

Northern Ireland Protocol Bill: A Rule of Law Analysis of its Compliance with International Law

Dr Ronan Cormacain, 17 June 2022



Executive Summary

This Report analyses the justification for the Government's legal position that the Northern Ireland Protocol Bill is lawful under international law.

It has been prepared in order to assist parliamentarians in their preparation for the Bill's Second Reading in the House of Commons.

The Government, in their statement summarising the Government's legal position, accept that the Bill involves the non-performance of international legal obligations, but claim that this is justified in international law under the doctrine of "necessity", which is recognised in Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001).

For the Government to be able to rely on the international law doctrine of necessity in Article 25 would require that:

- the Bill is "the only way" to proceed,
- implementation of the Protocol constitutes a "grave and imminent peril" to an essential interest of the UK,
- the Bill does not "seriously impair" the essential interests of the EU,
- the Protocol does not "exclude the possibility" of advancing necessity, and
- the UK has not "contributed to the situation of necessity".

It is impossible to see this Bill as being the only way to proceed when the Government has already reserved the right to proceed under Article 16 of the Protocol. Furthermore, even though negotiation with the EU is clearly difficult, it still represents another way to resolve these issues.

It is difficult to see antipathy by some in Northern Ireland to the Protocol and a refusal by a minority of elected politicians to form an Executive or Assembly reaching the very high bar of constituting a grave and imminent peril.

The Bill removes a great many protections from the Protocol, and it is difficult to see how these do anything other than seriously impair the essential interests of the EU.

The existence of a formal and bespoke mechanism within the Protocol for dealing with these kinds of emergencies implicitly precludes the possibility of also advancing necessity outside the terms of the Protocol.

It is for Parliamentarians themselves to judge whether the Government has contributed to this situation, but previous attempts (in the UK Internal Market Bill) to break the Protocol do not set a good precedent.

In short, the Government's legal position, that the Bill is lawful under international law because its breaches of the UK's international obligations is justified by the international law doctrine of necessity, does not bear close scrutiny.

Under Article 27 of the Articles on State Responsibility, even if this Bill is passed, and even if "necessity" was recognised by an international court, the EU would still be entitled to seek damages from the UK for this breach of an international obligation.

In the absence of justification, the Bill, as the Government accepts, breaches the UK's international obligations under the Northern Ireland Protocol. Parliament ought not to be complicit in such direct breaches of international law and should refuse the Bill a Second Reading.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. The project is being led by Dr Ronan Cormacain.

This Report has been written by Dr Ronan Cormacain, with assistance from Dr Oliver Garner, Dr Julinda Beqiraj, Murray Hunt and Kristin Hausler.

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Introduction

The Northern Ireland Protocol Bill would, if enacted, unilaterally change the Northern Ireland Protocol, and give powers to Ministers to further unilaterally change the Protocol.

There are many points of Rule of Law concern in the content of the Bill, in particular around the extensive use of Henry VIII clauses, the lack of legal certainty, restriction of access to justice and others.

However, this Report deals only with the single preliminary point – the Government’s legal justification for acting in a way which it accepts would be in breach of its international legal obligations in the Northern Ireland Protocol. In addition, it only deals with the argument on the Government’s own terms, by reference to the doctrine of necessity. A previous analysis argues that a failure to comply with the UK’s obligations under the Northern Ireland Protocol would in addition not be consistent with the Vienna Convention on the Law of Treaties.¹

What does the Northern Ireland Protocol Bill do?

The Ireland / Northern Ireland Protocol (“the Protocol”) is part of the Withdrawal Agreement (“the WA”) between the UK and the EU. The Protocol details the special provisions which are to apply in relation to Northern Ireland in consequence of the UK’s withdrawal from the EU.

Clause 1 of the Bill is admirably clear about what the Bill does:

- specified parts of the Northern Ireland Protocol do not have effect in the UK and
- Ministers have powers to provide that other parts of the Protocol do not have effect in the UK²

These parts of the Protocol which the Bill disapplies are collectively referred to as “excluded provision” in the Bill.

Clause 2 states that an excluded provision has no effect in UK domestic law, and clause 3 gives interpretative teeth to this.

