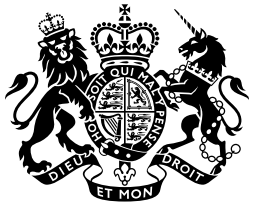
HM Government

Scotland analysis:
Devolution and the implications of Scottish independence

February 2013



Scotland analysis: Devolution and the implications of Scottish independence

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Executive summary

Scotland's choice

i. Before the end of 2014 people in Scotland will take one of the most important decisions in the history of Scotland and the whole of the United Kingdom (UK) – whether to stay in the UK, or leave it and become a new, separate and independent state.

ii. The UK Government, along with many others, believes that both Scotland and the UK are better served by maintaining their partnership. **A strong Scotland is good for the whole of the UK, and a strong UK is good for Scotland.** For three centuries the economic and social dynamism of Scotland has flourished as part of the UK family of nations within a single state. Scotland has played a significant role in the historical success of the UK, to the benefit of people in Scotland and the rest of the UK. (Paragraph 1.2)

iii. Scotland's success within the UK continues today. Scotland benefits from its close integration within a major global power. **Key decisions are taken in Scotland to address Scottish priorities and needs, while all the citizens of the UK benefit from collective decision-making and collective endeavour at the UK level.** (Paragraph 1.6)

iv. The UK Government believes that this partnership can and should continue into the future. But the UK Government also recognises that Scotland has the right to leave the UK if a majority of people vote for it in the referendum in 2014: that choice rests with people in Scotland. (Paragraph 2.1)

The Scotland analysis programme

v. It is crucial that the referendum debate is properly informed. People in Scotland expect and deserve good information on which to base their decision. The UK Government is therefore undertaking a major cross-government programme of analysis. (Paragraph 0.5)

vi. **The Scotland analysis programme will provide comprehensive and detailed analysis of Scotland's place in the UK.** It will set out the facts about a range of constitutional, economic and policy issues that are critical to considering Scotland's future. To inform the debate, the work will also set out analysis about the possible implications of independence, as far as these can be known. The programme, which was announced in June 2012, will publish a series of papers throughout 2013 and 2014. (Paragraph 0.7)

vii. This paper, the first in the series, examines the UK's constitutional setup and the legal implications of independence. Future publications will look at Scotland as part of the UK's economy, Scotland's and the UK's place in the world, and Scotland's future economic performance. (Paragraph 0.11)

viii. **Clarity about the legal and constitutional framework is vital to any consideration of the key issues in the independence debate** for two reasons. First, understanding devolution and the relationship between Scotland's two governments at Westminster and Holyrood is essential to understanding how modern Scotland works. Second, independence – leaving the UK and becoming a new, separate state – is a very significant legal change. Establishing the legal process for setting up a new state, and the international and domestic consequences of that process, is vital to understanding the choice on offer in the referendum. (Paragraph 0.12)

Scotland's constitution today

ix. The analysis in this paper makes the case that **devolution – Scotland's constitution today – offers people in Scotland the best of both worlds**. Scotland has always maintained its own distinctive identity, legal and education systems, and other aspects of civic life. But devolution has, in little more than a decade, brought political decision-making on key issues closer to the people affected by it, within the framework of a single UK. (Paragraph 1.18)

x. This means that a Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed. It also means that people in Scotland continue to benefit from decisions that are best made on a UK-wide basis. These contribute to guaranteeing the security of people in Scotland and the whole of the UK, providing significant economic opportunity, representing their interests in the world and allowing resources and risks to be shared effectively. (Paragraph 1.18)

xi. **Devolution is also a system of government that is flexible and responsive to changing needs and circumstances.** In 2012 the UK Parliament passed a second Scotland Act, which contained the single biggest devolution of financial powers since 1707. Between the landmark devolution Acts of 1998 and 2012, many other powers have been devolved. Most recently, the UK Government was able to deliver its commitment in the Edinburgh Agreement to transfer to the Scottish Parliament the power to hold a legal, fair and decisive referendum on independence. (Paragraph 1.34)

xii. That flexibility does not mean that independence would simply be an extension of devolution. Legally and constitutionally, independence is a totally different proposition. Independence would mean the end of devolution. Devolution ensures that Scotland has a strong position within the UK. Independence would remove Scotland from the UK, along with the benefits that devolution brings. (Paragraph 1.49)

What independence would mean in law and practice

xiii. To help understand what is meant by independence and some of its possible consequences, **this paper is based on independent expert opinion from two leading authorities on the issue of state formation and how this is seen in international law**. They are James Crawford SC, Whewell Professor of International Law at the University of Cambridge, and Alan Boyle, Professor of Public International Law at the University of Edinburgh. Their full and detailed legal opinion is published with this paper. (Annex A)

xiv. Professors Crawford and Boyle conclude that, in the event of a vote in favour of leaving the UK, **in the eyes of the world and in law, Scotland would become an entirely new state**. It is not legally possible for two new states to inherit the international personality of the former state. The remainder of the UK (comprising England, Wales and Northern Ireland) would continue as before, retaining the rights and obligations of the UK as it currently stands.[1] There are four main reasons for this (Paragraph 2.16):

- the majority of international precedent, with examples spanning the creation of an Irish state from within the UK, and the break-up of the Soviet Union;
- the retention by the continuing UK of most of the population (92 per cent[2]) and territory (68 per cent) of the UK;
- the likelihood that other states would recognise the continuing UK as the same legal entity as before Scottish independence, not least because of the UK's pivotal role in the post-war world order; and
- the fact that, on the rare occasions when one state is dissolved and two new states are created peacefully from it, this tends to happen by mutual agreement.

xv. On the last of these points, **it is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK** by voting the state out of existence, and the UK would therefore assume the position of the continuing state. (Paragraph 2.17)

xvi. The UK Government's analysis is founded on this expert assessment. It believes that making the full legal Opinion publicly available will enhance the debate about Scottish independence. The Opinion shows very clearly how a new Scottish state could be established. As such, its conclusions are not incompatible with Scottish independence but are essential to a proper understanding of its consequences. (Paragraph 2.26)

xvii. The concept of a negotiated separation is central to Professors Crawford and Boyle's analysis. Both the UK Government and the Scottish Government have acknowledged the need for negotiations if people in Scotland vote for independence. Both governments accept that these negotiations can only take place after a referendum.[3] (Paragraph 2.27)

xviii. The UK Government has set out clearly its reasons for this conclusion. **Unless people in Scotland choose otherwise, the UK Government will continue to be one of Scotland's two governments and cannot enter into discussions that would require it to act solely in the interests of one part of the UK.** Moreover, the Scottish Government has no mandate from people in Scotland to negotiate the terms of independence unless and until they obtain one in the referendum. (Paragraph 2.43)

xix. As the Scottish Government has said, in the event of a vote in favour of separation Scotland would not leave the UK immediately. Negotiations would begin, and both governments would enter into them in good faith. The Scottish Government has recently published its proposals for a transition to independence, although this does not address the critical issue of a Scottish state's position in international law.[4] (Paragraph 2.41)

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1 In the event of independence, the UK without Scotland is referred to as the 'remainder of the UK' or the 'continuing UK' in this paper.

