



Does the Vienna Convention provide a legal off-ramp for unilaterally changing the Northern Ireland Protocol?

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The [Northern Ireland Protocol](#) is part of the [Withdrawal Agreement](#), designed to set out the legal parameters of the withdrawal of the UK from the EU. The Government proposes to [introduce legislation](#) to unilaterally change the Protocol. On the face of it, this would appear to place the Government on the highway to a breach of international law. But are there any off-ramps which allow it to avoid this destination? This blog post examines one possible off-ramp, that this course of action is consistent with the [Vienna Convention on the Law of Treaties 1969](#).

Legal justification for unilateral amendment of the NI Protocol

The Foreign Secretary Liz Truss MP stated in Parliament on [17 May 2022](#) that "we are very clear that this is legal in international law, and we will be setting out our legal position in due course." This legal position has not yet been set out. Emily Thornberry MP, the Shadow Attorney General, has asked a number of [questions](#) about the nature and source of this legal advice, but no details have emerged. David Allen Green [suggests](#) there have been "shenanigans" over how this legal advice was obtained and the odd way in which the Treasury Devil was only partially consulted on it.

According to [The Times](#), Attorney General Suella Braverman QC MP has stated that the EU's implementation of the Protocol has been "disproportionate and unreasonable". She also argues that the Good Friday Agreement (GFA) has "primordial significance" which justifies amending the Protocol. As Joshua Rozenberg QC [remarked](#) "Those don't sound like legal arguments to me". It was a relief when Sir Jonathan Jones QC, the former Treasury Solicitor and Head of the Government Legal Department, [admitted](#) that primordial significance was a novel legal expression to him. I assumed that ignorance of this point was personal to me.

Professor David Collins [argues](#) that this is legal by reference to [Article 16](#) of the Protocol itself. Article 16 allows parties to unilaterally take appropriate safeguard measures if the application of the Protocol would lead to serious economic, societal or environmental difficulties. Oliver Garner sees Article 16 as providing a [theoretically possible](#) legal off-ramp, although he questions whether the criteria in Article 16 have been met. More importantly, he points out that the Government have not formally invoked Article 16, nor followed the procedure set out in the Protocol for invoking it.

The absence of a formal legal justification means that we are somewhat in the dark in setting out a critique of that justification. Will the Article 16 off-ramp be used? Is this a breach in a ["very specific and limited way"](#) as per the [Internal Market Bill](#)? Rather than considering the entire field of justifications, I limit myself solely to the Vienna Convention, acknowledging that restricts the width of this blog post.

Does the Vienna Convention provide a legal off-ramp?

The Vienna Convention on the Law of Treaties 1969 sets out the international framework for the interpretation and

implementation of treaties. The UK is a [party](#) to it, and reaffirmed its commitment to it in Article 4 of the [Trade and Cooperation Agreement](#).

The nature of legal change to the Protocol

Liz Truss, on 17 May, spoke of "changing the Protocol" and "fixing those elements" of the Protocol which are not working. Conor Burns MP [spoke](#) of "recalibrating, not tearing up" the implementation of the Protocol.

Article 42 of the Vienna Convention states that the termination of a treaty, its denunciation, withdrawal of a party, or suspension ("termination" for short) of part of it is only possible in accordance with the provisions of the Convention.

Article 44 lays down a general principle against partial termination of a treaty, as opposed to termination of the entire treaty. But it then sets out exceptional circumstances allowing for termination of part of a treaty if this is provided for in the terms of the treaty, or if that part of the treaty can for some reason be separated from the rest of the treaty. Partial termination still requires one of the legal off-ramps discussed further below.

The first question is therefore, what is the nature of legal change being sought? It is clear that a treaty can be amended by agreement between the parties (Art 39) but nowhere in the Convention does it allow the unilateral rewriting or amendment of a treaty. The most that a party can do is state that the provisions of the treaty cease to have effect, in the sense that the state considers itself no longer bound by those provisions in international law. So, if a Vienna Convention off-ramp is available, the Government could state that the Protocol ceases to apply to the UK, and it could state the domestic law that applies in its place. But it could not amend the actual terms of the Protocol itself.

