

Northern Ireland Protocol Bill – Committee Stage: A Rule of Law Analysis

Dr Ronan Cormacain Dr Oliver Garner, 12 July 2022



Executive Summary

This Report is intended to inform and assist parliamentarians in their deliberations on the Northern Ireland Protocol Bill, due for Committee Stage on 13, 18 and 19 July in the House of Commons.

There are two serious Rule of Law concerns with the Bill.

The first is that it seeks to depart unilaterally from the terms of an international agreement with the EU. Such a move is not in compliance with international law and thus undermines the Rule of Law and the international rules-based order.

One solution to this Rule of Law problem would be to introduce a prior condition before these changes take effect – that prior condition is either that these changes have been agreed with the EU, or else that these changes have followed the procedure set out in Article 16 of the Northern Ireland Protocol.

We recommend that MPs vote in favour of the amendment tabled as amendment NC10 which would implement this solution. This amendment does not rule out the UK taking unilateral action in the future, so long as it follows the procedure set out in the Protocol.

There are other amendments tabled which would partially address this Rule of Law concern by introducing a parliamentary trigger which must be pulled before these changes take effect. These amendments would not necessarily prevent a breach of the Rule of Law, merely delay the possibility and introduce an additional hurdle to be cleared. They are therefore additional to the recommended amendment but are not a substitute for it.

The second Rule of Law concern is that the Bill contains excessively wide ministerial powers, including powers for ministers to amend or repeal Acts of Parliament (Henry VIII powers), with insufficient safeguards for the exercise of these powers.

One solution to this Rule of Law concern would be to change the threshold before these powers can be exercised, from “the Minister considers appropriate” to “is necessary”. We recommend that MPs vote in favour of amendments which would make this change.

There is no amendment currently tabled which directly addresses the existence of the Henry VIII powers.



About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

www.binghamcentre.biicl.org

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 and Dr Oliver Garner.

Table of Contents

Executive Summary.....	2
Introduction.....	5
What does the Northern Ireland Protocol Bill do?.....	5
Problem 1 – Breaching international law	6
A possible solution – introducing a condition of compliance with international law	6
Amendment which gives effect to this solution	7
A partial solution – introducing parliamentary triggers before these provisions come into force	7
Amendments which would give effect to the partial solution.....	8
Problem 2 – Excessively wide ministerial powers.....	8
Rule of Law requirements on supremacy of the legislature	8
Nature of ministerial powers in this Bill	9
Amendments which would address these Rule of Law concerns.....	10
Appendix - The Government’s legal justification – “necessity”	10
Condition 1 – the “only way”	11
Condition 2 – “grave and imminent peril”	12
Condition 3 – does not “seriously impair an essential interest” of the other states	13
Exclusion 1 – obligation excludes the possibility of invoking necessity	13
Exclusion 2 – state has contributed towards the situation of necessity	14
Consequences of invoking necessity – payment of damages?	14
Necessity and additional excluded provision	15
Whose job is it to protect the Good Friday Agreement?.....	15

Introduction

The Northern Ireland Protocol Bill would, if enacted, unilaterally change the effect of the Northern Ireland Protocol within the United Kingdom, and give powers to Ministers to make further such changes unilaterally. This Report builds upon our previous Report, before the Bill's Second Reading, which examined, and found wanting, the government's legal justification for the Bill's departure from the terms of the Northern Ireland Protocol (the international law doctrine of necessity).

There are two main Rule of Law concerns over the Bill – its flagrant breach of international law, and its unwarranted bestowal of ministerial power to make regulations which can overturn Acts of Parliament (Henry VIII clauses).

The importance of complying with an international obligation was referenced on a cross party basis in the many debates on this point on the United Kingdom Internal Market Act 2020, as well as at this Bill's Second Reading in the Commons.

The Irish Taoiseach 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.”¹ 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.”²

This Report considers whether and how the Bill could be amended to remove these Rule of Law concerns.

What does the Northern Ireland Protocol Bill do?

