you are aware, in looking over the appointments of Commissioners. The new Commission will not be in place until 10 months after the European Parliament makes its decision.

David Miliband: It was late at night in the Lisbon summit when this was finally agreed. Just on a small point—I think you knew what you were saying but I could not remember—the European Parliament has a right to be consulted before the appointment, not afterwards.

Q565 Mr Moss: There seems to be some discrepancy with what the Prime Minister has said. He said that the European Parliament will not be consulted, and yet declaration 39 in fact says that “appropriate contacts will be made with the European Parliament.” Will you clarify the situation?

David Miliband: Yes, that was what was agreed late at night at the Lisbon summit, and it precisely refers to “appropriate contacts.”

Q566 Mr Moss: What does that mean?

David Miliband: I think that that will be in the eye of the beholder. It means that those contacts will not be inappropriate. There will be contacts and discussions.

Q567 Chairman: Mr Solana is a remarkable man with enormous abilities and experience. He has come to this role, having been Secretary-General of NATO, and is widely respected in many quarters. How will we find someone who has a similar pedigree, wants the job and has the confidence of all these different players?

David Miliband: The first point is that we do not know whether Mr Solana wants to carry on or not.

Chairman: He is not immortal.

David Miliband: No. Secondly, although he is a fine man in many ways, there are many people with experience. On the defence side, there are former defence Ministers, former NATO members and former Prime Ministers, but we should not go there. So yes, he has talents, but he is not unique.

Q568 Mr Heathcoat-Amory: The text that we now have is identical to that in the constitutional treaty—we can at least agree that that is the case for these clauses—and when it was negotiated in the Convention on the Future of Europe, the British representative, Peter Hain, tabled amendments to try to remove the double-hatting. He did not want the High Representative or Foreign Minister, as he was then called, to be a member of the Commission and a member of the Council, or to preside over the Council, so why did the Government accept the proposal?

David Miliband: I was not in this part of the Government at the time. I do not have an answer to that question, although I am happy to write to you with an answer.

Chairman: Perhaps one of your colleagues knows the answer.

Mr Heathcoat-Amory: You have got very short memories: I can remember it very well.

David Miliband: You can give us the answer.

Q569 Mr Heathcoat-Amory: I am asking you. The Government did not want the proposal, but they accepted it, and they are now saying that it is a good idea. However, by definition, the present Government do not want it, because it is exactly the same text; it has not been changed. We have got a text that the Government did not want. Why are we accepting it? You had another opportunity to amend what is now called the reform treaty—why did you not take it?

David Miliband: I will have to go back and find out what Peter Hain said and why he said it.
Chairman: Perhaps we can have a letter, which will help us when it comes to our reports.

Q570 Mr Heathcoat-Amory: May I ask another question? The High Representative will obviously try to secure the agreement of all member states for actions internationally. Where there is not possible—in the real world, countries disagree—what do you make of the additional clauses? They are not additional to the constitutional treaty—as I said, it is the same text—but they are additional to the present treaties which oblige member states to come together on foreign policy. I particularly ask you about the obligation in article 11, which says that there shall be “an ever-increasing degree of convergence of Member States’ actions.” That has echoes of the “ever-closer union” provision in the present treaties.

Another article obliges member states to “ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.” There are therefore two articles that will apply when there is no agreement, but there will still be an obligation on member states to converge their actions. Will that not bind us, even when we have exercised our veto?

David Miliband: I do not think so, no. We touched on this when we talked last time about the mutual support clauses. We are bound by what we agree and once we have agreed something by unanimity we are going to pursue it in various spirits of co-operation. They are two sides of the same coin, really; one side is the unanimity side and the other side is the mutual support side.

Q571 Mr Heathcoat-Amory: I am sorry, can you answer my question? I am postulating a situation whereby there has been disagreement in the European Council or we have exercised our veto over a proposal so there is no common action and no agreeing. However, there are these additional clauses—I emphasise that they are additional to what is in the present treaties—which mandate an ever-increasing degree of convergence in member states’ actions. I read out another one that has the same effect of ensuring, through the convergence of our actions, that the Union is able to assert its interests and values. There is an obligation. Unless the treaty is completely meaningless, the words lay down an obligation for us to agree to converge our actions with other member states whom, I have just said, we disagree with; we have exercised our veto. Is there not a contradiction?

David Miliband: I do not think so, because the previous sentence to one of those you read out is about member states consulting with others, which seems to me perfectly sensible. As we discussed with Ken Purchase at the beginning of this sitting, precisely because other people’s actions affect us, it makes sense to consult them and to understand where they are coming from and what they are trying to do in order to maximise our influence.

Q572 Mr Heathcoat-Amory: I have got the consultation obligation, but I am asking about another obligation. It is no good referring me to another—

David Miliband: Sorry, you said it was new and in fact it is existing—article 16 is existing. If I have got the right sentence here, it says: “Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union’s influence is exerted as effectively as possible by means of concerted and convergent action.” I think that that was the phrase you used.

Chairman: If there is a confusion, perhaps we could have something in writing to clarify. I have to move on to some other areas.

Q573 Mr Heathcoat-Amory: We have three very highly paid officials plus the Foreign Secretary and they cannot answer a very simple question about a text that will be signed tomorrow by the Prime Minister. I think it is rather serious.

Paul Berman: To comment on the Foreign Secretary’s point, the notion of convergent action is not new, it is there in article 16 of the current treaty. In relation to the new wording which also refers to convergent action—this is in article 11—that has to be applied within the framework of decision making of the Common Foreign and Security Policy. It does not undermine the unanimity checks elsewhere. It is an overarching provision which describes how it will work in the preceding paragraph. It makes it clear that unanimity is the default option for the Common Foreign and Security Policy. So this is an overarching provision but then you have to look at the specific provisions that follow on how it is to be applied.

Q574 Mr Heathcoat-Amory: But the overarching provision is precisely my concern. If we put on one side our ability to veto, there is nevertheless this overarching obligation to converge our policy and our actions. Incidentally, the clause I have just read out is not in the existing treaty and I have just checked that myself.

David Miliband: We have just read out a clause that is.

Paul Berman: What I said was that the concept of convergent action is in the existing treaty in article 16. That notion is retained in article 11, which sets out the general overarching provisions. To make it clear, article 11 is an overall description of the Common Foreign and Security Policy but in order to implement it you have to look at the detailed provisions that follow thereafter.

Q575 Mr Heathcoat-Amory: I am awfully sorry but, since we have a lawyer here, the clause in the existing treaty is different. It says that member states, “shall refrain from any action which is contrary to the interests of the Union”. That is a negative requirement. This is a positive requirement, to converge our actions. That is a new obligation and I think it undermines the separate provisions, which
allow us to veto in certain eventualities. It is, in your phrase, this “overarching obligation” that is precisely my concern.

Paul Berman: It does not override the detailed provisions. It is very standard practice in EU treaties. You have the introduction to a chapter and a general set of statements about how that policy is going to work. To see how it works in practice you have to look at the specific provisions. In article 11 you have a general description of how the Common Foreign and Security Policy is going to work. That includes a new paragraph that has been inserted in this treaty, spelling out the specific intergovernmental nature of the treaty, including the fact that unanimity is the default position. It then follows on to the language you identify, which talks about convergence.

What I am saying is that the concept of convergence is not new because that exists in article 16. This wording is new but it is part of the overall description of how the CFSP is going to work. In order to establish how it works in practice you must then look at the subsequent articles, which in particular include the provisions on conduct of decision making by unanimity, except in the exceptions that have already been discussed.

Q576 Mr Heathcoat-Amory: Finally, can I get you to confirm that the phrase, “the achievement of an ever-increasing degree of convergence for Member States’ actions” is entirely new. Would you agree to that? Yes or no?

Paul Berman: I cannot agree that it is entirely new because, as I have said already, the concept of convergence is already in article 16.

Q577 Mr Heathcoat-Amory: Where is it in this treaty?

Paul Berman: Article 16 talks about ensuring the Union’s influence is asserted as effectively as possible by means of concerted and convergent action. What I am saying is that the notion of convergent action is not new. What I do agree is that this paragraph is new, as is the preceding paragraph, which underpins the intergovernmental nature of CFSP. In order to understand how these overarching provisions are to be applied, they cannot be taken as free-standing obligations, read in isolation. They must be read with regard to the more specific provisions that follow, including the provisions on voting by unanimity.

Q578 Mr Heathcoat-Amory: Thank you for confirming that it is new. You are right. I have just checked article 16 and that phrase does not apply. Secondly, is it not really very worrying—

David Miliband: Sorry, but it does apply.

Q579 Mr Heathcoat-Amory: Well, I am sorry, but I have article 16 here and there is nothing about an ever-increasing degree of convergence.
have the first call for the new service. However, I agree with you that it is important that Britain gets proper representation.

First, I do not think that the run-down on the European Fast Stream negates our potential to have influence in the EAS, partly because there is much more scope now for people entering the Commission mid-career, which is a significant difference from the situation 20 or 30 years ago when you had to enter at the beginning and work your way to the top. Secondly, the EAS will be setting out to recruit people on secondment from the FCO and, as long as people are assured that they will be able to come back, that will be an attractive secondment. The balance of FCO effort is moving away from Europe, which had up to 35% or even 40% of staff until relatively recently and is down to 30%.

Q583 Mr Horam: Why are we running down the Fast Stream? What is the reason?
David Miliband: The truth is that we were struggling to get people for it. I am happy to get some management data on that. We were struggling to get people on to the Fast Stream track and we have been trying to do more in respect of secondment and the mid-career entry point. I am happy to get you stuff on that.