2 According to Office for National Statistics figures: www.ons.gov.uk/ons/rel/census/2011-census/population-and-household-estimates-for-the-united-kingdom/index.html

3 *Scotland's Future: from the Referendum to Independence and a Written Constitution*, Scottish Government, 5 February 2013, page 11

4 Op cit., *Scotland's Future*

xx. The legal Opinion indicates that the UK Government would enter into negotiations representing the continuing state of the UK. Other institutions, such as the institutions of the European Union (EU) and its Member States, would have to become involved in specific cases. The Scottish Government's planned White Paper later this year will set out what the current Scottish Government might hope to achieve in any negotiations. While the Scottish Government has indicated that its preferred timetable would be for negotiations to conclude and a new state to be established by March 2016, it is not possible to predict now the outcome of the negotiations, nor how long they would take. (Paragraph 2.39)

Implications of independence: legal and practical issues at home and abroad

xxi. However, some conclusions, based on the legal Opinion and other expert analysis, can be drawn at this point about the implications of independence.

xxii. **On the international stage the UK's membership of key organisations (including the EU, North Atlantic Treaty Organization (NATO), the International Monetary Fund (IMF), G8 and G20) and involvement in treaties would be largely unaffected by Scottish independence.** As a new state, an independent Scotland would be required to apply to and/or negotiate to become a member of whichever international organisations it wished to join. The UK Government could not legally do this on behalf of an independent Scottish state. (Paragraph 3.3)

xxiii. The position on the EU is particularly significant and complex. **The UK's EU membership would continue automatically. For an independent Scottish state, negotiations would be needed.** Rather than being purely a matter of law, the mechanism for an independent Scottish state to become a member of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States. It is likely to be a process requiring unanimity across all Member States of the EU. Since an independent Scotland would be a new state there is a strong case that it would have to go through some form of accession process to become a member of the EU. This is the view expressed by the President of the European Commission.[5] (Paragraph 3.10)

xxiv. **An independent Scottish state would also have to work through its position on thousands of international treaties** and agreements to which the UK is currently party and which would default to the continuing UK. So too would the other parties to these treaties. Some would be uncontentious, but there are important bilateral arrangements – national security agreements, for example – where the position of an independent Scottish state would be unclear. (Paragraph 3.22)

xxv. Domestically, the body of law passed by the UK Parliament would continue to apply in England, Wales and Northern Ireland, as it does now. **The UK Parliament would remain sovereign in the continuing UK, but would have no jurisdiction in an independent Scottish state in the event of independence.** So the UK's key national institutions – for example, the Bank of England and the security and intelligence agencies – would operate on behalf of the remainder of the UK as before, but would have no power or obligation to act in or on behalf of an independent Scottish state. (Paragraph 3.31)

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[5] "The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory." Letter to the House of Lords Economic Affairs Committee, 10 December 2012

xxvi. **An independent Scottish state would therefore seek new institutional arrangements.** It would be open to representatives of a new Scottish state to ask to make use of arrangements that exist within the UK. The principle and terms of any arrangements would be subject to negotiation with the remainder of the UK. The Scottish Government has said that it would seek to continue to use sterling for example.[6] A formal sterling currency union would only be possible if both parties managed to reach an agreement on conditions that satisfied their economic interests. (Paragraph 3.34)

xxvii. Another important factor determining domestic arrangements in an independent Scottish state would be the outcome of the negotiations on Scotland's EU membership and the implications of the potential loss of the UK's opt-outs. Currency is just one example of a number of areas where the Scottish Government's stated preference to retain current UK arrangements is at odds with the requirements for new states applying to join the EU and where the process for negotiating Scotland's membership is uncertain and unprecedented. (Paragraph 3.39)

xxviii. **Detailed negotiations would have to take place on a very large set of institutional arrangements that span the UK.** By way of illustration, when Czechoslovakia was dissolved some 31 treaties and 2,000 sub-agreements were signed.[7] Many issues remained unresolved more than seven years after the negotiations started.[8] In a UK context, hundreds of issues would surface, reflecting three centuries of integration. (Paragraph 2.42)

xxix. **These legal conclusions provide the basis for the analysis in the rest of the Scotland analysis papers that will follow over 2013 and into 2014.** Drawing on this foundation, the programme will analyse the way in which the current system in the UK operates in each area, and, where it is possible, the range of options that could operate in an independent state and how these might work. In this way, the Scotland analysis programme will provide a detailed, rigorous and evidence-based account of the key issues in this historic and vital debate ahead of the referendum.

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6 'Opportunities for Scotland's Economy', John Swinney, Glasgow Caledonian University, 11 June 2012: www.scotland.gov.uk/News/Releases/2012/06/Scotland-Economy11062012; Alex Salmond, *Today*, BBC Radio 4, 16 January 2013; Nicola Sturgeon, speaking at a *Times* and BBC debate in late May 2012

7 *Issues Around Scottish Independence*, David Sinclair, Constitution Unit, University College London, 1999: www.ucl.ac.uk/spp/publications/unit-publications/51.pdf; Professor Robert Hazell, Constitution Unit, University College London, writing in *The Guardian*, 29 July 2008: www.guardian.co.uk/commentisfree/2008/jul/29/snp.scotland; 'The Dissolution of the Czech and Slovak Federal Republic', 1993, cited in *The Breakup of Czechoslovakia, Research Paper*, R. Young, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1994, page 42

8 *Scottish Independence: A Practical Guide,* Jo Eric Murkens, Peter Jones and Michael Keating, 2002, page 99

Introduction

"Today, we look forward to the time when this moment will be seen as a turning point: the day when democracy was renewed in Scotland, when we revitalised our place in this our United Kingdom."

First Minister Donald Dewar, speaking at the opening of the Scottish Parliament in 1999

0.1 The uniting of the Kingdoms of Scotland and England to form the Kingdom of Great Britain in 1707 is one of the most important moments in our island story. The partnership formed by the Acts of Union, which came into force that year, gave rise to one of the most successful states the world has ever seen. It has been, and remains, hugely beneficial to all the people of the United Kingdom (UK).

Scotland in the UK – past, present, future

0.2 In these three centuries of partnership Scotland has seized the benefits of being part of a larger family of nations. Scotland has always been an outward-facing nation and within the UK has projected a global reach in economics and commerce, law, philosophy, the arts and sport and much else besides, punching far above its weight. Scottish people were at the forefront of the development of the modern world – its economy, scientific achievements and innovation, through the Industrial Revolution, and the emergence of liberal democracy and the rule of law.

0.3 Today, Scotland benefits from its close integration within a major global power. The Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed, while all citizens of the UK benefit from collective decision-making and collective endeavour at the UK level. The UK Government believes this partnership should continue into the future.

0.4 Before the end of 2014 people in Scotland will be asked whether they want to end that partnership and leave the UK or continue within it. Alongside many others, the UK Government will make a positive case for the UK.

An informed debate

0.5 The referendum presents one of the most important decisions in Scotland's and the UK's history. It is therefore important that the debate – and people in Scotland – is properly informed by analysis, and that the facts that are crucial to considering Scotland's future are set out.

0.6 The UK Government believes that Scotland is better off as part of the UK, and that the UK is stronger with Scotland as a part of it. The onus is on those who want Scotland to leave the UK to set out their proposals for independence and address some of the key questions relating to the implications it would have. Not all of the answers to these questions can be known in advance. This is because some of the details can only be established through negotiations between the representatives of an independent Scottish state, the continuing UK, and other bodies (for example the European Union (EU)). These negotiations would have to take place in the event of a vote for Scottish independence.[9]

The Scotland analysis programme

0.7 On 20 June 2012, the Secretary of State for Scotland announced to the House of Commons that the UK Government was commencing a detailed programme of analysis ahead of the independence referendum.[10] The objective of this programme is to provide comprehensive and detailed analysis of Scotland's place in the UK and how that would be profoundly affected by independence. The outputs of the analysis will provide sources of information and aim to enhance understanding on the key issues relating to the referendum. As such, the programme should be a major contribution to the independence debate.

0.8 On key issues, such as the constitution, the economy, public finances and taxation, defence, energy and welfare, the Scotland analysis programme will examine Scotland's existing arrangements and position as part of the UK. It will also analyse, where possible, some of the potential implications of independence.

