

Submission to the Advisory Committee

for

Framework Convention for the Protection of National Minorities

Fifth Monitoring Report of the United Kingdom

(Council of Europe)

29th March 2022

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A. Introduction

1. There has been much local comment regarding the UK's withdrawal from the EU. This withdrawal led to the Protocol, agreed by the UK and the EU. A wide spectrum of opinion from within the UK, Ireland, USA and the EU support the Protocol. In particular, supporters of the Protocol, from a political view, have expressed concerns about Nationalists in Northern Ireland (NI) since, if there was a 'hard-border' between Ireland and NI, this would injure their identity and would have an impact on overall peace and stability on the island of Ireland.
2. Political unionism has a different view. The Protocol impacts trade within the UK and breaches territorial integrity. Two NI High Court judgements stated that, while the Protocol was in conflict with the 1800 Act of Union regarding trade, Parliament was sovereign and thus the Protocol was valid. These judgements were in the context of domestic law, thus raising the issue regarding any possible contribution by international law.
3. Against this background, there is a widespread view across all interested parties in relation to the Protocol that international law is to be respected. It will be asserted in this submission that the protection of the Nationalist minority in NI is manifested by the Protocol breaching a fundamental principle of international law. Namely, this protection required it to have been achieved within the limits of respect for territorial integrity which the Protocol did not reflect. And, this fundamental principle of territorial respect is advocated by all international human rights bodies.
4. The Protocol was agreed between the UK Government and the EU to deal with the Northern Ireland (NI) 'problem'. Namely; NI is part of the UK, though geographically part of the island of Ireland, and therefore the UK has a land border with a member country of the EU (Ireland). Since the Protocol places NI in a foreign (EU) single market for goods with related foreign customs code and laws, this impacts upon the territorial integrity of the UK. Others take the view that the Protocol is necessary and acceptable.
5. Overall, and conscious of the contentious context of the issue in question, this submission is an earnest endeavour to be grounded firmly in relevant documentation, taking as a maxim that interpretation is based on the plain meaning of the language. The aim is to be both objective and evidence based, using quotations to reflect the perspective of those involved.

B. Judicial Process

6. A Judicial Review was issued against the Secretary of State for NI regarding the Protocol. The judgement¹ was delivered on 30 June 2021. It is 68 pages long and represents a considered legal analysis of the dynamics of withdrawal by the UK from the EU. An important element related to whether or not the Withdrawal Agreement (including the Protocol) conflicts with the 1800 Act of Union, viewed by the applicants as a foundational piece of legislation relating to the formation of the UK.
7. The Judgement considered that parliamentary sovereignty was fundamental to the UK's constitution and thus was a key consideration in the challenge before the court. In reference to the Act of Union, the Judgement accepted that subjects of Great Britain and

¹ Ref: COL11535, ICOS No: 2021/18686/01

Ireland were all “*on the same footing*” [48] in respect of trade whether in the year 1800 or any future treaty with a foreign country. From this, it concluded that the Protocol was in conflict with the terms of the Act of Union. It noted at [62]:

Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on “*equal footing*” in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods “*at risk*” and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the “*equal footing*” described in Article V1.