The basic model of the Bill is to disapply, or “turn off”, provisions of the Protocol. The Bill sets out something in the Protocol which is now excluded provision, and then grants Ministers the power to make regulations setting out the new law covering that thing.

Clauses 4 to 6 provide that the movement of goods is excluded provision, with Ministerial power to make regulations on this point. Clauses 7 to 11 make similar provision in relation to regulation of goods, and choosing between dual routes for goods. Clause 12 does the same for provisions of the Protocol dealing with state aid.

Clause 13 states that anything to do with the jurisdiction of the European Court of Justice is an excluded provision, and that rights of the EU to be present during implementation are also excluded provision. Clause 15 grants Ministers the power to add to the list of excluded provisions by way of regulations, with power to make additional laws (also by regulations) in connection with this. Clause 17 grants powers to make regulations dealing with VAT and other taxes.

Clause 20 states that proceedings must not be referred by a domestic court to the European Court of Justice, and that domestic courts are not bound by any ruling of that Court.

Under clause 22 the regulation making powers of a Minister under this Bill are the same as the powers of Parliament to make an Act of Parliament. That is to say, that Ministers can do anything by way of regulations that Parliament can do by way of an Act, including amending any Act of Parliament. This is generally referred to as a Henry VIII clause.

Conor Burns MP, on behalf of the Government said that the Bill is merely “tidying up” the Protocol.³ Former Head of the Government Legal Department Jonathan Jones QC disagrees:

¹ R. Cormacain, ‘Does the Vienna Convention provide a legal off-ramp for unilaterally changing the Northern Ireland Protocol?’, U.K. Const. L. Blog (13th June 2022) available at <https://ukconstitutionallaw.org>

² Full text of the Bill available at <https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf>

It is one of the most extraordinary pieces of legislation I have ever seen. It overrides (or empowers ministers to override) almost every aspect of the Protocol. “Limited and specific” it certainly isn’t.⁴

The Hansard Society have described the scope of delegated powers in the Bill as “breathtaking”.⁵

The Government’s legal justification – “necessity”

The Government accepts that, on its face, this Bill directly breaches the WA, an international treaty made between the UK and the EU. The Government’s justification is the international law doctrine of necessity, within the meaning of Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001. This justification is set out in the Government’s summary statement of its legal position published on 13 June 2022.⁶

The Articles on State Responsibility were adopted by the International Law Commission in 2001 and were submitted to the UN General Assembly. They are accepted by the Government and the international community as being an authoritative statement of customary international law. The International Court of Justice has specifically determined that Article 25 represents customary international law.⁷ The International Law Commission has also produced official Commentaries on the Articles on State Responsibility, which set out more detail on the Articles.⁸ Article 25 states

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity

The doctrine of necessity starts on the basis that there has been action not in conformity with an international obligation (in this case, breaching the Protocol), but then states that there is a defence to this. The way the Articles describe defences is to say that they “preclude wrongfulness”. As set out in the Commentaries, and accepted by the Government in its opinion, this doctrine only arises in “exceptional” cases. According to those Commentaries “stringent conditions are imposed before any such plea is allowed”,⁹ and those conditions must be cumulatively satisfied.¹⁰

³ “NI Minister: New Bill is a tidying up exercise of the Protocol” Mail Online, available at

<https://www.dailymail.co.uk/news/article-10911841/Bill-scrap-Northern-Ireland-Brexit-rules-published.html>

⁴ Jonathan Jones “The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen” The House (15 June 2022) available at <https://www.politicshome.com/thehouse/article/northern-ireland-protocol-bill-one-of-the-most-extraordinary-i-have-ever-seen>

⁵ Hansard Society Tweet, 13 June 2022.

⁶ Northern Ireland Protocol Bill: UK Government legal position (13 June 2022) available at <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position>

⁷ Gabčíkovo-Nagymaros Project (Hungary/Slovakia) ICJ Rep 1997, 7, International Court of Justice

⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) Adopted by International Law Commission at 53rd Session, available at https://legal.un.org/ilc/texts/instruments/commentaries/9_6_2001.pdf

⁹ Art 25, paragraph (14) of the Commentaries.

