



## In Context of the Constitutional Treaties

*The Consolidated Version of the Treaty on European Union, which is a consolidation of all preceding amended treaties including the most recent Nice Treaty of March 2001 states that the European Union is*

*“resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence...thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and around the world.” (Preamble)*

### Introduction

The Treaty examined here is the Consolidated Version of the Treaty on European Union. This is a consolidated treaty of all the previous treaties including the amendments made by the Nice Treaty. The Treaty outlines the goals of the European Union while delegating specific powers to European Institutions for the creation and implementation of programmes. Thus, the reality of the EU's actions may be different from the implications of the EU Treaty because they are subject to the interpretation of the Treaty by those implementing it.

Only the most important articles relating to the EU response to terrorism issue are highlighted. The text of the full Treaty is available on the EU website. Where the text is in quotes, it is quoted from the Treaty. Where it is not, it provides an explanation of a section of the Treaty text.

Section of Treaty	Key Points to Note
Preamble <sup>1</sup>	<ul style="list-style-type: none"><li>• Confirms the commitment to fundamental social rights as defined in:<ul style="list-style-type: none"><li>- the European Social Charter signed in Turin in 1961</li><li>- the Community Charter of the Fundamental Social Rights of Workers - 1989</li></ul></li><li>• develops a common foreign and security policy (see italicised text above)</li><li>• resolves to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an <b><i>area of freedom, security and justice</i></b>, in accordance with the provisions of this Treaty.</li></ul>

<sup>1</sup> The following extracts of the EU Constitution are taken from the “Consolidated Version of the Treaty on European Union,” *Official Journal of the European Communities*, 24.12.2002.

Section of Treaty	Key Points to Note
Title I - Common Provisions	The purpose/goals of the EU
Art. 2 - Objectives	<ul style="list-style-type: none"> <li>• “to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17”</li> <li>• “to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union”</li> <li>• “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.</li> </ul>
Art. 6 - Human Rights	<ul style="list-style-type: none"> <li>• “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”</li> <li>• Defined as in the <b>European Convention for the Protection of Human Rights and Fundamental Freedoms</b> signed in Rome on 4 November 1950 which states: <ul style="list-style-type: none"> <li>- “Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law” (Art. 5)</li> <li>- “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” (Art. 9, p.2)</li> <li>- In cases of war or crisis the “High Contracting Party” may deviate from the obligations as long as it is in line with international law (Art. 15)</li> <li>- The “High Contracting Party” may still limit the political activity of aliens (Art. 16)</li> </ul> </li> <li>• Respect for national identities</li> <li>• “The Union shall provide itself with the means necessary to attain its objectives and carry through its policies”.</li> </ul>

Section of Treaty	Key Points to Note
<b>TITLE V</b>	<b>Common Foreign and Security Policy (CFSP)</b>
<b>Art. 11 - Provisions on a Common Foreign and Security Policy</b>	<ul style="list-style-type: none"> <li>• "Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy"</li> <li>• "To safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the <b>United Nations Charter</b>"</li> </ul> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p><i>The UN Charter Preamble: "To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom"</i></p> </div> <ul style="list-style-type: none"> <li>• "To strengthen the security of the Union in all ways"</li> <li>• "To preserve peace and strengthen international security"...in accordance with the <b>United Nations Charter</b>, the <b>Helsinki Final Act</b><sup>2</sup>, and the objectives of the <b>Paris Charter</b><sup>3</sup>, "including those on external borders"</li> <li>• "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity"</li> <li>• "Member States shall act as a cohesive whole and will refrain from any action that will weaken the effectiveness of the EU in international relations."</li> </ul>
<b>Art. 12 - How will the EU do the above</b>	<ul style="list-style-type: none"> <li>• Defines the principles and the general guidelines</li> <li>• Creates common strategies, common positions, joint actions, and systematic cooperation among Member States for the implementation of the CFSP.</li> </ul>
<b>Art. 13 - Who defines the common foreign and security policy?</b>	<ul style="list-style-type: none"> <li>• The European Council is the main decision force which sets the policy, strategies, objectives, and duration<sup>4</sup></li> <li>• "The Council shall ensure the unity, consistency and effectiveness of action by the Union."</li> </ul>
<b>Art. 14 - Joint Actions</b>	<ul style="list-style-type: none"> <li>• The Council is responsible for the creation and adoption of <b>joint actions</b>.</li> <li>• Member States are committed to the decision of the Council. If a Council decision is failing, in matters of urgency, Member States may take the necessary measures with "regard to the general objective of the joint action"</li> <li>• Council may <i>request</i> the input of proposals from the Commission. When a national plan is formed, there will be adequate consultation time between Member States and the Council before implementation.</li> </ul>