0.9 Given there are many unknowns about an independent Scottish state – arising from the many issues that would need to be negotiated in the event of independence – analysing the implications is not straightforward. In some cases it is possible to establish a discrete range of potential consequences, for example through examining precedent or academic literature. To ensure that the work is broad-based and subject to external challenge and scrutiny, the UK Government is being open in its engagement with third parties, including academics, think tanks and other experts, particularly those in Scotland.

0.10 Some of the cross-cutting themes the analysis examines include:

- the opportunity for Scotland to pool risks with the rest of the UK, whether in relation to military or security threats, or economic challenges;
- the scale of the UK, which means Scotland has access to a larger single, domestic market, for example, in which Scottish firms – including in key sectors of defence, energy and financial services – conduct a majority of their trade;
- the UK's influence on Scotland's behalf in international institutions and world affairs, and the support the UK can provide to Scottish businesses and people around the world; and

[9] The UK Government has set out its position on why negotiations can only take place following a yes vote in a referendum and not before. See Chapter 2 of this paper, paragraphs 2.43 to 2.52, and speech by the Rt Hon. Michael Moore MP of 18 January 2013: www.gov.uk/government/speeches/setting-the-scene-for-2013; and 'Uncertainty of independence can't be wished away'; *Scotland on Sunday*, 13 January 2013 by the Rt Hon. Michael Moore MP: www.scotsman.com/scotland-on-sunday/opinion/comment/michael-moore-uncertainty-of-independence-can-t-be-wished-away-1-2734637

[10] The Secretary of State for Scotland's announcement can be found here: www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120620/debtext/120620-0001.htm#12062086000009 and an explanatory note can be found here: www.gov.uk/government/news/benefits-of-the-uk-to-be-examined-in-detail

- how integrated Scotland and the other three nations of the UK have become over 300 years, including the hundreds of institutions that are shared across the UK, which support businesses and individuals in their everyday lives. How these functions would be replaced in an independent Scottish state is a significant uncertainty.

Scotland's constitutional present and the legal implications of independence

0.11 This first paper in the series seeks to lay the foundations for the rest of the programme by examining both the current legal and constitutional arrangements for Scotland within the UK and some of the potential consequences of independence.

0.12 This is because clarity about the legal framework is vital to other aspects of the independence debate. Understanding devolution and the way in which Scotland's two governments and parliaments at Holyrood and Westminster work is crucial to understanding how current arrangements in all the main areas of Scottish life work. And establishing what independence means in legal terms, and how that affects the shape of a new Scottish state, is necessary for an informed debate on the choice being put to the Scottish people in a referendum. All the subsequent papers flow from this analysis.

The structure of this paper

0.13 **Chapter 1** sets out in detail how the flexible, effective and popular system of devolution within the UK works for Scotland. It describes how Scottish devolution has evolved and adapted, and how it continues to work to the benefit of people in Scotland.

0.14 **Chapter 2** looks at the main points of law around the creation of a new independent state. It seeks to answer the crucial legal question as to whether the formation of a new Scottish state means the creation of two new states, or whether the existing UK would carry on with England, Wales and Northern Ireland. Much depends on the answer to this question and therefore this paper is accompanied by a detailed, independent expert opinion by two of the world's leading experts in the area, Professor James Crawford SC and Professor Alan Boyle, Professors of International Law at the Universities of Cambridge and Edinburgh respectively. This legal Opinion is published as Annex A and provides a comprehensive analysis of this question. The chapter also examines the process of negotiations that would be required to bring the new state into being.

0.15 **Chapter 3**, the last chapter, looks at some of the practical implications of the conclusions drawn in Chapter 2. It deals with questions of an independent Scottish state's place in the world. What would be its position – and that of the continuing UK – with regard to key international institutions such as the United Nations (UN) and, crucially, the EU? What would happen to the thousands of treaties which Scotland, by virtue of being part of the UK, is bound by? In the same way, Chapter 3 deals with similar questions in a domestic context, including the most likely options for a process of separation and what that might mean for the new arrangements an independent Scottish state would have to put in place to replace the existing institutions which currently automatically apply in Scotland as part of the UK.

Chapter 1:
Scotland's constitution today

Summary

- Devolution within the United Kingdom (UK) means that a Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed.
- Equally, devolution means that, on issues where all the citizens of the UK benefit from collective decision-making and collective endeavour, decisions are taken at the UK level. These contribute to guaranteeing the security of people in Scotland and the whole of the UK, providing significant economic opportunity, representing their interests in the world and allowing resources and risks to be shared effectively. For example, Scotland stood together with the rest of the UK in supporting UK banks through the financial crisis and its aftermath.
- Devolution can and does adapt to meet changing circumstances within the UK, through the transfer of major new powers and other adjustments to the settlement since 1998. The Scotland Act 2012 devolved important new financial powers to the Scottish Parliament for the first time, which come into effect over the next three years. This is the largest transfer of financial powers to Scotland since the creation of the UK.
- Devolution is also a flexible, efficient and collaborative system of government. The processes established under devolution may not attract much public attention. They are often concerned with detailed policy or technical issues. But they enable two governments to work together effectively to serve and further the interests of Scotland and its people.
- Most recently, that flexibility enabled the UK Government to deliver on the commitment made in the Edinburgh Agreement to transfer the power to hold a legal, fair and decisive referendum on independence to the Scottish Parliament.
- Ultimately, devolution operates within the UK, and means that in Scotland people have the benefit of two parliaments and two governments. Legally and constitutionally, independence is a different proposition. Independence would result in an end to devolution – and the benefits it brings – rather than a continuation of it.

The establishment of devolution in Scotland

1.1 The creation of a parliament in Scotland in 1999, directly elected by people living in Scotland and responsible for the delivery of domestic public policy and services, was a transformational moment in Scottish history. The Scottish Parliament has quickly become a core part of public life and an institution that is accepted and respected by people in Scotland.[11]

1.2 Although devolution began in 1999, its origins are rooted in a long history. The Acts of Union of 1707 united the parliaments of Scotland and England, resulting in the formation of a single Parliament of Great Britain at Westminster. It also marked the beginning of a single multi-national state,[12] which has become one of the most successful partnerships of nations in history. Scotland, although smaller in population terms than England, has played an indispensable role in the development of the state ever since, from the contributions its citizens have made to establishing democracy and the rule of law, to the development of modern industry, science, philosophy, culture, sport and the arts.

1.3 Yet from the outset, a unique set of Scottish institutions and systems continued to exist and flourish within the UK, supporting a strong Scottish culture and distinct civic life. These included the Scottish education system, the Church of Scotland and Scots law. During the 19th century, there were calls for Scotland's separate institutions to be given political recognition and greater administrative support, which led to the creation of the post of Secretary of State for Scotland and the establishment of the Scottish Office in 1885.[13] In the early part of the 20th century the public sector in Scotland, headed by the Scottish Office, developed into a substantially decentralised apparatus of government in Scotland.

1.4 Throughout much of the 20th century there were various movements within Scotland arguing for greater democratic devolution rather than purely administrative reforms. These culminated in 1997 when the UK Government held a referendum in Scotland on the principle of establishing a Scottish Parliament with sweeping powers over domestic policy. This was passed by a majority of nearly three to one, and a question on whether the Parliament should be able to vary taxes was passed by nearly two to one.[14]

1.5 Having served the needs of people in Scotland for over a decade, the story of devolution did not end when the new Parliament opened its doors. As the passage of the Scotland Act 2012 has shown, devolution continues to evolve and adapt to meet the needs of Scotland today and in the future. Independence, however, would bring that process and its benefits to an end.