8. However, fundamentally, this conflict must be assessed in the context of parliamentary sovereignty. Regarding sovereignty, it noted that primary legislation incorporated the Withdrawal Agreement into domestic law - this being the explicit will of Parliament. All aspects were considered by Parliament, including being aware of the applicants’ view that the Protocol was contrary to NI’s constitutional arrangement. Also, accepting the principle that general phrasing could not override the clear specific will of Parliament and that the Act of Union was written over 200 years ago in more general phrasing compared with the specific will of Parliament’s Withdrawal Agreement, the latter should be given legal effect.
9. An appeal was lodged and the 211-page Judgement² was delivered on 14 March 2022, dismissing the appeal. Parliament was supreme, similar to above, while also recognising that there was conflict with the “*same footing*” of the Act of Union regarding trade. A similar quotation to the above stated that the Protocol “*positions NI primarily within the EU internal market rather than that of the UK*” [327] while “*simultaneously perpetuating the application of a discrete and potentially evolving corpus of EU laws in NI.*” [326]
10. Put simply, Parliament is supreme regarding domestic law and any general constitutional statute, such as the 1800 Act of Union, can be repealed. The Withdrawal Agreement, including the Protocol, is now part of domestic law. However, in this context, while Parliament is supreme regarding domestic law, consideration is required to be given to any contribution by international law. The Judicial Review [68] 55, referred to a principle “*which is based on the proposition that international law and domestic law operate in independent spheres*”. The Appeal Judgement referred to a similar distinction. Thus a key question: are universally accepted standards of international law applicable to the issue?
11. Also, the Appeal Judgement referred to the “*ordinary and natural meaning*” [219] in the context of the interpretation of the NI Act 1998. In this submission’s context, regarding the fundamental principle of international law with respect to the territorial integrity of the state, the ordinary and natural meaning is clear: ‘respect’ (recognise and abide by) and ‘integrity’ (the state of being whole and undivided).

C. Attitudes to International Law

12. In the Belfast Agreement³, the UK Government agreed “*to legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern*

² Ref: KEE11726, ICOS No: 2021/18686/01 and 2021/015249/01

³ The document published in 1998 was called ‘The Agreement’, though subsequently called by many ‘The Good Friday Agreement’. In law it is called ‘the Belfast Agreement’, thus this title will be used in this submission.

Ireland."⁴ From a general UK perspective, Sir John Major (UK Prime Minister 1990 to 1997) stated: "*For generations, Britain's word - solemnly given - has been accepted by friend and foe. Our signature on any treaty or agreement has been sacrosanct.*"⁵ And Lord Peter Hain (Former Secretary of State for NI from 2005 to 2007) stated, regarding the UK Government breaking international law, that it was "*certainly what you'd expect of a rogue state and what you'd expect of a banana republic.*"⁶

13. The Irish Government, in its submission to the Council of Europe⁷ under the heading 'The Status of International law in the Irish legal framework', stated: "*Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states.*" To be more specific regarding the Protocol, the former Taoiseach (Prime Minister of Ireland), Leo Varadkar stated:

As far as the Irish Government is concerned, the Withdrawal Agreement - including the Protocol on Ireland and Northern Ireland is an international agreement. International treaties have to be honoured and they trump any domestic legislation that any country may pass.⁸

14. From the EU perspective there has been the constant theme that the UK must abide by international law and thus must implement the Protocol. For example: Maroš Šefčovič, Vice President of the European Commission stated: "*Respecting international legal obligations is of paramount importance.*"⁹ And historically, with the demise of the USSR in 1989 when several States - formally within the USSR - wished to join the EU, the EU was conscious of both their ethnicity and thus the imperative nature of respecting territorial integrity. Consequently, the 'The Pact on Stability in Europe' became relevant and "*in response to the European Union's call*", member states were asked to adopt the Pact. The Pact listed the numerous international bodies that refer to "*sovereign equality, respect of the rights inherent in sovereignty...territorial integrity of States and respect for internationally recognised frontiers...*" For more detail see the **Annex**, pages **9** and **10**.

D. Commentary on the Protocol

15. It is considered that the Irish Government played an important part in determining the content of the Protocol, since it primarily involved the relationship between Ireland and NI post the UK exiting from the EU. Leo Varadkar (then Ireland's Prime Minister / Taoiseach) wrote:

To the nationalist people in Northern Ireland, I want to assure you that we have protected your interests throughout these negotiations. Your birth right as Irish citizens, and therefore as EU citizens, will be protected. There will be no hard border on our island. You will never again be left behind by an Irish Government. These rights will, of course, be available to everyone in

⁴ The Belfast Agreement: 'Democratic Institutions in Northern Ireland', par. 33 (b), 10 April 1998.

⁵ Sir John Major: News Letter, 10 September 2020.

⁶ Lord Peter Hain: News Letter, 10 September 2020.

⁷ Council of Europe: 'Report submitted by Ireland pursuant to Article 25, paragraph 1, of the Framework Convention for the Protection of National Minorities', page 7: 13 November 2001.