¹⁰ Article 25, paragraph (11) of the Commentaries.

Condition 1 – the “only way”

Article 25 is only available if it is “the only way” for the UK to protect its interests. Or in the words of the International Court of Justice “the act being challenged must have been the ‘only means’ of safeguarding that interest”.¹¹

The Commentaries of the ILC expand upon this point, stating:

The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabcikovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.¹²

Article 16 of the Protocol sets out a power for the UK or the EU to unilaterally take measures to safeguard itself if the Protocol leads to serious economic, societal or environmental difficulties. Annex 7 to the Protocol sets out the procedure to be followed if Article 16 is invoked. Professor David Collins has argued that Article 16 is an available remedy for the UK Government.¹³ Dr Oliver Garner of the Bingham Centre argues that a claim by the UK Government that the Article 16 NIP conditions have been fulfilled may be plausible, although notes that the Government has not yet followed the procedures for formally invoking Article 16.¹⁴

The Government’s legal position refers to Article 16 of the Protocol as setting out an additional way in which the Government could act to safeguard its interests. The opinion concludes by stating this Bill is “without prejudice to the UK’s right to take measures under Article 16 of the Protocol”.

It is impossible to state that this Bill is the “only way” to resolve the problem at the same time as stating that the Government reserves the right to use the Article 16 procedure to resolve the problem. These two positions are incompatible. Article 16 of the Protocol clearly envisages the possibility of serious problems arising with the implementation of the Protocol and was sensibly inserted into the Protocol by both the EU and the UK. The existence of this procedure means that this Bill cannot be the “only way” to act. By the Government’s own admission, this Bill is expressly not the only way to act, and therefore this first condition of Article 25 is not met.

In addition, the Government says that it continues to seek a resolution via negotiation with the EU. That is clearly proving to be difficult and carries with it the risk of unpalatable political consequences. But the legal test for Article 25 is “the only way”, not “the only way, apart from other ways that are quite difficult”. If a negotiated resolution remains possible, breaching the obligations in the Protocol cannot be the “only way” for the UK to protect its essential interests.

The test of necessity is not met because this Bill is not “the only way” for the UK to resolve problems with the Protocol. As well as the challenging negotiation route, the Government’s own legal position clearly envisages invoking Article 16 as an additional way of resolving its problems with the Protocol. If the Government accepts there are “other ways”, this Bill cannot be the “only way”.

¹¹ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) ICJ Rep 1997, 7, International Court of Justice

¹² Art 25, paragraph (15) of the Commentaries.

¹³ Professor David Collins, “No, Britain is not breaking international law on the NI Protocol” (The Telegraph, 19 May 2022).

¹⁴ Dr Oliver Garner, “British Cavalier Attitude: Why the EU Should Push the UK to Trigger Article 16 of the Northern Ireland Protocol” (29 May 2022) *Verfassungsblog*, available at <https://verfassungsblog.de/british-cavalier-attitude/>

Condition 2 – “grave and imminent peril”

Although condition 2 of Article 25 is that there is a “grave and imminent peril” to an essential interest, this full phrase does not appear in the Government’s legal position. In fact, the only word of this test which appears in that opinion is the word “peril” which appears once.

The word “grave” suggests that the threat is very serious. “Imminent” suggests that it is about to happen, or in the words of the Commentaries is “proximate”.¹⁵ “Peril” suggests not merely inconvenience or annoyance, but real danger or threat, the risk of something very bad happening. The language used in the Commentaries is “a grave danger either to the essential interests of the State or of the international community as a whole.”¹⁶

Applying condition 2 to the facts in Northern Ireland requires a certain amount of judgement that parliamentarians are well-placed to exercise. This Report does not seek to make a definitive judgement on this point.