<sup>2</sup> This was agreed at the Conference on Security and Cooperation in Europe in Helsinki in 1975.

<sup>3</sup> This was agreed at the Conference on Security and Cooperation in Europe in Paris in 1990.

<sup>4</sup> Please recognize the difference between the *European Council* and *the Council*. The European Council is made up of the Heads of State and the President of the Commission that meet twice a year. They set the overall general principles of the EU and specifically the CFSP. The Council, based on the recommendations of the European Council, defines and creates policy recommendations and has the final word on decision-making. Each Member State is represented here by the relevant Minister or Secretary of State.

Section of Treaty	Key Points to Note
<b>TITLE V (cont.)</b>	<b>Common Foreign and Security Policy (CFSP)</b>
<b>Art. 15 - Common Position</b>	<ul style="list-style-type: none"> <li>• “The Council shall adopt common positions”</li> <li>• The Member States’ national policies must “conform” to the common position of the Council</li> </ul>
<b>Art. 16 - Effective Information Exchange</b>	<ul style="list-style-type: none"> <li>• Member States shall inform other Member States and the Council on any matter of “foreign and security policy of general interest.”</li> </ul>
<b>Art. 17 - Common Defence Policy - (amended by the Treaty of Nice)</b>	<ul style="list-style-type: none"> <li>• Creation of a common defence policy, but respects Member States’ obligation to the <b>North Atlantic Treaty Organization (NATO)</b><sup>5</sup>. Decisions with defence implications shall be taken “without prejudice to the policies and obligations” of the Member States’ NATO obligations</li> <li>• Shall include humanitarian, rescue, peacekeeping, and crisis management tasks (including the use of combat forces to reach these ends)</li> <li>• This Article does not impede bilateral cooperation between two or more Member States within the Western European Union (WEU) and NATO, as long as it does not impede the powers of the EU.</li> </ul>
<b>Art. 18 - Who represents?</b>	<ul style="list-style-type: none"> <li>• The Presidency represents matters in common foreign and security policy, assisted by the Secretary-General of the Council, and the Commission</li> <li>• The role special representative may be created for certain policy issues by the Council.</li> </ul>
<b>Art. 19 - International Coordination</b>	<ul style="list-style-type: none"> <li>• “Member States shall coordinate their actions in international organizations and at international conferences. They shall uphold the common position in such forums.”</li> </ul>
<b>Art. 21 - Involvement of the European Parliament</b>	<ul style="list-style-type: none"> <li>• The Presidency must consult the European Parliament with regard to common foreign and security policy</li> <li>• Parliament may make recommendations to the Council and must hold an annual debate on the progress of the implementation of the common foreign and security policy.</li> </ul>
<b>Art. 22 - Member State and Council Relationship</b>	<ul style="list-style-type: none"> <li>• Any Member State may submit questions and proposals to the Council.</li> </ul>
<b>Art. 25 - Political and Security Committee (amended by the Treaty of Nice)</b>	<ul style="list-style-type: none"> <li>• The Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and give its opinions to the Council.</li> </ul>
<b>Art. 27 - The Commission and Cooperation (amended by the Treaty of Nice)</b>	<ul style="list-style-type: none"> <li>• the “Commission is fully associated with the common foreign and security policy”</li> <li>• Enhanced Cooperation<sup>6</sup> will safeguard all values and interests of the European Union</li> <li>• Art. 27b - “Enhanced cooperation...shall relate to implementation of a joint action or a common position. It shall <b>not</b> relate to matters having <i>military</i> or <i>defence</i> implications”</li> <li>• Enhanced Cooperation must be approved by the Council and Commission and both must be kept informed during its implementation.</li> </ul>

<sup>5</sup> NATO is an organization that has 26 member countries from Europe and North America dedicated to the principles of the UN Charter. Its basic principles are to prevent war and to promote peace and justice throughout the world.