Q584 Andrew Mackinlay: It is about their having confidence that they can return to the mainstream FCO.
David Miliband: But the point is that we need to exploit the opportunities for secondment that are created by the new EAS and we are determined to do that.

Q585 Chairman: You have just published a new, revised strategy. You have got rid of the 10 priorities and are moving towards a more focused approach. I have just had a letter about that. In that process there will perhaps be a reduction of commitment in certain parts of the world. If that is the case, will we be relying more and more on the European Union’s delegations, or European Union representation? I will give you a particular example. Two weeks ago, I met a delegation of Members of Parliament from Gabon, where we do not even have an Honorary Consul. I wonder whether, as the EU’s External Action Service is developed, the British Government might start using the EU’s base in particular countries, rather than having our own, inadequate, representation—or no representation at all?

David Miliband: No. I see the two as complementary, not substitutive. I will look into the Gabon situation, because there will be provision for British visitors. We are bound to have some sort of representation in Gabon.

Chairman: We do not at the moment.

David Miliband: We will find out about Gabon. The point is that more and more business within Europe that used to be done bilaterally is now done through the European Union, and that is the importance of UKREP, so there is no suggestion of running down UKREP. Equally, we need to have representation in all European countries: that will continue. However, the focus of the FCO’s staffing strategy is to put people into the priority areas, often areas of danger—it is why we are having a big upgrade in our Afghanistan effort, a big upgrade in our middle east and north Africa effort—which is part of a shift from the traditional focus of bilateral foreign policy in Europe to some of the new areas of threat that we face.

Q586 Chairman: Can we have a note on how you intend to tackle the staffing of the EAS from the UK point of view?
David Miliband: Of course. I am very happy to do that.

Chairman: Can we now move on? I have been told that it is about quarter past four. Gisela Stuart, please, on the Reflection Group.

Ms Stuart: Oh yes.

David Miliband: Fancy another role?

Ms Stuart: No.

Chairman: That is why we got her to ask the question.

Q587 Ms Stuart: I have already got redemption from one life sentence, I think. As we know, the Reflection Group is a group of wise men, suggested by President Sarkozy. While I think it is quite appropriate to have a forum to look at the way the European Union develops, I wonder what your view is on what the mandate of that group should be, particularly given that, in your opening statement, you said that one of the good things that ought to come out of the Lisbon treaty is that for the foreseeable future we put an end to institutional changes. Given that the Reflection Group will look at, particularly, Turkey’s accession—this huge member state potentially coming in—will that come into it, or how do you envisage that mandate?

David Miliband: It is very important that the Reflection Group be about the long-term future of the Union. It should start with the global context that it will face in 2020 or 2030, the changing economic, demographic and possibly political context, Europe’s place in the world, wholly consistent with the “global Europe” argument we have been making. It should not be trying to substitute itself for short-term policy making, and it certainly should be barred from getting into an institutional reorganisation. This is about the global context that Europe is going to face in 15 to 20 years’ time. That is the mandate: to think far ahead, and not to substitute itself for the negotiations and discussion. I certainly do not see it adjudicating on Turkey. In fact, the basis for many countries agreeing to have this group at all is that it does not get into the question of commitments already made to Turkish accession.

Q588 Ms Stuart: So you would exclude discussions on Turkey?
David Miliband: I do not think there will be a sub-clause in its mandate saying, “You’re not allowed to look at Turkey”, but I think it will be absolutely clear that this is about the global context of 2020 to 2030, and not about institutional reform.
David Miliband: The treaty was not about the budget, it was about the institutions. The issue of the auditing arrangements is therefore not something for the treaty. But as you say, the budget is not being ignored and nor is its management being ignored. The important starting point for us is to make sure first, that the budget focuses on things that Europe needs to do. Secondly, that it does them in as efficient a way as possible. Both of those things can be done from relatively close to a zero base. We should be starting from a simple proposition that the European Union should be spending on things that it should be doing; it should be doing it in an efficient and effective way. Thirdly, we need to ask whether public spending is the right way to achieve the policy goal described, presuming that we agree that it is a policy goal that Europe should be pursuing. Could that policy goal be achieved through regulatory or other means? That is the right way to approach the European budget. It is a fundamental budget review. It is to be launched in the next year or so. Those are the right starting points: does it add value; is it efficiently done; and is public spending—as opposed to other action—the right way of achieving the goal? We will also be arguing strongly that the European budget should be contained.

Q595 Mr Heathcoat-Amory: You say that the budget was not part of the treaty, but the budgetary process—the means by which Europe obtains money and spends it—is the subject of treaty articles. To that extent those articles could have been amended or strengthened. Some of us in the convention tabled amendments to strengthen the role of the European Court of Auditors and so on. I am not sure you are quite right in saying that nothing could have been done to reform that aspect of the treaty.

Can I ask you about a specific? When the Prime Minister was Chancellor of the Exchequer he raised the possibility of bringing back the structural funds so that the better-off members could spend their own money on industrial and social policy rather than having it filtered through the Brussels machine with all the inefficiency and incompetence that that would entail. Now he is Prime Minister, do you believe that is still his aim? Are there any other opportunities for bringing certain elements of the budget back under national control?

David Miliband: I would like perhaps to write to you or have an evidence session at greater length about the budget process. I am not going to use this occasion, especially only a couple of months after the Commission first issued its paper asking for views on that, to start setting out our negotiation stall in great detail. I do not think that that would be a wise thing to do. I would prefer to use the processes that are under way in Government to respond to that Commission publication and ensure that we do so in a way that maximises our negotiating potential.

We should follow that through and I am sure that it will be for the Committee to examine it. There is a whole range of issues where there are fundamental debates going on about the purposes of the spending
and how it is done, and it is better for us to do that in a way that responds coherently across the piece rather than just picking up individual items.

Chairman: Thank you, Richard Younger-Ross.

Q596 Richard Younger-Ross: Could you give us some idea of what the Government view or policy would be towards European common defence?

David Miliband: The European Security and Defence Policy is obviously standing. We have three priorities with regard to European security plans: first, capabilities; secondly, co-ordination with other players, notably NATO; and thirdly, conflict prevention and conflict response. We do not see institutional change as the prerequisite, but we see a focus on capabilities, co-ordination and conflict prevention as the priorities for discussion and that is our approach.

Q597 Richard Younger-Ross: There is an inconsistency in the document. The opening general provisions of the amended treaty’s chapter on Common Foreign and Security Policy states: “The Union’s competence in matters of Common Foreign and Security Policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.” However, the text of the treaty’s ESDP section itself provides the same wording but states that it “will lead to a common defence.” There is a conflict between “might lead”, which is what you seem to be saying, and the document, which says “will lead”.

David Miliband: I am not sure that there is the distinction that you draw. If you look at the ESDP, you will see that it states that “the common security and defence policy shall include the progressive framing of a common defence policy for the Union. This will lead to common defence, when the European Council, acting unanimously, so decides.” It shall, in that case, recommend it to the member states. That is in section 2, clause 2, article 28 A, so I am not sure that there is the contradiction that you described.

Q598 Richard Younger-Ross: It uses the word “might” in one place and not in the other, but if you go down, the ESDP provides for “permanent structured cooperation between certain nations.” Could you describe what that would mean?

David Miliband: That is what we discussed earlier in the session with Mike Gapes when we went through permanent structured co-operation and it was about capabilities. We addressed that earlier when we were talking about solidarity, do you remember?

Q599 Richard Younger-Ross: Just coming back to the issue of “will” or “might”, if there is permanent structured co-operation, that implies that there will be a common defence.

David Miliband: No, permanent structured co-operation is about groups of countries coming together to address capabilities issues.

Q600 Chairman: Perhaps we could have a note on that to clarify whether there is a difference of meaning, and we can then pursue a correspondence on that.

David Miliband: That is exactly the issue that we discussed at the beginning of the session.

Q601 Chairman: If there is a vote, is it possible for you to come back for a further 15 minutes, which would give us an opportunity to ask you about Kosovo?

David Miliband: I absolutely have to be gone at 4.45 pm, otherwise I will be late for my next meeting.

Q602 Mr Purchase: At the moment, we have experience of joint control and operations in military matters through NATO and other co-operations, which have not always been desperately successfully because of problems of leadership and so on. In the future, do you think that matters would be made easier if we had moved more towards a Common Foreign and Security Policy in the leadership of any armed intervention or action that we may need to take?

David Miliband: I do not think so. The system that works is that on ESDP missions, there is a nation in the lead and it provides the infrastructure. When I was at the NATO meeting last week this issue came up in discussion. There has been no suggestion that national leadership and national provision of an infrastructure, into which other nations can plug, is a problem. The issue in Afghanistan is not an ESDP problem. There is a different issue in Afghanistan in that there are 38 countries there, some European and some not. They need better international co-ordination. Double or triple-hatting is being discussed for NATO, the EU and the UN. I do not think that a common European infrastructure is necessary for that. The European problem is not an institutional one, it is to do with capabilities and co-ordination—perhaps partnership would be a better word.

Mr Purchase: In Europe—

Chairman: Ladies and Gentlemen, we will take 15 minutes for one Division—hopefully there will be only one.

Sitting suspended for a Division in the House.