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[11] *Final Report of Commission on Scottish Devolution*, page 55. Scottish Social Attitudes Survey 2012: www.scotcen.org.uk/media/1021490/ssa12briefing.pdf

[12] *The British Isles: A History of Four Nations*, Hugh Kearney, 2006, pages 212–8; Colin Kidd, 'Integration: Patriotism and Nationalism' in *A Companion to Eighteenth Century Britain,* HT Dickinson (ed.), 2006, pages 371–2

[13] *Constitutional and Administrative Law* (3rd edn, 2000), Hilaire Barnett, pages 56–7

[14] www.parliament.uk/briefing-papers/RP97-113.pdf

How Scotland is governed

1.6 There is a clear principle underlying the establishment of the Scottish Parliament and devolution across the UK. That is the importance of bringing the exercise of political decision-making closer to the people affected by it, where that will best serve the interests of people in Scotland. This means that Scottish responses can be developed to address Scottish issues.

1.7 It also means that people, wherever they happen to live in the UK, can draw on the UK's collective decision-making to: guarantee their safety and security; represent their interests in the world; and ensure that natural and financial resources are shared fairly and that risks are pooled effectively. Through devolution within the UK, people in Scotland can have the best of both worlds.

1.8 Before considering how devolution has been put into practice by UK and Scottish parliaments and governments, as well as the benefits it has brought, it is important to understand how the system established in 1998 operates. Under devolution, the Scottish Parliament at Holyrood has responsibility for everything that is not explicitly 'reserved' to the UK Parliament in Westminster.[15] While the UK Parliament retains the power to legislate in all areas, the UK Parliament does not normally legislate in relation to devolved matters except with the consent of the Scottish Parliament. People in Scotland therefore have two parliaments and two governments serving their interests, within the UK. The people of Wales and Northern Ireland also benefit from devolution, but each settlement is different, reflecting the circumstances of each and the flexibility and responsiveness of the partnership of the four nations within the UK.

1.9 Devolution has given the Scottish Parliament responsibility for the National Health Service (NHS), for education, and for civil and criminal law, including responsibility for the justice system, policing and prisons in Scotland. The Scottish Parliament is also responsible for local government, including its structure and financing, housing, regeneration and the planning framework in Scotland. It has powers to deliver economic development in Scotland, including financial support to businesses and industry. And it has responsibility for policies relating to road, rail, air and sea transport in Scotland, farming and fisheries, sport, and the arts.

1.10 Decisions on all of these domestic matters were devolved to Scottish ministers and the Scottish Parliament by the Scotland Act 1998. This policy responsibility is matched with spending power: around two-thirds of Scotland's public spending is controlled by the Scottish Parliament and the Scottish Government.[16]

[15] Scotland Act 1998: www.legislation.gov.uk/ukpga/1998/46/contents: see Schedule 5 of the Scotland Act 1998, summary of the Scotland Act 2012 (current powers) and key permanent Statutory Instruments.

[16] Total identifiable spend under Scottish Parliament/Government control was 67 per cent for 2011–12, Country and Regional Analysis 2012, Table A.21: Identifiable expenditure on services for Scotland, Wales and Northern Ireland in 2011–12, Office for National Statistics (ONS): www.hm-treasury.gov.uk/9802.htm. When public spending is analysed on a territorial basis, most is 'identifiable'. That means that spending can be identified as directly for the benefit of a particular region, e.g. on schools or hospitals. However, a small proportion (14 per cent in 2010–11) is non-identifiable because it cannot be split up and attributed to individual parts of the country as it benefits the UK as a whole. This mainly relates to defence, foreign affairs and debt interest.

1.11 The UK Government and the UK Parliament are responsible for those areas that are essential to the integrity of the state and where all people across the UK benefit from a common approach. Key areas of responsibility in Scotland reserved to the UK Parliament include providing for the defence and national security of UK citizens, macro-economic policy, foreign affairs, immigration, broadcasting, energy,[17] social security and pensions, and the constitution. The UK Government acts on behalf of people in Scotland, Wales, England and Northern Ireland in the majority of these matters.[18] The people of the whole of the UK decide how these powers are exercised through their representatives in the UK Parliament.

The flexibility of devolution

1.12 That does not mean that the boundaries between what is reserved and devolved were fixed under the 1998 Act. Devolution is a flexible and responsive system of government that has proved capable of adapting to new circumstances and needs in a highly integrated multi-nation state. Significant changes to the devolution settlement were brought in by the UK Government last year through the Scotland Act 2012 in response to recommendations from the Commission on Scottish Devolution or 'Calman Commission'.[19]

1.13 A central pillar of the Scotland Act 2012 is the extensive devolution of further financial powers to the Scottish Parliament. The key measures that will come on stream over the next three years are to:

- enable the Scottish Parliament to introduce new 'devolved taxes', with the consent of the UK Parliament; and
- devolve to the Scottish Parliament the power to set a Scottish rate of income tax – this means that all rates of income tax in Scotland will be reduced by 10 pence in the pound, and it will be for the Scottish Parliament to set a Scottish rate of income tax, which could result in rates in Scotland being lower than in the rest of the UK, the same, or higher.

1.14 With the implementation of the 2012 Act, the Scottish Government will fund a higher proportion of the spending for which it is responsible, rising from around 16 per cent today to a third by 2016–17.[20] Taken together, this represents the greatest devolution of fiscal powers since 1707, and provides evidence of how devolution has evolved over time.

1.15 Under the 2012 Act the power to borrow to fund capital projects and to set the drink-driving limit and a Scottish national speed limit was also devolved to the Scottish Parliament. In addition, Scottish ministers can now administer aspects of elections to the Scottish Parliament, determine maximum criminal penalties, and preside over

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[17] Energy is not wholly reserved. The relevant reservations in the area of energy are described under Heading D in Schedule 5 of the Scotland Act 1998, www.legislation.gov.uk/ukpga/1998/46/contents: see Schedule 5 of the Scotland Act 1998, summary of the Scotland Act 2012 (current powers) and key permanent Statutory Instruments.

[18] Devolution works differently in Scotland, Wales and Northern Ireland and not all of the same matters are devolved. Further details of how devolution works can be found at: www.cabinetoffice.gov.uk/content/devolution-united-kingdom

[19] The Commission was established in 2008 by the United Kingdom Government in response to a motion passed by the Scottish Parliament. It was set up and supported by all three main parties at Westminster (who formed the Opposition in the Scottish Parliament) in response to the establishment by the Scottish Government of a 'national conversation' about the future of Scotland.

[20] Government Expenditure and Revenue Scotland 2010–11: www.scotland.gov.uk/Topics/Statistics/Browse/Economy/GERS; Office for Budget Responsibility 2010–11: budgetresponsibility.independent.gov.uk/wordpress/docs/Dec-2012-Scottish-tax-forecast28946.pdf

appointments to the Trust of MG Alba (the Gaelic Media Service) and of the member for Scotland to the Trust of the BBC (British Broadcasting Corporation).

1.16 It is not just major pieces of legislation such as the Scotland Act 2012 which demonstrate the flexibility of devolution. The framework established under the 1998 Act contains provisions allowing UK ministers to make adjustments (through secondary legislation, or 'orders') to the settlement without the need for primary legislation (acts of parliament). There are many types of order and they work in a variety of ways. Some allow the transfer of powers between the UK and Scottish governments. Others enable UK ministers and Scottish ministers to act on behalf of one another.[21] For example, it was through an order[22] that the UK Government delivered its commitment in the Edinburgh Agreement to transfer the power to hold a legal, fair and decisive referendum on independence to the Scottish Parliament – enabling the Scottish Government to meet its democratic mandate.