However, it would not appear that the situation in Northern Ireland is one of grave and imminent peril. There is clearly antipathy towards the Protocol by some members of the community in Northern Ireland. The Democratic Unionist Party are refusing to accept the appointment of a Speaker to the Northern Ireland Assembly, (and presumably to accept the position of deputy First Minister). There have been protests and a bomb threat. But on the other hand, there have been multiple stalemates in the past in Northern Ireland, multiple occasions when the Executive has collapsed or the Assembly has not been able to sit. We are now thankfully a long way from the times of sustained bombing and shooting campaigns, widespread intercommunal violence and soldiers on the streets. Whilst not discounting the justified disquiet at how the Protocol is working on the ground, it is hard to see this as reaching the level of a “grave and imminent peril”. As Jonathan Jones put it

How can an agreement willingly entered into only in 2020, at what the Prime Minister described as a “fantastic moment”, be already proving so disastrous as to represent “grave peril” to the country?¹⁷

Furthermore, the case law makes it clear that it is not enough for a party to simply invoke necessity, it must be objectively true. In the *Gabčíkovo-Nagymaros* case, the court said that “the State concerned is not the sole judge of whether those conditions have been met”.¹⁸ In the Commentaries, the International Law Commission stated that “The peril has to be objectively established and not merely apprehended as possible”.¹⁹ Of the 90 members elected to the Northern Ireland Assembly this year, 52 have signed a letter stating that they do not agree with this Bill. If the majority of people who are ostensibly being protected from this peril do not think that they are in peril, it makes the existence of the peril hard to believe.

It is difficult to see the facts on the ground in Northern Ireland reaching the very high bar of a “grave and imminent peril”. Although there is clearly disagreement about the practical implementation of the Protocol, the majority of members recently elected to the Northern Ireland Assembly do not agree with this Bill.

Condition 3 – does not “seriously impair an essential interest” of the other states

Necessity cannot be invoked as a defence if it would seriously impair an essential interest of the other party to the international obligation.

The Bill makes serious inroads into the provisions set out in the Protocol. The Bill seeks to unilaterally change the following subject areas in the Protocol:

¹⁵ Article 25, paragraph (15) of the Commentaries.

¹⁶ Article 25, paragraph (2) of the Commentaries.

¹⁷ Jonathan Jones “The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen” The House (15 June 2022) available at <https://www.politicshome.com/thehouse/article/northern-ireland-protocol-bill-one-of-the-most-extraordinary-i-have-ever-seen>

¹⁸ Paragraph 51 of the judgement.

¹⁹ Article 25, paragraph (15) of the Commentaries.

- Movement of goods (clauses 4 to 6)
- Dual routes for goods (clauses 7 to 11)
- Subsidy control (clause 12)
- Implementation procedures (clause 13)
- Power by regulations to add other excluded provisions (clauses 15 and 16)
- VAT laws (clause 17)
- Exclusion of the jurisdiction of the European Court of Justice (clause 20)

The EU sought these provisions in the Protocol because they wanted to protect their interests, so it is difficult for the UK to argue that removing these things would not seriously impair their essential interests.

Exclusion 1 – obligation excludes the possibility of invoking necessity

Article 25(2)(a) contains the first exclusion – a provision stating when the defence of necessity is not available. Necessity is not available if the international obligation (i.e. the Protocol) “excludes the possibility of invoking necessity”. The International Law Commission Commentaries flesh this out. Some international obligations will expressly exclude the defence of necessity. But even if not expressly excluded, this may be implicit:

Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.²⁰

Article 16 of the Protocol is clearly designed to be used in an emergency situation. Given that a bespoke mechanism exists to deal with urgent problems arising under the Protocol, it is reasonable to infer that its presence is designed to exclude the possibility of an additional defence of necessity as a mechanism to deal with urgent problems. In other words, the presence of Article 16 implicitly excludes the defence of necessity.

The existence of a procedure in the Protocol for taking emergency action to safeguard essential interests implies there is no intention to have an additional power to take emergency action based outside the provisions of the Protocol.

Exclusion 2 – state has contributed towards the situation of necessity

The second exclusion is that the defence of necessity is not available if the state has contributed towards the situation of necessity. In other words, if the UK is partly at fault for the situation we are in, then the UK cannot claim necessity as a defence. The Commentaries flesh this out as follows

Thus, in the *Gabcikovo-Nagymaros Project* case, ICJ considered that because Hungary had “helped, by act or omission to bring about” the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.²¹

It is noteworthy that this contribution can include both acts and omissions. So, both the UK actively doing something, and also failing to do something.