On resuming—

Q603 Chairman: Thank you for coming back, Foreign Secretary. I know that you are very pressed. We will ask mainly about Kosovo. Before we do so, there has been a story today about the situation with regard to the British Council in Russia, which we commented on when we published our report three weeks ago. It has not come as a great surprise to us, but I wondered if you had anything to say about what seems to be a concerted attempt by the Russian Federation Government to damage relations with this country and the British Council’s work in Russia?

David Miliband: I know that the Committee takes the work of the Council very seriously and your report rightly highlighted the threats that seemed to
be hanging over it. Today, a Foreign Ministry spokesman in Moscow announced that Russia has ordered the closure of British Council offices in St. Petersburg and Ekaterinburg from 1 January 2008. That is a very serious and illegal measure. The 1963 Vienna convention on consular relations and the 1994 UK-Russia agreement on culture confer legal status on the Council’s activities throughout Russia. It is a sad fact, but I must point out that there are two countries in which the Council is not allowed to operate: Duma and Iran. I hope that the announcement today from the Russian Government does not signal that Russia is taking steps down that road, because that is deeply unwholesome company to be in. We are in touch with the British Council, and a meeting is taking place in 45 minutes between the Minister for Europe and the British Council about next steps. Our concern is, obviously, for British Council staff, but also for the Council’s place as a key institution facilitating dialogue between Britain and Russia, which must be a good thing whatever one’s view of different political issues. I have also been talking to European colleagues following the Litvinenko situation, and I shall be talking to them again tomorrow about a European statement on the situation, which I think is deployed throughout the House of Commons.

Q604 Chairman: Thank you very much. We will no doubt get an update from you and your officials in due course.

I turn to another area in which Russia plays a significant role—blocking a UN Security Council resolution to succeed resolution 1244 regarding Kosovo. You and the Prime Minister have referred to supervised independence, in line with the Ahtisaari plan. Are you confident that there is an adequate legal basis for implementation of the Ahtisaari plan within Security Council resolution 1244 without a new successor resolution?

David Miliband: In short, yes, but as I said in my written ministerial statement yesterday, we want to go to the UN. The last four months of dialogue and mediation have taken place in good faith. We have urged all sides—I have done so personally when meeting them—to engage properly to try to bridge the gap between the sides, but as Ahtisaari found, the troika team have also found it impossible to bridge the gap. We think that it is right to go back to the UN, but we think that there is a full force in resolution 1244—NATO Foreign Ministers agreed that last Friday, so NATO forces will stay there—and I think that it provides a sound legal base for the future.

Q605 Chairman: Would that include the European Union civilian presence there with regard to assistance to the judicial and police authorities? Can that continue without a Security Council resolution?

David Miliband: There is a Security Council resolution—1244. It provides the foundation for the European Security and Defence Policy mission as well as the KFOR mission.

Q606 Chairman: Will that view be shared by all your fellow Foreign Ministers at the discussions tomorrow?

David Miliband: Strikingly large numbers of EU Foreign Ministers have looked carefully at the legal text, and it is much less of an issue between us than before. I do not want to say “all”, but a vast majority now accept 1244 as a sound legal basis.

Q607 Chairman: But it is still possible, is it not, that several EU countries will decide for their own domestic or other reasons that they will not support the implementation of an Ahtisaari plan without the Security Council resolution?

David Miliband: There are two issues. One is going along with an Ahtisaari plan, and the second is recognising a newly independent country. Different European countries take different views on those two issues. I am not sure whether any European countries will hold out against the use of 1244 as the basis for European action.

Q608 Chairman: But there will be some that will not recognise an independent Kosovo?

David Miliband: I think that there will be some that do not recognise an independent Kosovo in the first wave; I do not know whether there are countries that will say that they will never do so.

Q609 Sir John Stanley: Foreign Secretary, as we know, the writ of the Kosovo Government does not run in the Serbian northern area of the country. In effect, to recognise Kosovo as an independent state on its present boundaries is basically to endorse a Cyprus-type situation. Do you rule out the possibility of partition as a solution?

David Miliband: Yes. Partition has floated around in discussions during the past two years. It certainly does not have our support, and it has very few supporters elsewhere. People often ask whether an independent Kosovo can make a go of it as a viable country. If that question is asked of Kosovo, it applies in spades to the north of the country around Mitrovica. I do not think that partition offers a way forward. The truth is that the Ahtisaari plan has significant devolved authority for that northern part of Kosovo, rightly, and it is important that the minority rights there are respected, although, as I said in the House yesterday, there are Serb minorities elsewhere in Kosovo and not just in the north.

Q610 Sir John Stanley: What is your present assessment as to what the repercussions would be in Kosovo at the moment, and indeed in Serbia, if there is effectively a unilateral declaration of independence by the Kosovan Government?

David Miliband: I think that the best answer is that it depends. If it was unilateral in the sense of being chaotic and unconnected to the international community’s response, I think that there would be dangers. If it is carefully done, in a way that recognises and lives by the guarantees that have been made by the Kosovan Government and the Serbian Government to the international authorities with
regard to preventing violence, and if it also respects the Ahtisaari plan with regard to minorities, there is a reasonable chance of moving forward, not in a way that everyone would like, but in a way that would preserve the basics of a respect for life and security on all sides.

Q611 Sir John Stanley: Can we take it as read that the British Government and other European Union members make it very clear in Belgrade that the main prize for Serbia is joining the EU and that it should be very careful about taking any steps that will send that process into reverse?

David Miliband: That is a really good point; I totally agree with that. I have met the Serbian Foreign Minister three times, and that is an absolutely key point. It is very good to hear it from you and the more that we can all keep making the point, within our different contexts, that this process is not about punishing Serbia but about finding a sustainable way for Serbia to live in the wider region, with its “European vocation”, which the Serbian Foreign Minister often talks about, the better.

Q612 Mr Purchase: The Serbians, however keen they may be not to mess the nest in regard to getting into Europe, are first and foremost Serbians. I do not believe that they will contemplate anything that takes the Kosovo province away from them. You have met the Serbian Foreign Minister; they believe that that could have been done at the time of the Balkan conflict. We could have imposed that if we had wanted to. They now believe that, legally and properly, Kosovo is part of Serbia. I think that there is absolutely no chance of the Russians ever agreeing to anything that the Serbians do not want. What I seek from you today, Foreign Secretary, is a commitment that Britain will not join again with America and invade, taking part in something that may have nothing to do with us at all, unless there is a clear, concise, agreed mandate from the UN.

David Miliband: We are there now, Ken; 16,000 NATO troops are there now.

Mr Purchase: I understand that.

David Miliband: Including 155 British troops. And it is good that we are there now, or that the international community is there now, because it is a huge anchor of stability and a huge bulwark against violence. They are there under UN authority.

Q613 Mr Purchase: But if it is used to enforce the separation of Kosovo from Serbia, that would be an entirely different matter altogether.

David Miliband: The “enforcement” is a separate issue. It is up to individual countries to recognise other countries. It will be for every country to make a decision about whether or not it wants to recognise a putative Kosovan state. I think that resolution 1244 set out a political process that did not circumscribe the outcome. It did not prescribe one outcome or another; it left the outcome open. But it did create a political process. I do not know if you will agree, but I think that it is important that the UN Secretary-General came to a Contact Group meeting in New York that I chaired in September. He started off by saying that the status quo is unsustainable. That is a very, very important point. It is unsustainable politically, because you have a UN protectorate within a sovereign country; it is unsustainable economically, because no one is investing in Kosovo because they do not know the political status, and it is unsustainable socially, because you have this limbo. You may be right that it is a situation that none of us would have chosen to be in, and certainly no one wanted the tragedies of the 1990s to happen, but we have to deal with the situation as it now.

Q614 Mr Purchase: I will just say finally, if I may, that I think that the use of forces to prevent the Serbians from controlling and ruling their country would be an absolute disaster.

David Miliband: Just so that we are clear, the mandate of the NATO forces is to prevent violence against people. That is what they are there for. They are there to protect human life.

Mr Purchase: Yes.

Chairman: It is 4.45 and I am conscious, Foreign Secretary, that you said that you absolutely had to leave at quarter to 5. I know that two of my colleagues indicated that they would like to ask questions, but I am sorry. Thank you, and thank you Ms Morgan, Mr Berman and Mr Shearman. No doubt, you will write to us on some other areas if we pursue questions afterwards, but thank you for your time and for answering our questions.

David Miliband: Thank you.

Letter to the Chairman of the Committee from the Foreign Secretary

I appeared on 12 December before the Committee to give evidence on developments in the EU. I also gave evidence on Russia and said the following:

“It is a sad fact, but I must point out that there are two countries in which the Council is not allowed to operate: Burma and Iran. I hope that the announcement today from the Russian Government does not signal that Russia is taking steps down the road, because that is deeply unwholesome company to be in.”

In fact, the Council is represented in Iran and Burma. I apologise for the mistake.

I am copying this letter to the Chairman of the House of Commons Liaison Committee.

David Miliband

13 December 2007
Written evidence

Letter to the Chairman of the Committee from Rt Hon Geoff Hoon MP, Minister of State for Europe

WRITTEN MINISTERIAL STATEMENT: CELEBRATING THE 50TH ANNIVERSARY OF THE TREATIES OF ROME

Please find enclosed a Written Ministerial Statement that I made on 12 March about events to mark the 50th Anniversary of signing of the Treaties of Rome.¹

As this statement sets out, EU Heads of State and Government will mark the Anniversary at an Informal meeting in Berlin on 25 March, and there will be an accompanying political declaration. There will also be a range of events taking place across the UK. In addition, the Foreign and Commonwealth Office and the British Council, supported by the Department for Education and Skills, are launching “Learning Together”—a new initiative to encourage partnerships between schools in the UK and Europe.