1.17 The first part of this chapter considered how devolution works and how it has continued to evolve since the 1998 Act that brought it into being. The next part examines how the exercise of powers at the UK level and by the Scottish Parliament and Government has brought benefits for Scotland. The final section of this chapter examines the way in which Scotland's two governments and two parliaments have worked together to serve Scotland's interests and highlights the advantages and flexibility of the devolution settlement.

How devolution delivers for Scotland through reserved powers

1.18 There are many areas where it is sensible – and in the interests of Scotland – for the UK Government to deal with matters across the whole of the UK. Devolution means that people in Scotland – and people across the rest of the UK – can benefit from the legislation, policies and services delivered on their behalf in the areas reserved to the UK Parliament. The UK's full political, economic and social union means that Scotland, and all parts of the UK, benefit from attributes developed over the last 300 years.

1.19 **Security:** The UK is able to protect its citizens from global risks, both at home and abroad. Strong alliances and networks across the world, and the UK's sophisticated armed forces, police and intelligence agencies, mean that the UK is better able to manage threats from terrorism and organised crime.

1.20 The breadth and diversity of the UK economy and its stable tax-base support public spending and therefore public services – such as schools, hospitals, roads, pensions and benefits – for everyone in the UK. Independent economic analysis[23] suggests that Scotland faces significant economic challenges – such as maintaining spending on public services, and dealing with declining oil and gas production and a faster ageing population than the rest of the UK, while maintaining sustainable public finances – and would be required to make difficult policy choices with regard to taxes and levels of public expenditure.

1.21 **Scale:** Businesses in Scotland have access to a single domestic market across the whole UK with no borders to restrict the free movement of goods and people – a far more deeply integrated market than currently achieved in the European Union (EU). There are tens of

[21] A full list of these powers can be found at: https://www.gov.uk/government/policies/maintaining-and-strengthening-the-scottish-devolution-settlement/supporting-pages/legislating-for-scotland

[22] The draft Scotland Act 1998 (Modification of Schedule 5) Order 2013: www.legislation.gov.uk/ukdsi/2013/9780111529881/contents

[23] *Scottish Independence: The fiscal context*, Institute for Fiscal Studies, 2012: www.ifs.org.uk/bns/bn135.pdf

millions of journeys between Scotland and the rest of the UK every year,[24] and Scotland trades almost twice as many goods and services with England, Wales and Northern Ireland as with all the other countries of the world combined.[25]

1.22 As future papers will show, being part of the larger UK generates jobs in Scotland, and reduces costs, encourages innovation and provides greater consumer choice. Scotland's economy has key specialisms in areas including the financial services, energy and defence industries. These sectors have created and sustained tens of thousands of jobs and help to contribute to Scotland's economic prosperity. Crucially, these sectors also benefit from being part of the balanced UK economy, which provides a larger market, protects employment and ensures their sustainability:

- Around 90 per cent of the customers of financial services firms based in Scotland live in the rest of the UK.[26]
- The strength of the Scottish energy sector – with the oil and gas industry estimating that it supports around 200,000 jobs[27] – is sustained by its consumer base across the rest of the UK.
- The UK is one of the world's largest domestic defence markets and defence exporters. UK Government defence spending helps to sustain more than 12,600 jobs in the defence sector in Scotland and more than 15,000 Armed Forces and Ministry of Defence civilian personnel based in Scotland.

1.23 **Influence:** The UK is the only state which is a member of all of the EU, the North Atlantic Treaty Organization (NATO), the Commonwealth, the United Nations (UN) Security Council, and – as the seventh largest economy in the world[28] – the G8 and the G20. The UK has one of the world's most extensive diplomatic networks, employing over 14,000 people in nearly 270 missions in 170 countries across the world, with an annual budget of around £1.6 billion. This provides a formidable platform from which to support and lobby for Scottish companies and products and provide assistance to UK citizens who need help abroad.

1.24 **Integration:** The UK is united for the common good of all its citizens. All parts of the UK share a rich and closely intertwined history and identity that has developed over more than 300 years. More than 450,000 people living in Scotland today were born in England, Wales or Northern Ireland, and more than 830,000 people born in Scotland now live elsewhere in the UK.[29] The UK's economy is fully integrated, and Scotland's economic performance (excluding income from volatile North Sea oil and gas) closely follows the UK average.[30] And Scotland has been well supported throughout history and throughout recent global economic challenges by long-standing, UK-wide economic institutions, such as a stable, single currency, with its associated protection and insurance, and the strength and credibility of the Bank of England.

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[24] In 2009 an estimated 24 million vehicles crossed the border between England and Scotland, with 11 million passenger journeys between other parts of the UK and Scotland's 17 airports. Road traffic flows are at: www.dft.gov.uk/traffic-counts. Passenger numbers are from Scottish Transport Statistics No. 29, 2010.

[25] Scottish Government – Scotland National Account Project, 2012, Q2: sum of imports and exports with the rest of the UK was £84 billion in 2011, compared with £46 billion with the rest of the world.

[26] Figures from Scottish Financial Enterprise: www.bbc.co.uk/news/uk-scotland-18515456

[27] www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EC030.pdf

[28] World Bank GDP ranking: data.worldbank.org/data-catalog/GDP-ranking-table

[29] *Scotland's Census 2001*, General Register Office for Scotland

[30] www.ons.gov.uk/ons/taxonomy/index.html?nscl=Regional+GVA

1.25 Over three centuries the UK has built many significant institutions such as the NHS and the BBC, fought for freedom and democracy in two World Wars and many other important campaigns, celebrated Olympic and Paralympic success and created one of the world's most successful and enduring multi-nation states.

1.26 The case studies below provide some examples of how powers have been exercised in reserved areas and exemplify how Scotland benefits from the high level of integration, the greater scale of the UK and its ability to pool risks, whatever they may be.

Reserved powers in action

The UK Government and Parliament have powers in reserved policy areas that bring real benefits to people across the nations of the UK. These benefits – which come with being part of the United Kingdom – include:

- **A larger macro-economy:** Where risks are pooled and benefits are shared. For example, the UK Government was able to inject £45.5 billion into the Royal Bank of Scotland (RBS) in 2008 to support the bank and protect the financial system, including savers and their deposits across all of the UK. RBS also insured £281.6 billion of its assets in the UK Government's Asset Protection Scheme.* The UK collectively was able to withstand the global financial crisis and ensure the stability of the economy and the banking system. The monetary policy of the Bank of England and the UK Government's commitment to reducing the deficit is now helping to keep interest rates low for all in the UK.
- **First-class defence:** The UK Government's defence budget is the fourth largest in the world, and all parts of the UK benefit from the high standard of security and expertise that the UK provides. For example, under current plans the Ministry of Defence intends to move all of the UK's conventional submarines to the Clyde. This means that Scotland's largest single-site employer will expand from 6,700 to 8,200 military and civilian jobs by 2022. World-leading defence companies in Scotland, with their particular expertise in shipbuilding and other naval defence equipment, employ more than 12,600 people and generate annual sales of more than £1.8 billion a year.**
- **A strong voice in the world:** The influence exerted by the United Kingdom works to the benefit of all its citizens. For example, as a major Member State of the EU, the UK is able to exert real influence over decisions made on agriculture, fisheries and financial regulation that impact directly on everyone in the UK. As a member of the G7, G8 and G20, the UK is at the top table when economic decisions are made. With a key role in NATO, a seat on the UN Security Council and a foreign aid budget of almost £7 billion a year, the UK collectively plays a key role in safeguarding the nation, and promoting peace, security, human rights and development to those in need around the world.