<sup>6</sup> Enhanced Cooperation is a mechanism by which a group of Member States can work together using the EU as a framework to further cooperation amongst themselves to further the goals and objectives of the European Union.

Section of Treaty	Key Points to Note
<b>TITLE VI</b>	<b>Provisions on Police and Judicial Cooperation in Criminal Matters</b>
<b>Art. 29 - Objectives</b>	<ul style="list-style-type: none"> <li>• Without prejudice, to provide “citizens with a high level of safety within an area of freedom, security, and justice by developing common actions among the Member States in the fields of police and judicial matters”</li> <li>• Specific objectives are: to prevent and combat crime specifically citing terrorism, trafficking of persons, offences against children, illicit drugs and arms trafficking, corruption, and fraud</li> <li>• Should be implemented with closer cooperation specifically stating the role of <b>Europol</b> and <b>Eurojust</b>.</li> </ul>
<b>Art. 30 - Common actions and Europol</b>	<ul style="list-style-type: none"> <li>• Cooperation among authorities such as police and customs by exchange of information, common evaluation, and joint initiatives in training and equipment</li> <li>• <b>Europol</b> - to become highly integrated with Member States’ law enforcement services and “establish a research, documentation and statistical network on cross-border crime.”</li> </ul>
<b>Art. 31 - Eurojust</b>	<ul style="list-style-type: none"> <li>• Ensuring <ul style="list-style-type: none"> <li>• cooperation especially with the European Judicial Network</li> <li>• compatibility and facilitating extradition</li> </ul> </li> <li>• “Progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism, and illicit drug trafficking”</li> <li>• Council will promote use of <b>Eurojust</b> in serious cases of cross-border crime.</li> </ul>
<b>Art. 35 - Court of Justice of the European Communities</b>	<ul style="list-style-type: none"> <li>• Court of Justice of the European Communities is responsible for “preliminary rulings on the validity and interpretation of framework decisions”</li> <li>• Member States must accept the jurisdiction of the Court of Justice, but the “Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out...with regard to the maintenance of law and order and the safeguarding of internal security”<sup>7</sup></li> <li>• “Court of Justice shall have jurisdiction to review the legality of framework decisions (both Member States and the Commission) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers”</li> <li>• If there is a disagreement between Member States on legal procedural matters, and if the matter cannot be settled by the Council, the Court can step in.</li> </ul>

## Comments

The Consolidated Version of the Treaty of European Union makes it clear that the European Union *respects and will protect* fundamental rights and the rule of law. However, these fundamental rights and the rule of law are **not** defined. Thus, there is a point where fundamental human rights such as liberty and freedom of speech can be encroached upon by the need for EU security, since there is no clarity about where and when EU security policy takes priority over the policy to protect fundamental rights.

Both the key areas which affect the EU's response to terrorism are governed by the 'intergovernmental method' of decision-making in the EU. These are areas of policy where the EU does not have competence to act but where, rather, the Member States have agreed

<sup>7</sup> The jurisdiction of the Court was to be extended into this area by the Treaty establishing a Constitution for Europe.

to act jointly and to cooperate. Decisions are taken by the Council (the European Parliament is merely consulted) and therefore the policy priorities of the Member States' governments will play a significant role in the decision-making process.

The Treaty acknowledges Member States' obligations to other defence organisations such as NATO, but it is also quick to note that Member States' ultimate obligation is to the European Union. It was even decided at the European Council meeting in Cologne (1999) that the European Union must have the ability to act independently of NATO with its own armed forces if necessary. So far, NATO and the European Union have been able to work closely, but if at any moment their policies were to diverge significantly, this could have detrimental results for the European Union, especially because there are countries in NATO (such as the United States) that will never be in the European Union and that have a different security agenda. This 'duality of loyalty' raises the question of the degree to which Member States will be able to work for a "common position" For example, Poland and the UK supported the United States in the war in Iraq while France and Germany adamantly opposed it. There is a provision in the Treaty for enhanced cooperation in bilateral agreements, but the Member State must first also take into account the "common position" of the EU. The example of the Iraq war was one where the cohesion of the CFSP was seriously stretched to its limits.