Rt Hon Geoff Hoon MP
Minister of State for Europe
15 March 2007

Letter to the Secretary of State for Foreign and Commonwealth Affairs, from the Chairman of the Committee

EVIDENCE ON THE FUTURE OF EUROPE

As you know, the Foreign Affairs Committee has since February been seeking to hear oral evidence on the Future of Europe debate, preferably from yourself but failing that from the Minister for Europe. We have consistently requested an early date for this evidence, so that Parliament could be better informed on the Government’s approach to the discussions taking place and so that Ministers could hear the views of the Committee.

You made it clear at an early stage that you did not feel it would be appropriate for you to give evidence on the Future of Europe debate in May, in addition to giving evidence immediately before the June European Council. Reluctantly, the Committee accepted this and decided to invite the Minister for Europe to give evidence on the Future of Europe at an earlier date instead.

Initially, Geoff Hoon responded positively to this request and two possible dates in May were identified. However, on 8 May I had to write to Geoff, when it became apparent that he was no longer prepared to offer a date in May. The dates he did offer in June either coincided with the Committee’s visit to Russia or were within seven days of your own appearance before the Committee. It is the strong view of the Committee that an evidence session in June is too late. By then, decisions concerning the approach to be followed by government Ministers and officials will effectively have been taken and the opportunity for Parliament to influence the debate will have passed.

The Committee regards the refusal of the FCO to provide a Minister to give oral evidence during this crucial phase of the discussions on the future of Europe as a failure of accountability to Parliament. I have therefore been asked to write to you to express the deep concern of the Committee.

I look forward to your response.

Mike Gapes MP
30 May 2007

Letter from Rt Hon Geoff Hoon MP, Minister of State for Europe, to the Chairman of the Committee

Thank you for your letter of 30 May to the Foreign Secretary expressing the Committee’s concerns about FCO Ministers providing oral evidence on the Future of Europe. I take those concerns very seriously, and wanted to repeat why I have been unable to appear before the Committee.

During our informal meeting in April, I readily agreed to appear before the Committee, at a mutually convenient time, to give evidence on the Future of Europe. Despite informally discussing possible dates in the week beginning 21 May, my office had to inform the Committee Clerk that a session would not be possible in that week due to Ministerial travel commitments. On 21 May, I visited Paris for a meeting with the new French Foreign Minister, and travelled on to Strasbourg for a longstanding commitment to visit the European Parliament. On 23 May I visited Ljubljana for meetings with the Slovenian Foreign and Europe Ministers, ahead of Slovenia’s Presidency of the EU in 2008.

¹ Not printed. See HC Deb, 12 March 2007, col 2 WS.
I was, however, very willing to appear before the Committee in the week of 28 May. I also asked my office to offer a variety of dates in June to the Committee. However, the Committee’s own travel plans meant that a mutually convenient date could not be found. I remain very happy to appear before the Committee and to have the opportunity to debate this important dossier.

In these circumstances I was therefore somewhat surprised to be subject to your criticism.

Rt Hon Geoff Hoon MP
Minister of State for Europe, to the Chairman of the Committee
6 June 2007

Letter to the Chairman from the Secretary of State for Foreign and Commonwealth Affairs 14 June 2007

I write in response to your letter of 30 May about Ministers providing evidence on the future of Europe.

FCO Ministers take our responsibilities to Parliament seriously and make every effort to meet the Committee’s reasonable requests to provide evidence. Both the Minister for Europe and I have agreed to appear before the Committee to discuss these issues. The timing of those evidence sessions have largely been determined by our Ministerial commitments and the Committee’s own availability. On occasion it will not be possible to meet the Committee’s requests and there will always be a need for flexibility in arriving at dates that are mutually convenient given the heavy travel and diary commitments of FCO Ministers and the Committee.

Besides our contacts with the FAC, we have agreed to appear in a debate on the floor of the House and in European Scrutiny Committee hearings on this issue. We have also answered oral questions in the House at FCO’s regular Question Time and responded to numerous written questions.

I was sorry to hear that the committee felt that there had been a breakdown in communication. I fear however that the suggestion that the Government has been uncooperative is not one I can accept.

Rt Hon Margaret Beckett MP
14 June 2007

Letter to the Chairman from Sir Peter Marshall, KCMG CVO

THE UNITED KINGDOM AND THE EUROPEAN UNION

As someone whose submissions the Committee has been gracious enough in the past to publish, may I offer a follow-up thought in relation to the oral evidence you are to hear on October 10 from the Foreign Secretary?

The FCO White Paper “Active Diplomacy” used by the Committee as a Frame of Reference for its Work as a Whole

Press Notice no 28 of 26 May 2006 recorded your Committee’s most welcome intention to ensure that the FCO White Paper on UK international priorities Active Diplomacy for a Changing World (Cm 6762, March, 2006) is considered as part of the Committee’s work as a whole, and should be taken into account in the context of other reports from the Committee. The question of the UK’s role in the European Union cannot but be of central concern in this regard.

Drawing “red lines” is an inadequate and atypical UK contribution to the Reform Treaty

There is unhappily a marked contrast between the positive clarity and leadership of Active Diplomacy on the one hand, and the lack of really effective UK participation in the preparation of the Reform Treaty on the other. By common consent, the UK has at least as great a contribution as any other member country to make to the building of an EU which all of us within it want and which the rest of the international community wants from us. The reasons for this faith in the British input emerge convincingly from Active Diplomacy and a number of kindred texts which can conveniently be termed “The British Conspectus”, as well, of course, as in the actual record, not least of the UK Presidency in the second half of 2005. Yet in the end HMG’s role in the preparation of the Treaty was effectively reduced to a damage-limitation exercise of drawing red lines around what were judged to be key UK interests.
“Leadership” was the Theme of the FCO Heads of Mission Conference on 20 March

Simultaneously, “Leadership” was the chosen theme for the gathering on 20 March 2007, of UK Heads of Mission at the QE II Conference Centre. The theme was echoed by many of Mrs Margaret Beckett’s cabinet colleagues. But surely one does not lead by drawing red lines. Nor can such a policy be regarded as “active diplomacy”. It is a strategy which just leaves the field to others to get their way at your expense. As De Gaulle once said, somewhat more graphically than elegantly, on les aura tout nus. It cannot but seem that the British people, and their EU partners, deserve better from HMG.

Mr Murphy’s Appearance before the Committee on 12 September

The reason for this contrast is hard to fathom. I have studied closely the transcript of Mr Jim Murphy’s meeting on 12 September with the Committee. I hope I may say that your Questions 249 and 250 seemed to me to be of particular importance. The answers they elicited from Mr Murphy are informative. His answer to Q 249 picks up the theme of the UK Presidency in the second half of 2005, especially at Hampton Court. A difference is that two years ago the emphasis was on tackling the delivery deficit instead of negotiating structural changes, whereas Mr Murphy seem to see the latter as a means to the former end. If the Reform Treaty consisted of only a handful of procedural changes, such as more durable tenure of the chairmanship of the European Council, that might well be the case. But there is much more in it than that, some of it highly controversial. The Reform Treaty, as it now stands in all its amplitude and complexity, and in the unconvincing method chosen for its presentation to a sceptical public, is regrettably part of the problem, not of the solution.

The answer to Q249 also implies that the issue of how to reconnect the public and Europe is not affected by the nature of the process adopted for approving the treaty. I do not believe this to be true. There is inevitably a good deal of the subjective about the views of the public on “Brussels”. At the end of the day HMG are asking the British people to take many things on trust. If they think they are being put upon in the matter of the Treaty, that will affect how they look at delivery. The delivery deficit is a subjective, as well as an objective, concept.

The answer to Q250 is hopeful that we can be spared a return to the seemingly endless discussions of structural and procedural matters: “with the reform treaty in place Europe has the tools to do the job”. I wish that were true. But it is not. The Brussels institutions, as at present structured and perceived, are far from being fit for 21st century purpose. The EU is the world’s principal under-performing asset.

Shortcomings of the Commission

The most obvious current defect in the EU is the structure and functioning of the Commission, which the planned future reduction in its numbers will do little to remedy. This is a matter to which insufficient attention has been devoted.

The Treaty of Rome is a highly professional document. The establishment of the Commission was its most imaginative element. Thanks largely to events, and also to the shortcomings of recent Commissioners, collectively and individually, it is now almost a caricature of the original intention. There are a number of reasons why the role of the Commission needed to evolve as the years passed and the number of member countries increased. But these do not adequately explain what has happened.

President Sarkozy’s Proposal

In an address at the Elysee on August 27 to a conclave of French Ambassadors, President Sarkozy proposed inter alia the establishment of a group of 10 or 12 Wise Persons on the Werner, Davignon or Westendorp models to look at the future of Europe. I am not aware what reaction, if any, this proposal, has evoked around the EU. I have seen no reference to it. Yet something of this sort is surely what is now required, although the terms of reference should be broader than those the President mentioned. Subsidiarity, and the record as regards competences so far conferred on the Union, would be crucial items on its agenda.