It is not possible in this Report to make a definitive factual assessment of the acts and omissions of the UK to determine whether or not this test has been met. However, one telling point is that the UK Government has previously and openly attempted to breach the Northern Ireland Protocol. In debating the United Kingdom Internal Market Bill, Brandon Lewis MP, Secretary of State for Northern Ireland stated

²⁰ Article 25, paragraph (19) of the Commentaries.

²¹ Article 25, paragraph (20) of the Commentaries.

“I would say to my hon. Friend that yes, this does break international law in a very specific and limited way.”²²

If the Government has contributed towards the situation, it cannot claim the necessity defence. Parliamentarians will need to exercise their own judgement as to whether this condition has been met.

Consequences of invoking necessity – payment of damages?

Article 27 of the Articles on State Responsibility goes on to make further provision about what happens if the Article 25 defence is relied upon. It states

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) the question of compensation for any material loss caused by the act in question.

Art 27(a) means that if the circumstances giving rise to necessity no longer arise, the measures taken must cease.

Article 27(b) means that even if necessity is proven, it does not have any effect upon the right for the wronged party to claim damages for breach of the treaty. In this case, even if the UK is justified in breaching the Protocol, the EU can still lawfully claim compensation for any damage it suffers as a result of the breach.

Even if this Bill is passed, and even if “necessity” was recognised by an international court, the EU would still be entitled to seek damages from the UK for this breach of an international obligation if it suffered a loss arising out of the breach.

Necessity and additional excluded provision

The Bill includes an additional power, in clause 15, for Ministers to add to “excluded provision”, so long as this is done for a “permitted purpose”. This is troublesome from a Rule of Law perspective because it is also connected to an extremely wide Henry VIII power in clause 16. It gives Ministers the power to unilaterally change other provisions in the Protocol, but with even less Parliamentary scrutiny.

However, it is also problematic for the purposes of the legal justification of necessity. It makes the invocation of necessity indeterminate – the Government cannot say what is necessary, save that some unspecified measures may also be necessary in future. The Commentaries state

State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25.²³

For the Government to grant itself a power to make secondary legislation to change other unspecified provisions in the Protocol is the opposite of “under certain very limited conditions”. Parliament is being asked to authorise future breaches, but without knowing what those future breaches are.

Whose job is it to protect the Good Friday Agreement?

Much has been made of the importance of protecting the Belfast / Good Friday Agreement in the Government’s legal opinion. It is correct to say that the Government does have a duty to protect it.

²² Hansard, House of Commons (8 September 2020) Vol 679 Col 509.

²³ Article 25, paragraph (14) of the Commentaries

But as a co-signatory to it, so too does the Irish Government, and they are adamant that this Bill is not the way to do it. The EU and the USA are co-guarantors of the Good Friday Agreement, and like the Irish Government, they do not see this Bill as a way to protect it. The other signatories to the Agreement are the political parties of Northern Ireland. And as has been pointed out above, the majority of them are opposed to this Bill.

This makes it all the more difficult to argue that this Bill satisfies the legal test of necessity. When the majority of the people the Bill ostensibly protects clearly state they do not want its protection, how is it possible to argue that the Bill is necessary?

The importance of complying with international treaty obligations

The importance of complying with an international obligation was clear in the many debates on this point on the United Kingdom Internal Market Act. This Bill goes against this well-established principle as enunciated by Parliament in that debate. Professor Mark Elliot, along with Lords Anderson and Pannick, in a letter to The Times stated

The Bill shows a lack of commitment to the rule of law and to a rules-based international order that damages the reputation of the UK.²⁴

Evidence for this comes from Irish Taoiseach Micheál Martin, who 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.”²⁵ 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.”²⁶

²⁴ The Times, 15 June 2022.

²⁵ Speech by the Taoiseach Micheál Martin at Plenary of the European Parliament (8 June 2022), available at <https://www.gov.ie/en/speech/b2559-speech-by-the-taoiseach-micheal-martin-at-plenary-of-the-european-parliament/#peace-in-ireland>

²⁶ Hansard, House of Commons, 17 May 2022, Vol 714, Col 550.

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