The Protocol on Ireland/Northern Ireland (“the Protocol”) is part of the Withdrawal Agreement between the UK and the EU. The Protocol details the special status regarding the application of certain provisions of EU law³ within Northern Ireland following the UK's withdrawal from the EU. It also establishes the rules governing movement of goods and related regulatory standards between Great Britain and Northern Ireland in light of the objective to prevent a goods and regulatory border on the island of Ireland.

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 will not have effect in the UK⁴

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 which parts of the Protocol are to be regarded as excluded provision as a matter of domestic law, and then grants Ministers the power to make regulations setting out the new law covering that subject-matter.

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

¹ 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>

² Hansard, House of Commons, 17 May 2022, Vol 714, Col 550.

³ See Annex 2 of the Protocol for full list.

⁴ Full text of the Bill available at <https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf>

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 the rights of the EU institutions to be present during implementation of the Protocol 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, 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.

Problem 1 – Breaching international law

The Bill is in clear breach of international law as it seeks to change unilaterally the domestic effect of an international agreement that the UK has signed up to, without legal justification. In our previous Report, we analysed in detail the Government's defence of necessity and concluded that it was not credible. That legal analysis is appended to this Report for reference and is summarised below.

The doctrine of necessity, under the international law relied on by the Government, requires that:

- the Bill is the only way for the UK to safeguard an essential interest against a grave and imminent threat,
- the Bill does not impair the essential interests of other states,
- the Protocol does not exclude the possibility of claiming necessity, and
- the UK has not contributed to the situation of necessity

In our view, although the test is failed on all these grounds, it most clearly fails on the ground that this Bill is the "only way" to resolve the situation.

Firstly, the Government has expressly stated that it reserves the right to invoke Article 16 of the Protocol, to take unilateral safeguarding measures. The existence of a procedure, within the Protocol, for resolving disputes, means that passing this Bill cannot be the only way to resolve disputes. Secondly, 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 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.

A possible solution – introducing a condition of compliance with international law

One way of ensuring that the Bill fully complies with the legal framework of the Northern Ireland Protocol and the Withdrawal Agreement would be to introduce a substantive condition before provisions relating to the Protocol can take effect or powers they give can be exercised.

This condition would be an international treaty compliance trigger – the domestic implementation of the Protocol could only be modified if this modification occurs in a way which complies with international law. This can be broken down into two alternate sub-conditions:

- the EU and the UK have agreed that the Protocol can be changed, or
- the UK invokes the Article 16 procedure for taking appropriate safeguard measures in response to diversions of trade and/or serious economic, societal or environmental difficulties.

This first route is the bread and butter of international relations – countries make a deal, it isn't working, so they negotiate some changes to that deal. If the two parties to an international treaty agree to vary that treaty, this is entirely in conformity with international law. Indeed, this possibility is provided for explicitly in the text of the Protocol. Article 13(8) states that the UK and the EU can supersede the Protocol, so long as any subsequent agreement indicates the parts that will be altered. This operates as a means to enable the subsequent alteration of international legal agreements on the basis of bilateral consent between the two parties.

The second route relies upon the procedure already negotiated and included within the Protocol for addressing emergency situations. Article 16 of the Protocol sets out what is to happen in difficult circumstances where one party to the Protocol feels they need to take unilateral measures to prevent serious economic, societal or environmental difficulties, or diversions of trade, that are likely to persist. Annex 7 to the Protocol outlines the various procedural steps that must be carried out, in order to adopt measures under Article 16.

Article 16 was not imposed upon the UK, but agreed between the EU and the UK as the best way of safeguarding essential interests. Professor David Collins has argued that Article 16 is an available remedy for the UK Government.⁵ Dr Oliver Garner of the Bingham Centre argues that a claim by the UK Government that the Article 16 conditions have been fulfilled may be plausible, although notes that the Government has not yet followed the procedures for formally invoking Article 16.⁶

Introducing these alternate conditions into the Bill as a pre-requisite for changing the Protocol would ensure that the Bill is compliant with international treaty obligations of the UK under the Withdrawal Agreement, the Protocol, and more generally with international law and the Vienna Convention on the Law of Treaties.