* www.nao.org.uk/publications/1011/the_asset_protection_scheme.aspx

** www.scottish-enterprise.com/your-sector/aerospace-defence-and-marine/adm-strategy/adm-facts/defence-facts.aspx

1.27 Subsequent publications in the Scotland analysis programme will set out in greater detail how Scotland contributes to and benefits from being part of the UK, and how the rest of the UK benefits from its partnership with Scotland. In addition to this paper on Scotland's place within the UK constitution and the legal implications of independence, the programme will look in detail at the economic and other reserved policy issues that are critical to the question of Scotland's future, and which will be important in the referendum debate.

How devolution delivers for Scotland through devolved powers

"The last ten years have shown that not only is it possible to have a Scottish Parliament inside the UK, but that it works well in practice … The Scottish Parliament has embedded itself in both the constitution of the United Kingdom and the consciousness of Scottish people. It is here to stay."

Commission on Scottish Devolution, 2009

1.28 Within the wider framework of the UK – and with significant powers and responsibilities conferred through devolution – the Scottish Parliament and Scottish governments have made decisions about how to allocate resources and decisions on the design and delivery of a very wide range of public services. Devolution has resulted in more than a decade of laws being made and policy decisions being taken in Scotland, aimed at meeting the specific needs and circumstances of people in Scotland.

1.29 The first legislation passed by the newly established Scottish Parliament was the Mental Health (Public Safety and Appeals) (Scotland) Act 1999.[31] Since then, the Parliament has passed more than 180 Acts to address some of the most important domestic issues facing Scotland. These include legislation establishing Scotland's first National Parks, reforming land tenure, family law and the justice system, updating licensing law, prohibiting smoking in public places and banning the sale of cigarettes from vending machines, introducing a proportional voting system for local elections, establishing new railway links and protecting children.

1.30 In addition to legislative devolution, some further executive powers have been devolved to Scottish ministers. Some of these powers can be exercised jointly by UK and Scottish ministers. Specific powers can be transferred to Scottish ministers in areas where the UK Parliament retains legislative control.[32] Scottish ministers have used these powers to promote renewable energy and energy conservation. They have also been used to promote the construction of railways in Scotland and to ensure that transport links are well integrated and serve the needs of people in Scotland. Under devolved powers, new services have been established, including lines from Stirling to Alloa and Bathgate to Airdrie.

1.31 The responsibilities of the Scottish Parliament and Government are therefore very broad. They have been used to determine a wide range of policies and deliver on Scottish priorities. That includes key economic drivers such as skills, promotion of enterprise, inward investment and capital spending across key sectors including transport, health, education and culture.

1.32 Devolution has allowed the Scottish Parliament and the Scottish Government to develop public services and to drive public policy in Scotland – across education, health, justice, enterprise, transport and well beyond – which respond to Scottish circumstance and need. This means in many cases taking decisions and ordering priorities differently to the rest of the UK. This is the practical and beneficial outcome of devolution.

1.33 The case studies below provide some examples of how legislation and public services in Scotland can and do develop differently from other parts of the UK, reflecting different priorities, policies and practices in Scotland.

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[31] *Mental Health and Scots Law in Practice*, Jim J. McManus and Lindsay D. G. Thomson, 2005, page 206.

[32] An explanation can be found in the *Final Report of Commission on Scottish Devolution*, page 43.

Devolved powers in action

A Scottish Parliament and Scottish Government have ensured that where decisions can best be taken at the devolved level – closer to and in the interests of those they affect – there are the means to make that happen. Examples of where devolution has enabled specific Scottish solutions to specific Scottish issues include the following:

- **In healthcare:** The Scottish Parliament was the first in the UK to legislate to ban smoking in public places with the **Smoking, Health and Social Care (Scotland) Act 2005**. This was introduced to address high smoking rates in Scotland, which contributed to 13,000 deaths a year and were greater than those elsewhere in the UK.* Following a detailed assessment of the impact on communities, legislation was passed by the Scottish Parliament, representing the first step towards the introduction of a ban on smoking in public places across the whole of the UK. Independent studies have found a significant reduction in second-hand smoke exposure and a range of other improved health outcomes in Scotland as a result.**
- **In transport:** Successive Scottish governments have been able to take decisions about transport infrastructure and investment that reflect the challenges presented by Scotland's topography and the needs of Scotland's families, communities and economy. A recent example is the **Forth Crossing (Scotland) Act 2011**, which provided the powers necessary for Scottish ministers to oversee construction of a new crossing over the Firth of Forth to carry traffic. The Forth Replacement Crossing is a major infrastructure project for Scotland, designed to safeguard a vital connection in the country's transport network and ensure that it is able to meet future demands.
- **In land reform:** A right to responsible access was established by the **Land Reform (Scotland) Act 2003**, addressing historical grievances over land ownership that were specific to Scotland. The law introduced the right for the public to be on private land for recreational, educational and certain other purposes, as well as a right to cross private land. It also imposes certain duties on local authorities in relation to access on and over land in their areas and, in particular, requires them to plan public paths. Further provisions passed by the Scottish Parliament allowed bodies representing communities and crofting communities to buy land to which they have a connection, addressing an issue peculiar to Scotland in the context of the Highland Clearances.

* *The UK Smoking Epidemic: Deaths in 1995*, C. Callum, 1998, quoted on: www.clearingtheairscotland.com/facts/facts.html

** 'Changes in child exposure to environmental tobacco smoke (CHETS) study after implementation of smoke-free legislation in Scotland: national cross sectional survey', Patricia C Akhtar, Dorothy B Currie, Candace E Currie, Sally J Haw, BMJ (2007), volume 335, page 545: www.bmj.com/content/335/7619/545

A flexible and efficient system of government

"The 'settlement' created under the authority of the Scotland Acts is neither fixed nor static, but fluid and dynamic, its flexibility being operated by governments of all colours in the best interests of Scotland and the rest of the United Kingdom alike … a spirit of mutual advantage and interdependence animates not only the design but the practical reality of devolution."

Professor Adam Tomkins, John Miller Chair of Public Law, University of Glasgow, August 2012[33]

1.34 The processes underpinning devolution rarely attract much public attention and are often concerned with detailed policy or technical issues. Yet as a system of government, devolution provides the flexibility necessary to deliver the best of both worlds and support a modern, evolving UK. Through the use of orders (secondary legislation), powers can be devolved to meet unique or rapidly changing circumstances as they arise and, where both parliaments agree, without the need for primary legislation.

1.35 As noted earlier, it was using this process that the UK Government devolved to the Scottish Parliament the power to hold a referendum on independence by 2014. Both governments worked together successfully to agree a process to ensure that a legal, fair and decisive referendum can be held on Scottish independence. This will be one of the most important collective decisions that people living in Scotland will be asked to make. By using the powers in the Scotland Act 1998, the governments were able to reach a sensible and agreed process to transfer the power to the Scottish Parliament to hold the referendum, thereby allowing the Scottish Government to meet its manifesto pledge from the 2011 election.[34]

1.36 The use of orders under the 1998 Act is also an important part of the smooth working of governance in Scotland. For example, they have often been used to ensure that Scottish Parliament legislation can be given full effect by making changes to legislation for other parts of the UK or in reserved areas.[35] The Scottish Parliament legislated to prevent the touting of Commonwealth Games tickets; but, as there is a risk that touting might also take place elsewhere in the UK, additional measures were brought in via an order under the 1998 Act[36] to prevent that occurring. This measure, and others like it, are critical to ensure that the objectives of Scottish Parliament legislation enacted, to ensure that a coherent body of legislation emerges from Scotland's two parliaments and to ensure that devolution works in practice.