The second question is, can the Government do some salami-slicing, chopping of the bits of the Protocol that it does not like, but keeping the rest intact? In other words, is the Protocol, or portions of the Protocol, separable from the rest of the Withdrawal Agreement? The Withdrawal Agreement does not state that its terms are separable, and the EU has not agreed to separability. The test for separability is set out in Art 44(3):

- (a) the said clauses are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust

The Protocol is contained in a separate annex, so ground (a) is capable of being met in relation to the Protocol in its entirety, although not in relation to picking and choosing individual provisions within it. There does not seem to be any way that ground (b) is met, given that on 8 June, Micheál Martin, the Irish Taoiseach stated in a [speech](#) to the European Parliament that the Protocol is "an integral part of the Withdrawal Agreement". It is open to question whether ground (c) is met.

The answer to these two questions would appear to lead to the conclusion that it is not possible to pick and choose which bits of the Protocol are to be obeyed, and which bits can be ignored. Moreover, even if the Government is able to justify the separability of Protocol provisions, it would have to meet the Vienna Convention's conditions for termination, which I now go on to discuss.

Possible off-ramps in the Vienna Convention

The Vienna Convention contains multiple potential off-ramps, some more fanciful than others. Without knowing which one could

be used, I briefly survey the hypothetical possibilities under each of the Convention's grounds for termination.

Violation of internal law

Art 46 prevents a state from terminating a treaty for violation of an internal law, unless that violation of internal law was manifest and concerned a rule of internal law of fundamental importance. It would be difficult to sustain an argument that the Protocol manifestly violated the Northern Ireland Act 1998, based as it is upon the GFA. One of the recitals to the Protocol states:

"AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the '1998 Agreement'), which is annexed to the British-Irish Agreement of the same date (the 'British-Irish Agreement'), including its subsequent implementation agreements and arrangements, should be protected in all its parts"

Given that the UK Government cited the GFA and pointed out its importance at the time of making the Protocol, it would be difficult for it to argue that the Protocol which it agreed actually broke the Northern Ireland Act 1998. In any event, the Northern Ireland Court of Appeal have already ruled in *Allister* that the Protocol is not in breach of the Northern Ireland Act 1998 (grounds 2 and 3 of the appeal) nor in breach of the Act of Union (ground 1 of the appeal). For the sake of completeness, *Allister* also ruled that the Protocol did not breach Article 3 of Protocol 1 to the European Convention on Human Rights (ground 4) nor EU law (ground 5).

Error in making of treaty

Article 48 allows the state to claim that an error in a treaty invalidates its consent to that treaty "if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty". No error has been alleged by the Government.

Fraud or corruption

Article 49 gives fraud as a ground for invalidating a treaty and Article 50 gives corruption. Although there have been allegations that the EU has been guilty of what Brexit minister Lord Frost termed "[legal purism](#)", there have been no allegations that the EU committed fraud in the negotiations. In fact, as David Allen Green [points out](#), it is hard to see the distinction between legal purism and complying with your legal obligations. Nor have there been allegations that Lord Frost (or anyone else) has been corrupted.

Coercion

Articles 51 and 52 allow for invalidation if a treaty was obtained via coercion. Although there have been conflicting versions over who held the upper hand in the negotiations, no-one has suggested that the EU coerced the UK.

Conflict with a peremptory norm of international law ("jus cogens")

Under Art 53, a treaty can be invalid if it conflicts with a peremptory norm of general international law. There is no exhaustive list of what are peremptory norms of general international law, but they are generally considered to include such things as the use of force between nations, genocide, torture etc. Nothing of this nature has been alleged against the EU.

Furthermore, under Article 44(5), there can be no separability where termination is sought under Articles 51 to 53.

Termination by agreement

Art 54 allows termination by agreement between the parties, or if authorised by the terms of the treaty. Article 57 allows for

suspension on the same conditions. Neither of these conditions apply here, other than via the Article 16 of the Protocol route mentioned above.

Implied right of denunciation

Article 56 allows denunciation (i.e. termination) if it can be implied that the right of denunciation was intended. There has been no evidence that either party intended a right of denunciation. Denunciation by this method requires a 12 month period of notice.