⁸ Leo Varadkar TD: Ulster Television's News programme, 'UTV Live', 8 September 2020.

⁹ Maroš Šefčovič: Section of statement issued, Brussels, 21 July 2021.

Northern Ireland who chooses to exercise his or her right to be an Irish citizen, regardless of their political persuasion or religious beliefs.¹⁰

16. From the UK's perspective, among key participants during the negotiations that led to the 1998 Belfast Agreement were: Tony Blair, the UK Prime Minister from 1997 to 2007 and Jonathan Powell, Tony Blair's Chief of Staff, also from 1997 to 2007. Both could be viewed as influential and expressed clear views on the post-Brexit issue.

Tony Blair

In addition, at the core of the agreement was the following deal: Northern Ireland would remain part of the UK for as long as a majority in the north wanted it, but in return the nationalist aspirations and identity of those who wanted a united Ireland would be recognised and given effect. The open border between north and south was key. Had that been in doubt, there would never have been a peace agreement. Simple as that.¹¹

Jonathan Powell

Brexit was always going to trample on someone's rights. If the United Kingdom was going to leave the Customs Union and the Single Market then there had to be a hard border somewhere. At first Boris Johnson proposed it should be between Northern Ireland and the Republic, which would have injured the identity of nationalists.¹²

17. From an EU perspective, Ursula von der Leyen, President of the European Commission, was speaking following a meeting with Ireland's Prime Minister, Micheal Martin. She said:

The Protocol is the solution to the impact of Brexit on Northern Ireland. It is the only solution to protect peace and stability on the island of Ireland and to protect the integrity of the single market. We are convinced that to achieve these objectives the Protocol needs to be implemented.¹³

18. In reference to the above Lord Jonathan Caine, a former Advisor in the Northern Ireland Office - a Westminster Government Department - addressed the issue while speaking in the House of Lords on 13 September 2021. This related to a debate on the Lords European Affairs Committee report on the Protocol. He cited this discussion in a print-media article. Regarding the draft joint UK-EU Report, that he saw for the first time on 4 December 2017, he stated:

At a meeting the following day in the Cabinet Room, I stated that the document had every hallmark of having been drafted in Dublin, at which point one very, very senior official replied, "That's because it largely was".¹⁴

¹⁰ Leo Varadkar TD: Quoted in an open letter comprising 1,000 signatories from a broad cross-section of civic nationalism urging the then Taoiseach to adhere to his commitment given on 8 December 2017 and for his government to ensure their rights as Irish citizens are protected; Irish News, 5 November 2018.

¹¹ Tony Blair: 'The EU was crucial to securing peace in Ireland. This plan puts it in peril', The Guardian, 5 October 2019.

¹² Jonathan Powell: 'Opinion', Belfast Telegraph, 21 October 2019.

¹³ Ursula von der Leyen: 'News Letter', 16 July 2021.

¹⁴ Lord Johnathan Caine: 'News Letter' 16 September 2021

19. This draft UK-EU Report was signed on 8 December 2017. Lord Caine stated: *“In classic EU negotiating fashion, we were unable to remove any of the agreed text...”* He added:

Early on the Friday morning, Mrs May did indeed fly to Brussels and sign the joint report. Regrettably, the die had been cast and whatever way we tried to present the situation, the principle that Northern Ireland would be treated separately from the rest of the United Kingdom had been conceded.

20. Perhaps the most recent comments (22 March 2022), relevant to this submission and indicative of the Protocol’s dynamics, is by the all-party Sub-Committee of the House of Lords. It stated that *“...more than 300 EU directives or regulations will automatically continue to apply to Northern Ireland on a dynamic basis after the end of the transition period.”*¹⁵ Also, *“...the Committee noted a lack of clarity over the areas in which regulatory divergence between Great Britain and Northern Ireland was likely to develop.”*¹⁶ The Committee concluded:

We reiterate the conclusion of our introductory report that as a consequence of Brexit, the Protocol, negotiated by the Government and the EU and implemented in the UK via the European Union (Withdrawal Agreement) Act 2020, has created a democratic deficit, in that EU law as set out in the Annexes to the Protocol applies to Northern Ireland on a dynamic basis, subject neither to UK Government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont.¹⁷