Crucially, a condition being established by Parliament that the provisions in the Bill regarding excluded provision can have effect if agreed by the EU or in compliance with Article 16 and the Annex 7 requirements would not prevent the *creation* of the powers as an insurance policy in preparation for such a situation. In other words, this solution would facilitate the invocation of Article 16, not prohibit it. The key difference is that this would be a measure in compliance with international law, not a measure in defiance of it.

Amendment which gives effect to this solution

Lammy amendment

The amendment tabled by David Lammy MP, Peter Kyle MP and Stephen Doughty MP (NC10) would give effect to this solution. It sets out an agreement condition and an Article 16 condition. If either of these are satisfied, then the provisions on excluded provision have effect and the powers set out in the Bill to change domestic law may be exercised. The agreement condition is that the parties agree to the changes. The Article 16 condition is that the UK fully invokes and follows the Article 16 procedure for making changes to the Protocol.

This amendment would ensure that the powers in this Bill which would otherwise breach the terms of the Protocol are only exercised in accordance with the UK's international obligations. We recommend members vote in favour of this amendment as the best way of protecting the Rule of Law.

A partial solution – introducing parliamentary triggers before these provisions come into force

As soon as this Bill comes into force, the UK will be in breach of its international obligations under the Protocol. Under clause 26, the Bill comes into force on the day or days that a Minister appoints by

⁵ Professor David Collins, "No, Britain is not breaking international law on the NI Protocol" (The Telegraph, 19 May 2022).

⁶ 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/>

way of regulations. The two most common ways for legislation to be brought into force is either by stating the date on the face of the Bill, or allowing ministers to specify a date by way of regulations.

One partial solution to the breach of international law would be to introduce an additional parliamentary hurdle before these provisions come into force. Rather than this Bill coming into force automatically upon ministerial say-so, it would require some further parliamentary check before it comes into force. This would enable Parliament to scrutinise whether there is a legal justification for not performing the UK's obligations under the Protocol at the time the Government proposes to do so. However, it is only a partial solution as it does not guarantee that there will not be a breach of international law, but instead delays that possibility, and makes it subject to further parliamentary approval.

Amendments which would give effect to the partial solution

Neill amendments

The amendment tabled by Sir Bob Neill MP would give effect to this partial solution. This amendment would change clause 26 so that provisions of the Bill only come into force after the House of Commons has passed a resolution approving them coming into force (and this motion has also been tabled in the House of Lords). There is a linked amendment to clause 1, which essentially signposts the substantive change. The substantive amendment does not necessarily prevent a breach of international law, but it both delays that breach, and provides a further opportunity to prevent it.

Stella Creasy MP has tabled amendment NC9 which has an effect which is similar to the Neill amendment.

The Neill amendments would give effect to this partial solution. Although not a full solution to the Rule of Law problem, if NC10 is not inserted into the Bill we recommend members vote in favour of this amendment as providing the next best way of introducing a degree of protection for the Rule of Law.

Farry amendment

Two linked amendments have been tabled by Stephen Farry MP, Claire Hanna MP, Colum Eastwood MP, Layla Moran MP and Alistair Carmichael MP, numbered as amendments 3 and 4. These amendments are similar to the Neill amendments, but instead of requiring the prior consent of Westminster before this Bill becomes effective, they require the prior consent of the Northern Ireland Assembly. Putting to one side the fact that the Assembly is not currently sitting, these amendments do not necessarily prevent a breach of international law, but do delay the possibility it and provide for democratic input from Northern Ireland before the breach comes into force.

These amendments would give effect to this partial solution. Although not a full solution, we recommend members vote in favour of this amendment as providing an additional protection for the Rule of Law.