Interestingly, when the Vienna Convention was being negotiated, there was a [suggestion](#) that there ought to be a unilateral right for a country to terminate a treaty. However, the UK delegation introduced an amendment (passed as [A/CONF.39/C.I./L.311](#)) that termination was impermissible "unless the character of the treaty is such that a right of denunciation or withdrawal may be implied" (now contained in Art 56(1)(b) of the Convention). The reason for this, as expressed ([in paragraph 3](#)) by the UK delegation was:

"The stability of treaties had to be ensured in the interests of international peace and security, but provision also had to be made for parties to withdraw from treaties which, although of indefinite duration, were intrinsically temporary in character."

No argument has yet been advanced by the UK Government that it was implied within the Protocol that either party had the right to unilaterally terminate it.

Termination by reference to a subsequent treaty

Article 59 allows for termination or suspension if a subsequent treaty supersedes the original treaty. Although the UK and EU have now signed a Trade and Cooperation Agreement, there was no intention that this would overwrite the Withdrawal Agreement. The Trade and Cooperation Agreement expressly refers to the Withdrawal Agreement, but does not state that it supersedes it.

Termination for breach

Article 60 allows for termination if a party to the treaty has committed a material breach of the treaty. At its height, the allegation is that the EU has been implementing the Protocol in a disproportionate way. This does not meet the test for material breach in Article 60.

Fundamental change of circumstances

Article 62 allows for termination: "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties". According to [Professor Yarik Kryvoj](#), the case law indicates a requirement for a "radical" change.

Given that the Protocol discussed the importance of the GFA, the avoidance of a hard border on the island of Ireland, the integral place of Northern Ireland within the UK's internal market (all expressed in the recitals to the Protocol), and the need for agreements on the future relationship between the parties (expressed in the recital to the Withdrawal Agreement), it is hard to see that there has been any fundamental change in circumstances. The circumstances before the Protocol are the same as those after it. Nothing has changed in the difficulty of having an agreement which both prevented a hard border on the island of Ireland, and at the same time allowing the UK to take control of its borders. The same problems that we see now were present (and loudly expressed) at the time when the Protocol was made. At best, the Government's argument on this point would be "we didn't realise how bad the consequences would be at the time we made the agreement" (which is a somewhat embarrassing argument to make).

Procedures to be followed in cases of termination etc

Articles 65 to 68 set out the procedure to be followed where a party seeks to terminate a treaty. None of these procedures have been followed.

A hierarchy of treaties?

Becoming even more speculative, the legal argument being put forward by the Government appears to be that because of the "primordial significance" of the GFA, it somehow trumps subsequent treaties. This concept does not appear in the Vienna Convention. But even if it did, it is difficult to see how this grants a unilateral right to the UK to change the Protocol.

The GFA was agreed by the Government of the UK and the Government of Ireland. It was also agreed by the participants in the multi-party talks (essentially the Northern Ireland political parties). The co-guarantors were the US and the EU. Two unionist parties in Northern Ireland have called for the Protocol to be unilaterally changed. The majority of politicians elected in the most recent Assembly elections in Northern Ireland do not want unilateral change ([53 versus 37](#)). Nor does the Government of Ireland, the US or the EU. It is odd for the UK Government to claim the mantle of acting to protect the GFA when many of the other parties / guarantors of the GFA are diametrically opposed to this.

Conclusion

Three years ago, Professor Yarik Kryvoi argued in [giving evidence](#) to Parliament that it would be "very difficult to find a good reason" for the UK to terminate the Protocol. Without ruling out the possibility of a good reason, I have been unable to find a one that is feasible within the terms of the Vienna Convention.

Micheál Martin [said](#) that "Unilateral action to set aside a solemn agreement would be deeply damaging. It would mark a historic low-point signalling a disregard for essential principles of laws which are the foundation of international relations." Similar sentiments came from Simon Hoare MP, chair of the House of Commons Select Committee on Northern Ireland, when he [said](#) "Respect for the rule of law runs deep in our Tory veins, and I find it extraordinary that a Tory Government need to be reminded of that."

Applying the criteria of Jonathan Jones, there does not appear to be any "tolerably plausible" argument, or "respectable legal argument" contained within the Vienna Convention to justify the Government's approach. Without a legal off-ramp, it appears that the Government is well on its way to breaching the Rule of Law.

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