The rather new institutions of **Europol** and **Eurojust** are emphasized as becoming strong and important coordination mechanisms between the national judicial systems and police forces at the European Union level.

Finally, the Treaty does manage to emphasize the need for effective internal and external cooperation **and** provides for this through enhanced cooperation. Enhanced cooperation allows national governments of some of the Member States to take initiatives under the EU framework to promote EU values, but without going through the full EU-wide decision-making process. (The enhanced coordination system is still subject to scrutiny by the Council and the European Parliament.)

### **What would the Constitutional Treaty change?**

Most importantly, the Constitutional Treaty includes the **Charter of Fundamental Rights** of the European Union under its Articles II-39 to II-46.<sup>8</sup> Among other rights, the Charter includes the right to liberty and security; the protection of personal data; the right to asylum in line with the **Geneva Convention of 1951**<sup>9</sup> and the **Protocol of 31 January 1967**<sup>10</sup>; protection in the event of removal, expulsion, and extradition; non-discrimination; and freedom of movement and of residence. Inclusion in the Constitutional Treaty makes the Charter legally binding and thus makes all EU action and legislation subject to the provisions of the Charter. The Charter does not, however, become legally binding on Member States other than in the context of Member States implementing EU legislation.

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<sup>8</sup> The Charter of Fundamental Rights is basically composed of the European Social Charter signed in Turin in 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989. It also takes into consideration past judicial decisions of the Court of Justice and the European Court of Human Rights.

<sup>9</sup> Defines "refugee" for the first time. It has been heavily criticized for not including internal asylum seekers *within* states in events such as civil war. Furthermore, it makes asylum seekers not just a problem of the receiving country but of the UN, and thus the EU (since it adopted this principle) as a whole.

<sup>10</sup> Among other things, this protocol especially strengthens the degree of cooperation among states in terms of asylum seekers or "refugees."

In addition, the Constitutional Treaty defines more clearly the differences between the EU and the Member States' competencies. By the principle of conferral, the Constitutional Treaty states that all competencies not outlined by the Constitution are matters for Member States' competence. There is a "flexibility clause", however, which states that the EU can involve itself in areas not specifically set out in the Constitution as EU competences, but only with the consent of the European Parliament and all the Member States.

The Constitutional Treaty gives more power to the European Parliament in the decision-making process on certain issues. This is particularly so for matters relating to Justice and Home Affairs.

*References:*

- **Charter of Fundamental Rights of the European Union** - see also Constitutional Treaty - <http://europa.eu.int/scadplus/leg/en/lvb/l33501.htm>
- **Charter of the United Nations** - <http://www.un.org/aboutun/charter/>
- **Consolidated Version of the Treaty on European Union and the Constitutional Treaty** - [http://europa.eu.int/eur-lex/en/search/search\\_treaties.html](http://europa.eu.int/eur-lex/en/search/search_treaties.html)  
- [http://www.wordiq.com/definition/European\\_constitution](http://www.wordiq.com/definition/European_constitution) (differences in the Constitutional Treaty in comparison to past treaties)
- **European Convention for the Protection of Human Rights and Fundamental Freedoms** - <http://www.pfc.org.uk/legal/echrttext.htm>
- **European Social Charter** - <http://conventions.coe.int/treaty/en/treaties/html/035.htm>
- **Geneva Convention of 1951-** <http://www.ufsia.ac.be/~dvanheul/migration/genconv.html>
- **Helsinki Final Act** - <http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm>
- **NATO** - <http://www.nato.int/>
- **Paris Charter** - <http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm>
- **Protocol of 31 January 1967** - <http://www.asylumlaw.org/docs/international/NewYork1967.PDF>