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[33] Paper for the Advocate General's legal forum, July 2012

[34] www.number10.gov.uk/news/scottish-independence-referendum/

[35] Orders taken forward under section 104 of the Scotland Act 1998 allow for consequential modifications to be made to reserved law in consequence of legislation passed by the Scottish Parliament. This order making power allows for amendments to be made to reserved law to reflect changes in legislation in Scotland. This is key to ensuring that reserved law is up to date and is key to making devolution work. For further details see: www.gov.uk/government/policies/maintaining-and-strengthening-the-scottish-devolution-settlement/supporting-pages/legislating-for-scotland. They have been used more than 50 times to date: www.gov.uk/government/uploads/system/uploads/attachment_data/file/69949/SCOTLAND-ACT-ORDER-LIST-December-2012__1_.pdf

[36] The Glasgow Commonwealth Games Act 2008 (Ticket Touting Offence) (England and Wales and Northern Ireland) Order 2012 (SI 2012/1852): www.legislation.gov.uk/uksi/2012/1852/contents/made

1.37 Other orders enable the Scottish Parliament to take advantage of the economies of scale and larger buying power of the UK, for example by enabling the UK Government to purchase on behalf of Scottish ministers a stockpile of flu vaccines ahead of the winter in 2011.[37] Another was used in 2006 to allow UK ministers to exercise Scottish ministers' functions for purchasing radio equipment for the fire services.[38] This meant that one single contract could be let for services, giving both administrations the potential to benefit from greater joint bargaining power in negotiating a price.

1.38 The parliament of an independent Scottish state could develop and implement legislation similar to that promulgated by the UK Government should it so choose. Consistency in the application of legislation across the current territory of the UK could also be attempted through formal agreement between two separate sovereign states in the event of independence. However, differences in the development and application of laws and regulations in two separate but neighbouring states would make this consistency harder to achieve over time.[39] No matter how close their relations, no sovereign parliament can legislate on behalf of another. Under devolution, however, the UK Parliament can and does legislate on behalf of the Scottish Parliament, a practice explored further below.

Working together to serve Scotland's interests

1.39 While many of the processes underpinning devolution are not set out in legislation, they all enable Scotland's two governments to work closely together to respond to changing circumstances and serve the needs of people in Scotland.

1.40 The Sewel Convention is one of the most important. It is widely used and acknowledged as being effective. It essentially means that, although the UK Parliament has the power, it will not normally legislate in relation to devolved matters except with the consent of the Scottish Parliament. It is more than a decade into the life of the Scottish Parliament and the Sewel Convention has consistently been adhered to.

1.41 The Convention has been put into practice through a process which allows the Scottish Parliament to consider a motion (called a Legislative Consent Motion or LCM).[40] If passed, it would give consent to the UK Parliament to pass legislation extending to Scotland on a devolved issue. Through LCMs, devolution also gives Scottish ministers (with the consent of the Scottish Parliament) the ability to ask the UK Parliament to legislate on its behalf by including provisions on devolved matters in UK Bills. The process allows Scotland to have the "best of both legislative worlds at Westminster and at Holyrood".[41]

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[37] The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2011 (SI 2011/2439): www.legislation.gov.uk/uksi/2011/2439/contents/made

[38] The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2006 (SI 2006/1251): www.legislation.gov.uk/uksi/2006/1251/contents/made

[39] The effectiveness of the UK's existing regulatory framework – and its contribution to supporting inward investment and the UK economy – will be explored in further Scotland analysis papers.

[40] LCMs have been used on more than 120 occasions since 1999. The Scottish Parliament Procedures Committee and the House of Commons Scottish Affairs Committee have examined the application of the Convention and come to the conclusion that it is both necessary to the effective working of devolved governance and works well. *Final Report of Commission on Scottish Devolution*, page 49

[41] Scottish Government website, *The Sewel Convention: Key Features*: www.scotland.gov.uk/About/Government/Sewel/KeyFacts

1.42 That can be because it would be more effective to legislate on a UK basis in order to put in place a single UK-wide regime. It may also be used because no time is available at the Scottish Parliament but the UK Parliament is considering legislation for England and Wales which the Scottish Government believes should also be brought into effect in Scotland, or for a range of other reasons.[42]

1.43 Using LCMs can therefore help to free up Scottish parliamentary time, allowing Scottish Government ministers to focus on priority issues and enable legislation to be introduced that is of benefit to people in Scotland. Recent examples of where Scottish Government ministers have found this of use are in relation to:

- regulating financial services: "There is no added value in separate legislation as Scottish interests are reflected in the Bill and a separate process would be complex and require further time and resources to achieve the same policy aim." John Swinney, then Cabinet Secretary for Finance and Sustainable Growth (November 2009); and
- preventing bribery: "Uniformity across the UK would provide a more effective and workable legislative framework than would be possible if separate bills were introduced in the two Parliaments. It avoids difficulties of cross-border bribery, which might arise should the law on one side of the border be perceived as weaker than the law on the other." Kenny MacAskill, Scottish Cabinet Secretary for Justice (January 2010).

1.44 The UK Government and Scottish Government are committed to the principles of working together on matters of mutual interest, and to good communication and mutual respect. They work together long before a bill enters parliament or in routine policy issues where none is required. These principles are set out in the Memorandum of Understanding between the UK Government and the devolved administrations first published in 1999, and regularly updated.[43]

1.45 The way both governments have routinely worked together to serve Scotland's interests over the past 13 years has been demonstrated across a number of areas. These range from co-ordinating public health responses to flu pandemics to joint working between agencies to support people back into work.

1.46 The bid for the Commonwealth Games in Glasgow in 2014 was a success for Glasgow, for Scotland and for the UK, and is a good example of the close collaboration between the two governments. According to independent evaluation[44] an important part of the bid's success came down to the ability of Scotland's two governments to co-operate, draw on shared resources and learn from one another. This included sharing the UK's experience of running the London Olympic Games, the co-operation of UK Government agencies in processing high volumes of visa and work permit applications, and access to the UK's only accredited facilities for dope-testing in London.[45] As the evaluation makes clear, it was the investment and in-house expertise of the Scottish Government and Glasgow City Council, coupled with the benefits of being part of the wider partnership of the UK that was critical to bringing the Games to Glasgow.

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[42] See guidance provided on the Scottish Government website: www.scotland.gov.uk/About/Government/Sewel/KeyFacts. It can also be used where provisions are minor or technical and uncontroversial, for example: the Child Poverty Bill 2009, Bribery Bill 2009, Financial Services Bill 2009–10.

[43] Memorandum of Understanding 2012: www.cabinetoffice.gov.uk/resource-library/devolution-memorandum-understanding-and-supplementary-agreement

[44] *The Report of the CGF Evaluation Commission for the 2014 Commonwealth Games*, www.thecgf.com/media/games/2014/2014_Evaluation_Report.pdf

[45] www.wada-ama.org/Documents/Science_Medicine/Anti-Doping_Laboratories/WADA_Accredited_Laboratories_EN.pdf

1.47 Co-operation on policing (which is almost entirely devolved) and intelligence or organised crime (which is largely reserved) will be critical to the Games and is a crucial part of keeping the citizens of Scotland and the rest of the UK secure. Some examples of how routine collaboration between services across reserved/devolved boundaries enables Scottish police to deliver on local operational priorities – while working closely with UK-wide agencies to deal with UK-wide threats – are examined below.

Co-operating to keep the UK secure

Police: Co-operation between the jurisdictions of Scotland, England and Wales, and Northern Ireland is facilitated by UK legislation that makes extensive provision for cross-border powers of arrest and detention. The current system of mutual recognition of arrest warrants by the courts enables co-operation between police forces across the UK without the need for lengthy administrative processes to arrest criminals in different jurisdictions.

Organised crime: The benefits of the current close working relationship between Scotland and the rest of the UK in tackling organised crime are clear. Long-standing judicial and policing co-operation, and mature collaborative arrangements across a number of agencies, enable a coherent picture of threats to be described and for a prioritised approach to tackling organised criminal groups to be taken.