The vital Role of the Foreign Affairs Committee

I realise that the current debate in this country is concentrated on whether or not there should be a referendum. I would regard it as crucial that any decision on the matter should not be taken on an “either/or” basis: that is to say, there should be no general assumption that holding a referendum is somehow a substitute for the fullest parliamentary scrutiny. It could be that 21st century circumstances will both enable and require a mixture of representative and direct democracy in the conduct of our affairs generally of a sort which we have not previously seen. But this not would diminish the value of the Select Committee system, which I am sure I am not alone in regarding as one of the brightest stars in the Parliamentary firmament. At all events, and especially in the case of the EU, the importance of the role of Foreign Affairs Committee cannot but be enhanced.
In view of the postal strike, I am venturing to submit this letter to you by e-mail and the courtesy of your highly esteemed Committee Clerk.

Peter Marshall
6 October 2007

Email to the Committee Specialist from Sir John Weston, former UK Permanent Representative on the North Atlantic Council and UK Permanent Representative to the UN

I do have a point of view, which is that the whole slide toward the greater pooling of national powers, in an EU which is already too big for its own good, continues to be carried out by a bureaucratic sleight of hand on the part of EU officials in Brussels and in national foreign ministries, one which—so far as the UK is concerned—enjoys no mandate at all from the British people. In the FCO, from my earlier experience as Political Director, I would say EU policy was in effect made by cabal; and if you had “unsound” views or awkward practical objections, you were not part of it. But then you have MPs on your Committee (I hope and pray) who must be well aware of all that already.

John Weston
8 November 2007

Letter from the Chairman of the Committee to the Leader of the House and Lord Privy Seal

As you may know, the Foreign Affairs Committee is preparing a report on “Foreign Policy Aspects of the EU Reform Treaty”. We are taking evidence on this topic from the Foreign Secretary on 12 December.

I am writing because I have learned from the FCO that one option that is being considered within Government is for the bill to allow the new treaty to pass into UK law to be introduced before Christmas, with a Second Reading debate in the week the House returns in January (w/c 7 January).

The Foreign Affairs Committee will be overseas during the period 7–10 January, and accordingly I very much hope that Second Reading of the bill will not be scheduled for a date during that week. It would be very unfortunate if members of the Committee were prevented from contributing to the debate because of a clash of timing.

I hope it will also be possible to give the Committee as much advance notice as possible of the timing of the bill’s introduction and Second Reading, in order to allow us to make the necessary arrangements for agreeing our report.

26 November 2007

Memorandum from Brendan Donnelly, Director of the Federal Trust

THE REFORM TREATY AND CFSP

1. Under the Maastricht Treaty of 1992, the European Union undertook to develop a Common Foreign and Security Policy (CFSP). Fifteen years later, most of the Union’s governments and almost all external commentators have concluded that movement towards the goal of a functioning CFSP, however defined and understood, has been limited and patchy. The provisions of the Reform Treaty on the external actions of the European Union are a conscious attempt to inject new momentum and coherence into the operation of the CFSP.

2. The Committee will recall that the ratification of the Maastricht Treaty was a matter of considerable political controversy in the United Kingdom, with those elements of the text bearing on the CFSP figuring prominently in the public debate at that time. To the extent that this controversy continues today, it will inevitably colour judgements and perceptions of the clauses in the Reform Treaty which bear upon the CFSP. Those who are hostile to the concept of a Common Foreign and Security Policy will see the proposals of the Reform Treaty on this topic in a very different light to those who favour the Maastricht Treaty’s aspiration to establish the European Union as a more important actor on the world stage. Indeed, public and political attitudes to the Reform Treaty’s proposals on CFSP can be regarded as a microcosm of public and political attitudes towards the Reform Treaty in general. Those content with the evolution of the European Union over the past fifteen or twenty years will on the whole tend to regard the Reform Treaty as a further step along a path which they are happy to tread. Those generally hostile to this evolution will find little in the Reform Treaty to bring to a halt or even to reverse the tendencies within the Union which, rightly or wrongly, cause them concern.
3. Before considering in more detail the individual provisions of the Reform Treaty on CFSP, it is, however, worthwhile drawing an important distinction between two areas of the European Union’s activities which enjoyed similar treatment in the Maastricht Treaty, but which have since diverged in their development. These two areas are the Common Foreign and Security Policy itself and the European Union’s policies on Justice and Home Affairs (JHA), covering such questions as asylum, immigration, crime prevention and the mutual recognition of civil judgements. Under the Maastricht Treaty, both these areas were treated as areas primarily of intergovernmental co-operation, with only a limited role for the European Commission, the European Parliament and the European Court of Justice. Since the Maastricht Treaty, these European institutions have greatly gained in influence in the sphere of JHA, a process carried further by the Reform Treaty. No similar development, however, has occurred in the sphere of the CFSP. For better or worse, the central institutions of the European Union will continue for the foreseeable future to play in the Common Foreign and Security Policy a much less influential role than that which they play in JHA. For better or worse, the Reform Treaty essentially takes as given the “intergovernmentalist” framework of the CFSP and tries to make it work better. Whether the governments of the European Union will always be content to conduct their foreign and security policy on this intergovernmental basis will, and can only be, a question for future decision-making. It cannot be said, however, that any substantial movement away from intergovernmentalism in European foreign-policy making seems imminent or even foreseeable. Those whose general criticism of the European Union’s recent evolution is that it has moved since the Maastricht Treaty in an excessively “integrative” or “federalist” direction will find little comfort for their critique in the provisions of the Reform Treaty on the CFSP.

THE HIGH REPRESENTATIVE

4. Central to the proposals of the European Constitutional Treaty on the Union’s external policies was the creation of the post of “European Foreign Minister” in succession to the “High Representative”. This post and its extended responsibilities have been retained in the Reform Treaty, although the title of “Foreign Minister” has been abandoned in favour of retaining the existing title of “High Representative”. Some controversy has been occasioned, particularly in the United Kingdom, by this change of nomenclature. The view of this submission is that the title “Foreign Minister” was always an over-generous, even misleading description of the new post. The holder of this new post will be essentially a representative and advocate of policies established by others, namely national Foreign Ministers. He or she will not have the determinant role in establishing these policies enjoyed by the British, Czech or Italian Foreign Ministers when the formulation of British, Czech or Italian foreign policy is at issue. At the present stage of development for the Union’s Common Foreign and Security Policy, national governments are not sufficiently willing to pool their national sovereignties in this area for the concept of a European “foreign minister” to be a sustainable one.

5. If the proposed Reform Treaty comes into force, the Union’s High Representative will have significant new powers, notably those of acting as chairman of the Foreign Affairs Council, of making proposals to the Foreign Affairs Council and of directing the Union’s external action service. In some circumstances the High Representative will also have the right to speak on behalf of the European Union in international fora such as the United Nations. These are significant administrative changes, which are likely to help make more coherent and effective the external actions of the European Union. The present rotating Presidency of the Foreign Affairs Council has definitely militated against continuity and focus in the Common Foreign and Security Policy. But it cannot be stressed too often that despite his or her simultaneous role as a Vice-President of the European Commission, the High Representative is very much the agent of the national foreign ministers. His or her capacity to be a forceful representative of the European Union on the world stage depends very largely on the willingness of national foreign ministers to agree on worthwhile external policies for the European Union. The presence or absence of political commitment to the CFSP from national capitals over the next decade will be at least as important in this connection as the personal qualities and institutional competences of the High Representative.

6. It is after all the national foreign ministers who will appoint, dismiss and instruct the High Representative. In the great majority of cases, the High Representative’s instructions will be exclusively dependent upon unanimous agreement among the national foreign ministers. The traditionally marginal roles of the European Commission, Parliament and Court of Justice in CFSP are reaffirmed by the Reform Treaty. Even where the High Representative has made a specific proposal for the instructions he or she would like to receive, these instructions require unanimity from the foreign ministers, unless they have previously agreed unanimously to adopt the Representative’s proposals by Qualified Majority Vote. Such a vote by Qualified Majority would in any case be tempered in its effects by the right of any outvoted member of the Foreign Affairs Council to appeal to the European Council, where decisions can only be taken by unanimity. As will be discussed later in this submission, the Reform Treaty does envisage some limited extension of Qualified Majority Voting within the Foreign Affairs Council, but unanimity will remain for the foreseeable future the predominant form of decision-making within that body. The point is well illustrated by the much-discussed possibility of the High Representative’s presenting to the UN’s Security Council an agreed EU position concerning a matter on the Security Council’s agenda. This has been seen by some as undermining the roles of France and the United Kingdom as permanent members of the Security Council. If, however, either France or the United Kingdom do not wish the Union to be represented at the
UN on any particular issue by the High Representative, they will always be able to prevent by their veto the adoption of a common European approach to the topic in question. Without a common European approach, there would be nothing for the High Representative to expound to the Security Council.

7. An unhelpfully unresolved issue under both the European Constitutional Treaty and the Reform Treaty is the unclear allocation of representative responsibilities between the High Representative and the President of the European Council. It may be that practice will resolve these ambiguities, with perhaps the President of the European Council acting as the negotiating partner for heads of state and government from third countries, and the High Representative negotiating with the relevant foreign minister. This overlapping of responsibilities is a definite check on the High Representative’s freedom of manoeuvre, a check which commentators will either welcome or regret depending upon their starting-points. The Reform Treaty does not answer entirely the question “Who speaks for Europe?”