21. In a wider chronological context, before the above agreement was concluded on 8 December 2017 and mindful of the importance of the Irish Government’s perspective, consideration was given in the Irish Parliament to Brexit and matters relating to customs, trade and tariffs. Mr. Niall Cody, Chairman of the Board of Revenue Commissioners, gave evidence. He stated that it was the Board’s responsibility to focus *“...on the fair and efficient implementation of possible tax and customs outcomes post-Brexit...[and] our planning is based on the full range of possibilities, including the possibility that customs controls or processes will apply between Ireland and the UK.”*¹⁸

22. While it was recognised that businesses, traders and transport operators have concerns regarding Brexit, nevertheless a positive perspective was presented to the Committee. For example, Mr. Cody stated: *“At present, we are ranked second in the EU for ease of customs procedures so we have a track record of minimising the customs burden.”* The present and likely future position was summarised as follows:

In 2016, 6% of import declarations were checked and less than 2% were physically checked. The vast majority of these checks were carried out in approved warehouses and other premises with a very small number at a port or airport. The low level of import checks is the result of pre-authorisation of traders, advance lodgement of declarations and an extensive system of post-

¹⁵ House of Lords, European Affairs Committee; Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Chapter 1: Introduction, par. 2, page 5, 22 March 2022.

¹⁶ House of Lords; *ibid.*: par. 24, page 11.

¹⁷ House of Lords; *ibid.*: ‘Conclusions’, par. 88, page 32.

¹⁸ Mr. Niall Cody: Oireachtas (Ireland’s legislature), ‘Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach debate’, 25 May 2017.

clearance checks, including customs audit, which are carried out at traders' premises. Authorised economic operators, AEOs, have a special status in the system and under agreed protocols are allowed to operate greatly simplified customs procedures. There are currently 133 AEOs, which account for 82% of all imports and 89% of exports. It will be very important that the bulk of trade continues to be through AEOs after Brexit.

23. Reference was also made to the development of paperless customs systems with it being managed entirely on the basis of electronic processing. Mr Cody concluded his presentation by stating that *“we are not looking for sites for customs posts.”*¹⁹

E. Framework Convention for the Protection of National Minorities' (FCNM)

24. The rationale for the FCNM is clear. *“Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent.”*²⁰ Combine this with the monitoring process is testament to this protection not being unique. And, the FCNM's related 'Facts Sheet' states: *“Virtually all European states have some population belonging to national minorities.”*²¹ Each of the 39 European countries²² subject to the FCNM has its own particular characteristics, but all are subject to the same FCNM template.
25. Jamie Bryson (a prominent political activist in NI) published a response to the UK Government's command paper.²³ He stated, regarding the possibility of continued instability, that there could be a short breathing space *“predicated upon the reality that if the Government do not move at the promised speed, then underlying societal instability will once again become overt...only this time with a greater intensity than before.”* A potentially ominous statement regarding the coming period. I do not support at all societal instability. This reference is only in order to not ignore a potential reality, given the present political uncertainty.
26. In paragraph 13, Leo Varadkar referred to international treaties having to be honoured and that *“they trump any domestic legislation that any country may pass.”* I agree, international law must be respected and it trumps domestic law. However, what if two separate parts of international law conflict with each other, namely the Protocol and the FCNM. Which part trumps the other? Given the universal acceptance of the principle of respect for territorial integrity, this would seem to clearly overrule another international agreement, namely the locally relevant Protocol, with precise and limited application.
27. Consider one element of the FCNM. The Preamble states in its penultimate paragraph that signatories to the framework Convention:

Being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons

¹⁹ The quotations for Mr Cody are not precisely referenced, since there was not any notation in the document to enable precise referencing.

²⁰ Council of Europe, FCNM: page 1.