Problem 2 – Excessively wide ministerial powers

The Northern Ireland Protocol Bill continues the trend in Brexit-related legislation of creating wide powers for Ministers, including “Henry VIII” clauses that allow primary legislation to be modified through delegated legislation.⁷

Rule of Law requirements on supremacy of the legislature

Benchmark B4 of the Venice Commission Checklist requires that the supremacy of the legislature over the executive is ensured. One of the central arguments made in favour of Brexit was that Parliament take back control of its laws. But this Bill hands extremely wide powers to Ministers to rewrite Acts of Parliament.

⁷ See our Reports on this subject area, United Kingdom Internal Market Bill: A Rule of Law Analysis of Clauses 42 to 45 (21 September 2020), Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny (20 April 2020),

A Report on the constitutional standards laid down by the House of Lords Select Committee on the Constitution⁸ states that:

- Delegations of legislative power should be framed as narrowly as possible
- The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure
- Delegated powers should not be framed in such a way that gives little indication of how they should be used.

A previous Report⁹ by the Bingham Centre set out standards to ensure effective Parliamentary scrutiny of delegated powers in the context of Brexit. It argued that:

- Politically sensitive matters should in principle be dealt with through primary rather than secondary legislation.
- Delegated powers should be sought only when their use can be clearly anticipated and defined.

Nature of ministerial powers in this Bill

Ministerial powers in this Bill to make regulations are numerous, extensive and subject to very low hurdles before those powers may be exercised. The delegated powers memorandum describes these powers as “necessarily broad”. The memorandum cites the “grave and imminent situation in Northern Ireland” as justification for these powers.

The memorandum lists 19 powers to make delegated legislation, in a 26 clause Bill.

These include powers to amend primary legislation via a Henry VIII clause, as well as powers to make regulations which have retrospective effect, that is the regulations will go back in time and have effect at a time before they were made.

The criteria for making these powers are either non-existent (for example in clause 4(3) a Minister of the Crown may make regulations), or set with an extremely low hurdle (for example in clause 9(1) a Minister may make regulations which the Minister considers appropriate). This criteria of “considers appropriate” does not act as an effective constraint on ministerial discretion for two reasons. Firstly, it is a purely subjective criteria, i.e. not that something is appropriate, but that the minister considers it appropriate. Secondly, the bar of “appropriate” is extremely low. A better bar would be the inclusion of some objective standard, such as “is reasonable” or “is necessary”, or “may in exceptional circumstances”.

The extent of these powers is breath-taking. Every single regulation making power is a Henry VIII power. Clause 22(1) makes the scope of these powers clear.

“Regulations under this Act may make any provision that could be made by an Act of Parliament (including provision modifying this Act).”

This provision grants to the minister the full power of Parliament to legislate. Although Henry VIII powers are becoming ubiquitous, it still ought to be the case that only Parliament should be able to make Acts of Parliament, not ministers.

The Hansard Society has issued a briefing focused only on the nature of delegated powers.¹⁰ They comment that

the real operation of the Bill and the implementation of its policy objectives will be entirely at the discretion of Ministers once the Bill receives Royal Assent.

⁸ J Simson Caird, R Hazell, D Oliver “The Constitutional Standards of the House of Lords Select Committee on the Constitution” (UCL, 2017)

⁹ J Simson Caird and Ellis Patterson “Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny” (Bingham Centre, 2020)

¹⁰ Hansard Society “The Northern Ireland Protocol Bill: Delegated Powers” (24 June 2022) available at https://assets.ctfassets.net/n4ncz0i02v4l/1CsSPKO7FU7cSlQoaZGsuc/29e3be7273456aa79c41f602a25c744e/Hansard_Society_Northern_Ireland_Protocol_Bill_Briefing_June_2022.pdf

They also make a number of specific recommendations, including removing certain clauses, or changing the nature of the tests within them. The Hansard Society have described the scope of delegated powers in the Bill as “breath-taking”.¹¹

Conor Burns MP, on behalf of the Government said that the Bill is merely “tidying up” the Protocol.¹² Former Head of the Government Legal Department Jonathan Jones QC disagrees:

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.¹³

The regulation making powers in this Bill undermine the Rule of Law. They undermine the law-making power of the legislature, and grant far too wide a discretion to ministers to take whatever action they wish.