**THE EXTERNAL ACTION SERVICE**

8. The High Representative will be helped in his increased responsibilities by a “European external action service”. This body is the natural administrative expression of the European Union’s desire to give greater force and coherence to its external policies. Many details remain to be agreed about the precise composition and working methods of the action service, but its potential tasks include at least the provision of personnel for Commission representations in third countries; the better co-ordination of existing policies of the European Union, such as trade, development and environmental policies; and the briefing and support of the High Representative. The action service could also in the longer term provide the personnel for groups of European Union countries which might wish to have “joint embassies” in countries where the majority of the diplomatic work conducted by national representatives is of a routine and administrative nature. The countries of the Schengen area for instance might well conclude that Schengen visas in certain countries, from which little nationally sensitive political reporting could anyway be expected, were better issued by a single authority in that country rather than by separate national embassies. Any such developments could naturally only proceed on a voluntary basis, where groups of national governments saw a common interest in pooling resources.

9. There seems little doubt that over the longer term the existence of the “external action service”, which will carry out a number of the functions traditionally associated with national diplomatic services, is likely to strengthen the position of the High Representative. It may well enable the Representative to make a more regular and cogent case for the European Union to act in a unified fashion, action for which he or she will be a prime implementer and advocate. Those who on the whole regard more common external action by the European Union as a potentially desirable development will naturally welcome such a likely outcome of the external action service’s activities. Those who are more sceptical of an enhanced role for the European Union in this field will be correspondingly suspicious of its likely activities.

**QUALIFIED MAJORITY VOTING**

10. The Reform Treaty envisages some limited use of Qualified Majority Voting within the CFSP. The appointment of the High Representative will be by QMV, as will certain administrative questions such as those relating to diplomatic and consular protection measures, and urgent matters such as humanitarian aid. This submission unequivocally welcomes this facilitation of decision-making. The extent of the new sovereignty-pooling involved should not, however, be exaggerated. Experience has shown that national ministers prefer, even when majority voting is theoretically available as a decision-making procedure to proceed by consensus, with the possibility of majority voting acting essentially as a spur to compromise by minorities. This phenomenon is likely to be particularly pronounced in the predominantly intergovernmental area of the CFSP. It is difficult to believe that a large member state such as the United Kingdom in particular will often, if ever, find itself bound by majority decisions which it finds seriously damaging or unacceptable to itself.

**STRUCTURED CO-OPERATION**

11. The Reform Treaty envisages the possibility of what is called “structured co-operation” regarding military matters between a sub-set of those EU member states enjoying the highest degree of military capacity. This co-operation would take place on an intergovernmental basis, and would be designed to increase the military effectiveness of the member states and their ability to work together on joint European military tasks. Decisions on the membership of the subset would be taken by qualified majority voting, a provision which has aroused some critical comment in the United Kingdom. Given the universal recognition throughout the European Union that “structured co-operation”, however it evolves, will have no credibility or even reality without the full engagement in it of the United Kingdom, it strains the bounds of credibility to imagine that the membership of this intergovernmental sub-set would ever be one unacceptable to the United Kingdom. It is worth recalling that participants in the sub-set have the right to withdraw from it at any time, a right which would apply to the United Kingdom as much as to any other member state. If “structured co-operation” in fact proceeds beyond its present largely aspirational nature, the United Kingdom will be more fully associated with its genesis and evolution than has been the case in any other
area of the European Union’s activities. The likelihood that this sub-set of “structured co-operation” might over time develop in a way imical to the United Kingdom’s interests is remote in the extreme. The possibility that “structured co-operation” will remain a name without substance is on the other hand a much more pertinent one. It is a recurrent theme of this submission that the Reform Treaty can typically only provide a framework within which national governments may be encouraged to take appropriate decisions. It cannot dispense national governments from the sometimes painful necessity of taking and implementing those decisions.

CONCLUSIONS

12. A number of factors combine to explain why at present and probably for the foreseeable future the CFSP will remain exceptional in its decision-making structures within the European Union. Most large and small member states alike have shown themselves reluctant to entrust the central institutions of the European Union with similar competences under the CFSP to those which they have happily given to Commission, Parliament and Court of Justice in other areas of the Union’s activities. The desire of national governments to retain the large measure of executive discretion which they all enjoy in their national foreign policies may be one reason for this reluctance. Another will certainly be the difficulty of constructing for the unpredictable and episodic challenges of foreign policy the sort of long-term legal and political structures appropriate to the internal market or Justice and Home Affairs. Traditionally, British governments of all political colours have usually proclaimed their preference for intergovernmentalism in the European Union rather than continuing integration through central structures. Under the Reform Treaty, this preference is clearly respected and to a large extent shared by most of its partners.

13. It is of course possible that in time the European Union’s governments will conclude that the intergovernmentalist model for the CFSP is inherently defective and that only a more institutionally integrated European foreign policy can meet their shared and collective goals. The Reform Treaty does not preclude such a possibility, but nor does it prescribe any such outcome. In regard to the CFSP, as in regard to many other of its provisions, the Reform Treaty takes as its underlying philosophy “the art of the possible”, rather than the creation of new possibilities.

The differing attitudes of commentators to the desirability of creating or destroying such new possibilities is one important reason why reactions to the Reform Treaty have been so varied in this country and elsewhere.

Memorandum from Open Europe

SUBMISSION FROM OPEN EUROPE ON THE FOREIGN POLICY ASPECTS OF THE EU REFORM TREATY

This letter of evidence is submitted by Open Europe, an independent think tank founded and supported by UK business leaders, which aims to enhance discussion and analysis of the EU’s policies and their effects.

The proposed EU Treaty includes a large number of important new powers for the EU in foreign policy, all carried over from the original EU Constitution. These include institutional changes, such as the creation of a de facto EU Foreign Minister and an EU diplomatic service, the introduction of majority voting into foreign policy, a single legal personality for the EU, enhanced cooperation, a new “hard core” in defence, a mutual defence commitment, a commitment to move towards a common defence, a requirement to consult with other EU members on foreign policy actions, and a terrorism solidarity clause. The UK Government objected to many of these things when the original EU Constitution was being drawn up, but has subsequently signed up to them.

“Europe must believe that it can be in 20 years the most important world power . . . That can happen only after the agreement on a common foreign policy. The Constitution is an important step in this direction.”

Spanish Prime Minister Jose Zapatero, Der Spiegel, 8 November 2004

1) AN EU FOREIGN MINISTER

[“High Representative of the Union for Foreign Affairs and Security Policy”]

While the title “Union Minister for Foreign Affairs” has been replaced by the High Representative of the Union for Foreign Affairs and Security Policy, he or she will have all the same powers as proposed in the original Constitution—against the wishes of the UK.

The new minister will have an automatic right to speak for the UK in the UN Security Council on issues where the EU has taken a position.
Under Article 19 (2) of the Treaty, “When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be asked to present the Union’s position.”

While concerns surrounding representation rights may seem premature based on the vague new treaty text alone, they are substantiated by leading EU and Member State officials’ statements. Last October, Lord Malloch Brown, then Deputy General Secretary of the UN, told Brussels diplomats that the EU was heading towards representation by a single seat within the UN institutions. He said, “I think it will go in stages. We are going to see a growing spread of it institution by institution. It is not going to happen with a flash and a bang.” He added that he hoped that it would happen “as quickly as possible. I’m a huge fan of it.”

This is reaffirmed by EU officials, including the European Commissioner for External Affairs, Benita Ferrero-Waldner, who said “Europe must speak with one voice in the Security Council . . . I think that one should consider a special seat for the EU in the Security Council.”

The UK also eventually accepted that the new minister will be a member (Vice-President) of the Commission (the UK has resisted giving the Commission a role in Foreign Policy since 1992). This “double-hatting” blurs the distinction between the EU’s intergovernmental and “supranational” bodies—giving the High Representative a hand in each.

He or she would also have the power to appoint EU envoys. At the end of the negotiations the UK also eventually accepted that the High Representative will chair meetings of the EU General Affairs and External Relations Council. As the Guardian noted: “Britain said the new official should not chair regular meetings of EU foreign ministers, nor take over the resources of the European Commissioner for external affairs. It lost.”

Perhaps most importantly of all, when the Council asks the Foreign Minister for a proposal on a particular subject, once he or she has made that proposal it will be subject to majority voting.

The proposed Article 17(2) TEU stipulates that the Council shall act by qualified majority, “when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or that of the High Representative.”

So not only would the High Representative be able to devise proposals, (which has raised debate regarding exclusivity on the right of initiative on military missions) but the majority voting process means the UK would be prevented from vetoing such a proposal.

This change could have important repercussions. EU states could (unanimously) ask the Foreign Minister to come up with a plan but then, if individual states such as the UK don’t agree with what he/she comes back with, could find themselves in a majority voting situation. For example, on the squabble between NATO and the EU over who will supply air transport to the African Union troops in Darfur, the UK might not be able to block the EU from pointlessly duplicating NATO—if this was proposed as part of a plan from the Foreign Minister.

In October 2007, Le Monde newspaper reported that several names have already cropped up in Brussels in discussions over who should fill the new post. These include the current High Representative for CFSP, Javier Solana, Swedish Foreign Minister Carl Bildt, Austrian External Affairs Commissioner Benita Ferrero-Waldner, ex-Polish President Aleksander Kwasniewski and former French Foreign Minister Michel Barnier.

2) An EU External Action Service

A single “European External Action Service” as proposed in the Treaty would for the first time bring together national officials with the 745 civil servants in the Commission’s DG external relations and the 4,751 members of staff in the Commission’s existing “delegations” around the world.

If the Treaty is approved, the new diplomatic force will begin to take shape in January 2009, although it is expected to take far longer to establish a functional and effective EU diplomatic corps.