²¹ <https://www.coe.int/en/web/minorities/fcnm-factsheet>

²² <https://www.coe.int/en/web/minorities/country-specific-monitoring>

²³ Unionist Voice Policy Studies: 'Analysis of UK Government Command Paper', 21 July 2021.

belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states.²⁴

28. This quotation “...sets out the main aim of the framework convention [and] it also stresses that this effective protection should be ensured within the rule of law, respecting the territorial integrity and national sovereignty of States.”²⁵ The UK and Ireland have both ratified this principle, thus they should be committed to its implementation and, more generally, both are - in word - committed to adhering to the principles of international law (Par. **12 & 13**).
29. The word ‘respecting’ used in the above quotation is important. Generally, if one respects other people, one shows respect for their wishes, rights, or customs and one avoids doing anything they would dislike or regard as wrong. From a legal perspective, in the Oxford Dictionary, respect means that one agrees to recognise and abide by the legal position. Respect for the legal position is not simply abiding by the law, which one must do. To ‘recognise’ involves acknowledging the existence, validity or legality of a position and acting accordingly.
30. I am conscious that the FCNM also contains a section relating to provisions concerning its interpretation and application, namely; Articles 20 to 23. For example, Article 21 states that nothing in the FCNM “shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.” The aspect of ‘territorial integrity’ permeates all of the FCNM, thus indicating its importance.

F. Concluding Comments

31. The Council of Europe describes the FCNM as: “...one of the most comprehensive treaties designed to protect the rights of persons belonging to national minorities.”²⁶
32. Culture and identity are critical to peace and stability in NI’s society. The nationalist minority aspires to a united Ireland. Aspirations are important and both communities’ aspirations (unionist and nationalist) are equally legitimate. However they are legally different. NI as an integral part of the UK is the legal position according to international law, whereas the status of the aspiration for a united Ireland is that of a legitimate right to wish for a change in NI’s legal position. A key question: what rights require consideration regarding culture and identity in order to provide the basis for a democratic, stable and peaceful society? The answer is the FCNM; it being ‘hard law’, thus the UK Government is required to uphold the FCNM and to give account regarding implementation.
33. However the Protocol, ratified by the UK Government, represents a clear violation of a fundamental principle of international law. (pars. **7, 9, 11** and **20**) Consequently, this submission asserts that the Protocol breaches an essential aspect of the FCNM since the UK acted outside the limits for ensuring the effective protection of national minorities (par. **27**). And, the UK breached also its commitment in the Belfast Agreement (par. **12**).

²⁴ Council of Europe FCNM: page 1.

²⁵ FCNM: ‘Explanatory Report - ETS 157 - Protection of National Minorities’, par. 28, page 4, February 1995.

²⁶ <https://www.coe.int/en/web/minorities/fcnm-leaflet>

34. Chronologically, regarding the Irish Government, advice to solve the problem (pars. **21** to **23**) was provided (25 May 2017) but the Irish Government did not accept this advice. Rather, it sought and obtained agreement with the EU and then stated (8 December 2017) that *“the nationalist people in Northern Ireland”* will have their interests protected as *“there will be no hard border on our island.”* (8 December 2017). This was the same date the Protocol was agreed. It is worth noting this quotation does not refer to trading aspects and, subtly, the words “our island” are used. Consider this paragraph in the context of Johnathan Powell’s perspective (par. **16**). Also, I believe that the Irish Government breached its commitment to the Council of Europe (par. **13**).
35. And the former Commissioner for Public Appointments in NI summarised the above chronology well:
- That is our fundamental problem. I think of back in May 2017, the Head of the Irish Revenue Commission gave evidence to the Irish parliament that how it could be done electronically and didn’t see any need for customs posts and all that stuff. The BBC reported quite extensively on this. If it had gone ahead like that we wouldn’t be here. But unfortunately policy changes in the Irish Government and we ended up where we are. ²⁷
36. In summary: Leo Varadkar secured, in his words (par. **15**), the protection of the nationalist minority in NI that in turn resulted in a breach of the UK’s territorial integrity, though an alternative was offered (pars. **21** to **23**) that was not accepted. This was endorsed by the UK Government but consequently is at variance with its commitment to the FCNM (par. **27**) that effective protection is to be within the bounds of respect for territorial integrity.
37. Accepting that the post Brexit position requires adjustment in trading arrangements, but this is beyond the scope of this submission. However, and importantly, the trading adjustments required do not - and should not - extend to disrespecting territorial integrity. If there had been an EU / non EU ‘hard border’ on the island of Ireland in 1996/1998, there would have been nothing to preclude negotiations being initiated and continuing until agreement was secured, as occurred with the Belfast Agreement on 10 April 1998.
38. To not find an agreement would have been an abrogation of responsibility by the negotiating politicians. Tony Blair’s comments (par. **16**) are simply a charade. To say, that without the soft border in the island of Ireland associated with UK and Ireland’s membership of the EU, there would have been no deal in 1998 is to ignore the reality of the clear need for peace in NI, after nearly 30 years of violence.
39. The EU’s perspective (par. **17**) is that the Protocol is the only solution to protect the integrity of the single market. The EU’s market integrity is important and customs procedures are required, but does not trump a country’s territorial integrity. Yet, from the EU’s internal relationships perspective, territorial integrity was very important (**Annex**, pages **9** and **10**); but apparently not so when considering a country no longer in the EU.
40. Fundamental principles of international law must be upheld. They should neither be breached to facilitate a National Minority’s identity nor is a breach required to facilitate post-Brexit trade arrangements. The latter aspect is referred in order to complete the analysis, though it is not central to this submission.