Amendments which would address these Rule of Law concerns

A number of amendments have been tabled by David Lammy MP, Peter Kyle MP and Stephen Doughty MP which would address some of these Rule of Law concerns. These amendments would all essentially make the same change to the regulation making powers set out in the Bill. They would all replace the criteria that “the Minister considers appropriate” with the new criteria that “it is necessary”. This amendment would do two things. Firstly, it would turn the decision from a subjective decision of the minister, to an objective one. That is, rather than “the minister considers”, it is the objective “is”. Secondly, it would raise the threshold before this power can be exercised from “appropriate” to “necessary”. This is a far more suitable threshold for the extensive ministerial powers set out in this Bill.

Hilary Benn MP has tabled a specific amendment which would remove one particular ministerial power in clause 18(1). That power authorises a minister to “engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol ... if the Minister of the Crown considers it appropriate to do so”. The Hansard Society specifically criticised this power as not being subject to any parliamentary scrutiny whatsoever. The Hilary Benn amendment is currently numbered amendment 12.

These amendments would go some way to ensuring the supremacy of Parliament over the executive and adding proper checks on the exercise of ministerial power. We recommend members vote in favour of them.

There is currently no amendment to clause 22(1) which would remove or ameliorate the extensive Henry VIII power it contains.

Appendix - 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 2022.¹⁴

¹¹ Hansard Society Tweet, 13 June 2022.

¹² “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>

¹³ 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>

¹⁴ 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>

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.¹⁵ The International Law Commission has also produced official Commentaries on the Articles on State Responsibility, which set out more detail on the Articles.¹⁶ 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”,¹⁷ and those conditions must be cumulatively satisfied.¹⁸

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”.¹⁹

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 *Gabčíkovo-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.²⁰

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.²¹ Dr Oliver Garner of the Bingham Centre argues that a claim by the UK Government that the Article 16 NIP conditions

¹⁵ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) ICJ Rep 1997, 7, International Court of Justice

¹⁶ 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/english/commentaries/9_6_2001.pdf

¹⁷ Art 25, paragraph (14) of the Commentaries.

¹⁸ Article 25, paragraph (11) of the Commentaries.

¹⁹ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) ICJ Rep 1997, 7, International Court of Justice

²⁰ Art 25, paragraph (15) of the Commentaries.

²¹ Professor David Collins, “No, Britain is not breaking international law on the NI Protocol” (The Telegraph, 19 May 2022).

have been fulfilled may be plausible, although notes that the Government has not yet followed the procedures for formally invoking Article 16.²²

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".

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".²³ "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."²⁴

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.

²² 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/>

²³ Article 25, paragraph (15) of the Commentaries.

²⁴ Article 25, paragraph (2) of the Commentaries.

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?²⁵

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”.²⁶ In the Commentaries, the International Law Commission stated that “The peril has to be objectively established and not merely apprehended as possible”.²⁷ 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:

- 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

²⁵ 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>

²⁶ Paragraph 51 of the judgement.

²⁷ Article 25, paragraph (15) of the Commentaries.

non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.²⁸

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.²⁹

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

“I would say to my hon. Friend that yes, this does break international law in a very specific and limited way.”³⁰

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.

²⁸ Article 25, paragraph (19) of the Commentaries.

²⁹ Article 25, paragraph (20) of the Commentaries.

³⁰ Hansard, House of Commons (8 September 2020) Vol 679 Col 509.

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 25.³¹

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 authorised 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. 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?

³¹ Article 25, paragraph (14) of the Commentaries

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

The Bingham Centre for the Rule
of Law is a constituent part of the
British Institute of International and
Comparative Law (www.biicl.org).

Registered Charity No. 209425