Article 13b states that decisions relating to the creation of a diplomatic service will be taken by qualified majority vote on a proposal from the EU Foreign Minister. A paper published by Javier Solana in March 2005 suggested that only a third of the staff of the service will come from member states’ diplomatic services. Estimates of the size of the service vary widely. One EU official briefed that the number of diplomats alone would be 7,000, but that it could rise to 20,000.5

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2 The Times, 6 August 2007
3 EUobserver, 25 January 2005
4 26 June 2007
5 European Voice, 9 November 2004
The European Parliament’s External Relations Committee has raised concerns over the proposed EU diplomatic service. It warned that if the diplomatic service was set up as an independent institution it would “take on an uncontrollable life of its own” and would result in an “independent super administration”. It suggested that the service would consist of between 5,000 and 7,000 diplomats,6 yet funding details of the service are not specified.

Wilhelm Schoenfelder, former German ambassador to the EU, highlighted the open-ended nature of the EU diplomatic force, asking “What will be the share of member states, and how will be the share among member states? I don’t know. These are all open questions.”7

Jose Luis Rodriguez Zapatero, the Spanish Prime Minister, has said, “We will undoubtedly see European embassies in the world, not ones from each country, with European diplomats and a European foreign service. We will see Europe with a single voice in security matters. We will have a single European voice within NATO. We want more European unity.”8

Nicolas Schmit, the Luxembourg Foreign Minister has said, “We want a political Europe that can speak with one voice, and with one minister of foreign affairs and a common foreign service.”9

The UK Government originally opposed the EU Diplomatic Service. In the negotiations on the draft Constitutional Treaty Denis MacShane said, “We believe that it remains for EU Member States to organise their respective bilateral diplomatic services at the national level.”10

Under the Treaty Article 20 TEU is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection—so moves towards common consulates and embassies would be likely to accelerate. This is important because the UK has expressed doubts about existing Commission proposals in this area.

In November 2006 the European Commission published a Green Paper which revealed plans to establish EU “consulates” around the world. It argued that “Setting up common offices would help to streamline functions and save on the fixed costs of the structures of Member States’ diplomatic and consular networks . . . these offices could be housed in various representations or national embassies or in just one, or they could share the Commission delegation.” It went on to say that “the EU consulates could take over functions now controlled by member states, including issuing visas. “In the long term, common offices could perform consular functions, such as issuing visas or legalising documents.”11

Geoff Hoon responded to the Green Paper saying that Member States have long held the unanimous view that the provision of consular assistance to their citizens is primarily a matter for national authorities, and that “some of the Green Paper’s proposals, which involve a greater role for the Commission and Council Secretariat, therefore sit uneasily with this position”. He said, “It is also notable that, leaving aside the legal difficulties, the Commission has no expertise in providing consular assistance. We are therefore concerned by those proposals which envisage the Commission becoming involved in consular service delivery (eg the provision of training for consular staff).”12

There are questions about transparency in the operations of the High Representative and the European External Action Service. Former Director-General of the Council Secretariat Sir Brian Crowe, a contributor to a European Policy Centre working paper on the development of EU foreign policy, cautioned that “Member States should not expect to see all communications between the High Representative/Vice President and the EEAS, as foreign services cannot operate with “complete transparency”. Given the delicacy of the EEAS and the HR/VP positions, they would need some “breathing space” to get going.”13

This leads to questions regarding the EU’s commitment to transparency and accountability, as well as who is ultimately the decision-maker or agent of foreign policy.

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6 EUobserver, 28 February 2005
7 EUobserver, November 27, 2007 http://euobserver.com/9/25207
8 AP, 17 February 2005
9 BBC, 26 January 2007
10 Hansard Written Answer, 17 June 2002
12 http://www.publications.parliament.uk/pa/cm200607/cmselect/cmuele/41-v/41x07.htm
14 Hansard, 25 March 2003
15 Hansard, 1 December 2003
16 The UK Government lists these areas as “EU humanitarian aid operations”; “Civil protection”; “Implementation of solidarity clause”; Creation of a ‘start-up fund’ for urgent Common Foreign and Security Policy measures; Urgent EU aid to third countries; Membership of structured co-operation in defence; Appointment of High Representative of the Union for Foreign Affairs and Security Policy by the European Council; Role of the High Representative of the Union for Foreign Affairs and Security Policy in CFSP implementing measures; Measures to facilitate diplomatic and consular protection.”
http://www.theyworkforyou.com/wrans/?id=2007-07-26b.146189.h&s=EU#t146189.q0
3) MAJORITY VOTING IN 11 DIFFERENT AREAS OF FOREIGN POLICY

At the start of the original negotiations on the Constitution Peter Hain promised that “QMV is a no-go area in CFSP” [Common Foreign and Security Policy]. During the IGC, Jack Straw said that the move to QMV in this area was “simply unacceptable.”

Nonetheless the Government has now accepted it, according to its own analysis, in nine different areas of foreign policy. In fact there is also majority voting on at least two other aspects of foreign policy—so the veto would in fact be given up in a eleven different areas.

However the Government still insists that “unanimity will remain the rule for setting the Common Foreign and Security Policy,” which is an extraordinary distortion of the facts.

Areas where majority voting would be introduced in foreign policy:

1. Proposals from the EU Foreign Minister. Perhaps the most important introduction of QMV relates to the new Foreign Minister. Article 17(2) TEU stipulates that the Council shall act by qualified majority, “when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or that of the High Representative.”

2. The design of the EU diplomatic service. The new Article 13a TEU allows the organisation and functioning of the new EU diplomatic service to be decided by QMV. The tasks and even the eventual size of the service are still unclear in the Treaty, but the shift toward a more centralised and powerful institution would inherently result in a major shift of power from the Member States to EU establishments, likely to grow in strength over time. The Council will act on a proposal from the Foreign Minister after getting the consent of the Commission.

3. Consular issues. Under the Treaty Article 20 TEU is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection—so moves towards common consulates and embassies would be likely to accelerate. The UK has already expressed reservations and concerns regarding EU consular services proposed by the Commission (see above).

4. Setting up an inner core in defence. Under Article 31(1) TEU, the decision to set up the “permanent structured cooperation” group would also be taken by QMV, as would subsequent decisions to expel members, or to admit new ones to the group.

There is also the prospect of majority voting within the inner core. Article 280H (1) TFEU allows for the Council to act by qualified majority voting in the context of enhanced cooperation, if the Council, acting unanimously, so decides. While this new article does not cover “defence” decisions, it presents the prospect of majority voting within the inner core and could affect the common foreign and security policy.

(Additional concerns with the proposed permanent structured cooperation are discussed in greater detail below.)

5. Terrorism and mutual defence. Article 188r TFEU stipulates that the detail and meaning of the “terrorism solidarity clause” is to be decided by QMV. This is important because the Government had clear reservations about this article. During negotiations on the original Constitution, Peter Hain proposed an amendment to remove a key provision of the article—that “Should a Member State fall victim to a terrorist attack, the other Member States shall assist it,” but the amendment was rejected.

Article 188r (2) reads, “Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities.” In a separate proposal, the Government asked for the new EU power to “prevent” terrorist threats to also be deleted. At a plenary session of the European Convention Hain objected that, “if it carries real military obligations to offer military assistance it is duplicating the NATO guarantee. If it does not . . . it is empty rhetoric.” However, his objection was ignored.

6 & 7. Urgent financial aid, and Humanitarian aid. Two new Articles 188i and 188j set up majority voting on urgent macro-financial aid and humanitarian aid. The UK tried to have these articles deleted. The UK argued that “Macro-financial assistance has been agreed urgently when required.” Both amendments were ignored.
Although this ostensibly seems a benign change (and is now cited by the Government as an “uncontroversial” example of a move to QMV), it could raise highly important questions. To give a past real-world scenario, this might have been used to decide whether the Union should continue to fund the Palestinian Authority after the 2006 elections which returned Hamas to power—the UK and other Member States disagreed about this, the UK being keen only to fund NGOs and not the Hamas-led authority.

8. The election of the Foreign Minister. New article 9e specifies that the Foreign Minister/High Representative is elected (and can be sacked) by qualified majority voting. Because he or she is going to be a member of the Commission, whichever country he or she is from will lose its national commissioner if it has one, when he or she is appointed.

9. Civil protection. Article 176b allows the EU to pass laws by majority vote on the response to natural or man-made disasters. The UK sought to forestall this move to majority voting, arguing that it wanted to preserve “the current flexible arrangements.” However, this request was ignored.

10. Terrorist financing controls. A new article 67a allows for decisions on measures to control the financing of international terrorism to be taken by QMV. The UK Government was not against this article per se, but wanted it to be changed to stop it restricting member states’ freedom to act. The UK argued that “At present, the scope of [the] article . . . is certainly too wide and open-ended. Member States should retain competence to take further action consistent with the European law, for example to take immediate action to freeze assets of terrorists identified in accordance with national procedures and laws.” However, the UK did not get the changes it wanted.

11. The new EU Foreign Policy Fund. Article 26(3) TEU creates a “start up fund” for foreign policy operations. This new fund is seen by many as the first step towards a common defence budget for the EU. All aspects of funding are to be decided by QMV—including the amounts paid by member states, despite UK demands that decisions relating to the fund should be unanimous.

Conclusions on the shift to QMV

Efforts to increase, centralise, and streamline power to create and implement EU foreign policy, are wrought with complications and insurmountable obstacles. EU Member States’ differences in opinion in various foreign policy areas have been intractable and preclude agreement on a common foreign and security policy, adopted by all 27 nations and articulated by the High Representative of the Union.