Dermot Nesbitt

²⁷ Felicity Houston: BBC NI: ‘Spotlight Special’, 16 February 2022

Annex

A

The Pact on Stability in Europe

Paris, 20-21 March 1995

(Selected paragraphs)

1.

We, Ministers for Foreign Affairs and Representatives of States and International Organisations participating in the Paris Conference on Stability in Europe, met in Paris on 20 and 21 March 1995, in response to the European Union's call, to adopt the Pact on Stability in Europe.

6.

In this spirit, work has focused on the intensification by participating States of good-neighbourly relations in all their aspects, including those related to the rights of persons belonging to national minorities.

7.

This intensification requires sustained efforts. It must be based on effective implementation of the existing principles and commitments established within the framework of the UN, the OSCE and the Council of Europe, notably all of the principles contained in the 1975 Helsinki Final Act, the 1990 Charter of Paris for a new Europe, the 1990 Copenhagen Document, the 1992 Helsinki Document, the 1994 Budapest Documents, as well as the Vienna Declaration of the Council of Europe summit of 1993 and, for the States that are party to them, the relevant treaties and conventions of the Council of Europe, including the 1994 Framework-Convention for the protection of national minorities. These principles refer to sovereign equality, respect of the rights inherent in sovereignty, refraining from the threat or use of force, inviolability of frontiers, territorial integrity of States and respect for internationally recognised frontiers, peaceful settlement of disputes, non-intervention in internal affairs, respect for human rights, including the rights of persons belonging to national minorities, and fundamental freedoms, including freedom of thought, conscience, religion or belief, equal rights and self-determination of peoples, cooperation among States and fulfilment in good faith of obligations under international law.

Contd.

B

**UK Parliament, House of Commons, Hansard for 28 March 1995
(Volume 257)
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Reference:

<https://hansard.parliament.uk/commons/1995-03-28/debates/d59fd704-de67-4efb-9b92-9e1cf05888fe/StabilityPact>

Ms Quin

To ask the Secretary of State for Foreign and Commonwealth Affairs if he will make a statement on the outcome of the EU conference on regional stability held in Paris. [15687]

Mr. Douglas Hogg

The stability pact concluding conference which took place in Paris on 20–21 March was attended by all participating States of the Organisation for Security and Co-operation in Europe. The Pact's aim has been to help nine prospective members of the EU - Czech Republic, Slovakia, Poland, Hungary, Romania, Bulgaria, Estonia, Latvia and Lithuania – resolve problems, especially concerning frontiers and minorities, before enlargement, by promoting good neighbourliness on the basis of OSCE principles. The conference adopted the stability pact and transferred it to the OSCE which is entrusted with its implementation. The EU joint action under the common foreign and security policy has now been successfully completed.