Current divisive issues such as the status of Kosovo, confronting Iran, the meeting of human rights violator Robert Mugabe in the upcoming EU-AU summit, as well as past cleavages stemming from the invasion of Iraq, are only the most salient points of contention which have obstructed the development of a common foreign and security policy within the EU bloc. The attempts to institute QMV in various foreign policy issues are misguided, over-ambitious efforts to create an unrealistically seamless CFSP.

The EU-AU summit in December reveals but one fissure in European foreign policy toward Africa. While Gordon Brown has maintained his stance against dealing with Zimbabwean leader Robert Mugabe, while the human rights abuses in Zimbabwe go unaddressed, the Portuguese EU President has expressed a willingness to go forth with the summit as scheduled. The UK voice would seem to become irrelevant on this issue as South African Foreign Affairs Minister Nkosazana Dlamini-Zuma told reporters that “Summits depend on a number of people, not just one, and one person does not make a summit.”

4) A SINGLE LEGAL PERSONALITY FOR THE EU

The draft treaty states that the Union shall have “legal personality”, as in the original Constitution. This would mean that for the first time the EU, rather than member states, could sign up to international agreements on foreign policy, defence, crime and judicial issues (currently the EC can only sign agreements in first pillar issues like trade). That would be a huge transfer of power and make the EU look more like a country than an international agreement.

Talking about the original version of the Constitution, Italian PM Romano Prodi said that this change was “A gigantic leap forward. Europe can now play its role on the world stage thanks to its legal personality”. The French government’s referendum website argued that, “The European Union naturally has a vocation to be a permanent member of the Security Council, and the Constitution will allow it to be, by giving it legal personality.”

Even the UK Government admitted that it could cause problems. When the Constitution was first being drafted, Peter Hain said that “We can only accept a single legal personality for the Union if the special arrangements for CFSP and some aspects of JHA are protected.” He told MPs: “we could support a single legal personality for the EU but not if it jeopardises the national representations of member states in international bodies; not if it means a Euro-army; not if it means giving up our seat on the United Nations Security Council; and not if it means a Euro-FBI or a Euro police force.”

24 International Herald Tribune, 10 October 2007
The UK Government had long been opposed to the idea of giving the EU a legal personality. Back in 1997 Prime Minister Tony Blair boasted that he had successfully stopped a provision for this appearing in the Amsterdam Treaty. He said, “Others wanted to give the European Union explicit legal personality across all the pillars of the treaty. At our insistence, that was removed.”

5) Enhanced Cooperation—Safeguards Removed

“Enhanced cooperation” is EU jargon for the idea that smaller groups of member states can go ahead with projects within the EU framework, while other member states choose not to get involved.

The UK Government has long been cautious about enhanced cooperation. After the Amsterdam treaty in 1997 Tony Blair said, “We secured a veto over flexibility arrangements which could otherwise have allowed the development of a hard core, excluding us against our will.”

The Government has been particularly wary of extending enhanced cooperation into foreign affairs. In 2000 Robin Cook warned, “We have no idea what enhanced co-operation might lead to.”

But under the Treaty many of the safeguards which currently apply to enhanced cooperation are removed. For the first time enhanced cooperation groups can decide to move to majority voting within their group, with no veto for nonmembers of the group (Article 280h TFEU).

Enhanced cooperation would apply to the whole of foreign policy. An “emergency brake” mechanism which applies in foreign affairs to enhanced cooperation under the existing treaties is deleted by the new Treaty.

6) Permanent Structured Cooperation—an Inner Core in Defence

The new Treaty will also carry over the original Constitution’s proposals on structured cooperation. The proposed Articles 27 (6) and 31 (1) TEU provide for the establishment of a special sub-group of member states “whose military capabilities fulfill higher criteria and which made have more binding commitments to one another in this area with a view to the most demanding missions”. This provision for so-called “permanent structured cooperation” within the EU framework would allow neutral countries to opt out, and create an “inner core” of EU members interested in taking forward military integration, and serve as a mechanism which would allow certain Member states to move faster towards a common European defence.

The implications of this should not be underestimated: The French Defence Minister Hervé Morin, has said, “The responsibility of our generation is to give a more ambitious dimension to defence Europe . . . Soon, a new institutional treaty will permit reinforced cooperation, notably in the area of defence, since defence Europe will move forward by using a hard core of countries which want to take on their own Security.”

The Young European Federalists say in a briefing paper that they “Welcome the possibility to establish Structured Co-operation in the field of Defence, which is a significant step toward a Single European Army.” They also welcome “the introduction of structured cooperation in the field of defence, which will allow the willing States to create the bulk of an effective European defence, without which Europe will never be able to develop an autonomous foreign and defence policy.”

Article 31 TEU will specify that the group can be set up by QMV. The rough outline of how the group would work is explained in a new protocol annexed to the original EU Constitution. This outlines a number of qualifications which member states would have to pass to join permanent structured cooperation. Clause 1 stipulates that it is open to any member state undertaking to:

a) “proceed more intensively to develop its defence capacities through the development of its national contributions and participation” in multinational forces and activities of the European agency; and
b) “have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned . . . within a period of five to 30 days . . . and which can be sustained for an initial period of 30 days.”

Article 2 of the Protocol specifies that participating member states would cooperate to:

a) achieve “approved objectives concerning the level of investment expenditure on defence equipment”; b) “bring their defence apparatus into line with each other”; c) “take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces”; d) “make good . . . the shortfalls perceived in the framework of the ‘Capability Development Mechanism’”; and e) “take part . . . in the development of major joint or European equipment programmes in the framework of the Agency.”

25 Hansard, 18 June 1997
26 Hansard, 18 June 1997
27 La Tribune, 19 July 2007
28 http://jef-europe.net/uploads/media/ep02_euroarmy_doc
29 http://www.jef-europe.net/index.php?id=4145
The Government was initially strongly opposed to the structured cooperation proposal. Peter Hain argued in an amendment, “The UK has made clear that it cannot accept the proposed ESDP reinforced cooperation provisions. While we support Member States making higher capability commitments and cooperating with partners to this end, the approach described here—a self-selecting inner group—undermines the inclusive, flexible model of ESDP that the EU has agreed.”

However, the Government failed in its attempts to remove the provision for enhanced cooperation from the original Constitution, and after the meeting between the UK, France and Germany in October 2003, the UK agreed to back the idea in return for assurances that member states could not be excluded from the group if they wanted to join.

7) A NEW MUTUAL DEFENCE COMMITMENT

The proposed new Article 27 (7) TEU states that, “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.”

This article is essentially a mutual defence commitment. Irish Foreign Minister Dermot Ahern has said, “The European Constitution provides for a mutual defence commitment. This establishes an obligation to assist another Member State that is the victim of armed aggression on its territory.”

Lord Robertson, former Secretary General of NATO, warned that it is “dangerous to introduce a mutual defence clause into the Constitution if you do not have the means to carry it through.”

The Government wanted this entire paragraph to be deleted from the Constitution, and issued an unsuccessful amendment to this end, in which Peter Hain wrote, “Common defence, including as a form of enhanced cooperation, is divisive and a duplication of the guarantees that 19 of the 25 Member States will enjoy through NATO.” However, the UK Government abandoned this objection.

8) A COMMITMENT THAT THE EU WILL MOVE TO A COMMON DEFENCE

The proposed Article 27 (2) TEU states that “The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.” Currently, the treaties state that the progressive framing of a common defence policy “might” lead to a common defence. (Article 17 TEU).

The UK objected to this change, arguing that “We believe there is no prospect of the Council taking a decision to agree common defence in the near future. It is therefore inappropriate for the text to pre-judge the decision of the Council.” However, the UK later gave way.

9) A REQUIREMENT TO CONSULT WITH OTHER EU MEMBERS ON FOREIGN POLICY ACTIONS

Article 17a contains a requirement for a Member State to consult other Member States before taking foreign policy action: “Before undertaking any action on the international scene or any commitment which could affect the Union’s interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.”

The UK opposed this provision, arguing that “We will need to ensure that we are not prevented by any provision in the Constitution from carrying out an independent foreign policy”. This has the potential to significantly restrict the freedom of the UK Government in implementing foreign policy it deems appropriate, by subjecting it to evaluation and approval other EU Member States. However this request for an amendment was ignored.

10) A NEW TERRORISM SOLIDARITY CLAUSE

New article 188r states that “Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities.”

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30 Address to the National Forum on Europe, 21 April 2005
31 Le Figaro, 19 November 2003
32 http://european-convention.eu.int/Docs/Treaty/pdf/30/30_Art%20I%2040%20Hain%20EN.pdf
It states that, “The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack; and to assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.”

The UK Government wanted to delete the sentence “Should a Member State fall victim to a terrorist attack or a natural man-made disaster, the other Member States shall assist it.” In a separate amendment the Government also asked for the new EU power to “prevent” terrorist threats to be deleted. However, both objections were later abandoned.

The political motivation behind the clause is to reinforce moves towards a mutual defence commitment (see above). The only sense in which the terrorism solidarity clause is not a mutual defence guarantee is that it is addressed to threats from “non state actors.”

The power to take action to “prevent” rather than respond to terrorism is likely to be used by the EU to expand its role. Crucially, the meaning of the new article is to be defined by QMV, meaning that it could be used as a flexible basis for EU action.

*November 2007*

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