Counter-terrorism operations: The Security Service is responsible for the covert investigation of intelligence leads, calling on police resources in Scotland or the rest of the UK as required. Where there is an overseas dimension, the Security Service (MI5) relies on the support of the Secret Intelligence Service (MI6) and Government Communications Headquarters (GCHQ). The police service leads on the development of the evidential case. It is this richness of distinctive yet complementary skills brought together by the close working relationship between the Security and Intelligence Agencies and the police which is key to the highly resilient and successful UK model for countering the terrorist threat across the UK.

1.48 As highlighted above, the existing policing and security system within the UK is based on long-established arrangements for inter-agency working between local police forces and UK-wide criminal or security agencies. It is also based on legislation that enables them to operate effectively across the jurisdictions of Scotland, England and Wales, and Northern Ireland. It is unlikely that an equally embedded system would be established between two separate states, and it would be virtually impossible to replicate the same degree of integration. The need to arrest a suspect over an international border between Scotland and England, for example, may need to be facilitated by the Serious Organised Crime Agency (SOCA) or its successor[46] in London and an equivalent in an independent Scottish state before it could be carried out by a local force on either side of the border. Additional processes that would be required to facilitate joint working across international frontiers could therefore have a detrimental effect on the delivery of justice and security across the current territory of the UK.

[46] SOCA is due to be replaced by the National Crime Agency (NCA) under Part 1 of the Crime and Courts Bill.

1.49 Devolution as a system of government therefore facilitates close working between Scotland's two governments. While co-operation between separate states and the exchange of knowledge and expertise could continue across international borders in the event of independence, people in Scotland would lose the benefit of having two governments working closely together to serve their interests. Moreover, many of these processes simply could not take place without international agreements being in place. As such, it is unlikely that it would be as easy to replicate the same level of routine co-operation that is commonplace under devolution between the agencies and governments of the UK and Scotland across an international border.

Conclusion

1.50 The analysis in this chapter has demonstrated that devolution means that Scotland has two governments working in its interests, each in areas best suited to their role. This enables people in Scotland to have the best of both worlds. Devolution allows decisions to be made which reflect different priorities within Scotland in key areas, bringing government closer to people in Scotland. It also allows all citizens to benefit from the collective decision-making processes that are in place to guarantee their security, represent their interests in the world, and ensure that natural and financial resources are shared effectively, wherever they happen to live in the UK.

1.51 It has also shown that devolution is flexible and has been adapted to meet changing circumstances. Many adjustments have been made through the Scotland Act 1998 to achieve this. Significant new powers have also been devolved to the Scottish Parliament through the Scotland Act 2012.

1.52 As demonstrated above, devolution is also an efficient, effective and collaborative form of government. Effective co-operation between Scotland's two governments is built into the fabric of devolution, and exemplified in how they work together on a daily basis.

1.53 That is not to say that people in Scotland will always agree with the way that power is exercised on their behalf either by the UK Government or the Scottish Government. The same can be said for people living in all parts of the UK. Devolution cannot "solve the problems of resources or banish the dilemmas of government,"[47] and nor could any other form of governance in Scotland. But what is at stake in the referendum on independence is not the particular policies of a given government. The choice facing people in Scotland is between what devolution within the UK has to offer and the alternative of independence.

1.54 They are not the same thing, however. Independence is not an extension of devolution, nor does it represent the gradual accretion of powers to a devolved legislature until a new state is born.

1.55 Becoming a new, independent state is a completely different proposition to redefining arrangements within an existing state. The question of what constitutes a state, and how new states are created, is therefore crucial to an understanding of the choice people in Scotland are being asked to make in 2014 and is dealt with in the following chapter.

[47] Foreword to *Scotland's Parliament*, Donald Dewar, 1997

Chapter 2:
What independence would mean: law and practice

Summary

- Should a majority of people in Scotland vote for independence, Scotland would leave the United Kingdom (UK) following a process of negotiations.
- Two of the most important factors determining what independence would mean for the UK and for Scotland in practice are the legal issues associated with state formation and the process for negotiating the terms of independence.
- Independent legal opinion by two of the world's leading experts in international law and the law of state formation concludes that, in the event of independence, the UK would continue and Scotland would form a new, separate state.
- Their analysis cites the overwhelming body of international precedent in support of this conclusion. This includes, within the UK context, the creation of what is now the Republic of Ireland.
- Given this, representatives of the UK Government would enter any negotiations on the terms of independence as representatives of the continuing state of the UK.
- Until the outcome of the referendum is known, neither the UK Government nor the Scottish Government has a mandate to carry out these negotiations which, by their nature, would involve putting the interests of people in one part of the UK above the interests of another part of the UK. All UK Government ministers have a responsibility to the citizens of all parts of the UK, and cannot undertake any activity that would undermine those duties.
- For that reason, neither the UK Government nor the Scottish Government can enter into talks in advance of a referendum on the terms of independence. To do so would involve unpicking the fabric of the UK before people in Scotland have had a chance to have their say in the referendum.
- Clarity about the legal issues associated with statehood and the parameters of the negotiations is critical for an informed debate about the implications of independence for both the UK and Scotland, at home and abroad. The expert Opinion on which this paper is based provides the necessary and clear answer.

Scotland's choice

2.1 Successive UK governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK Government would not seek to prevent that happening.[48] That is why the UK Government sought to reach an agreement on a legal, fair and decisive referendum on independence for Scotland in October 2012, through the Edinburgh Agreement.[49] Should a majority of voters in Scotland vote in favour of independence in that referendum, the UK Government would, in the same spirit, move to initiate negotiations for Scotland's departure from the UK.

2.2 The UK Government has also consistently stated that Scotland could be a viable independent state and Scotland has the right to choose that path. But the UK Government, standing alongside many others, will continue to argue the case that all parts of the UK are better served by staying together.

2.3 Much of the debate around whether Scotland would be better off staying in the UK or leaving it revolve, understandably, around what a new Scottish state might look like and how it would differ from current arrangements within the UK.

2.4 There are two important general factors determining what independence would mean for both the UK and Scotland in practice. These are: first, what the principles set out in international law and modern cases of individual state formation tell us about how new states are formed; and second, how the process for negotiating the terms of independence would work. Both are examined in this chapter.

Legal issues

2.5 In the event of independence, there would be a new state in the international community called Scotland. The question is then: what happens to the state known as the UK? The UK could carry on legally as before, but without Scotland. Alternatively, the UK could cease to exist and two new states could come into being – Scotland, and one comprising England, Wales and Northern Ireland that has not previously existed.

2.6 The answer matters hugely for Scotland because it determines the basis on which the new Scottish state would come into being. If the second proposition is true however, Scottish independence would have profound consequences for the rest of the UK as well, and far more dramatic than has commonly been thought. In this scenario the rest of the UK could not, for example, automatically retain its membership of key international organisations like the North Atlantic Treaty Organization (NATO) or the European Union (EU) because, like Scotland, it would be a new state.

2.7 Given the importance of this issue, in 2012 three departments of the UK Government – the Foreign and Commonwealth Office (FCO), the Cabinet Office and the Office of the Advocate General for Scotland – commissioned detailed independent expert advice. The authors of that advice are Professor James Crawford SC, Whewell Professor of International Law at the University of Cambridge and a world-renowned expert on the law and practice of state formation and issues of state succession and continuation, and Professor Alan Boyle, Professor of Public International Law at the University of Edinburgh specialising in the law of treaties, international law-making and the settlement of international disputes. Their paper – hereafter referred to as

[48] *Scottish Independence: A Practical Guide,* Jo Eric Murkens, Peter Jones and Michael Keating, 2002, pages 12–13 provide one source of reference for the position of key UK ministers from the 1980s onwards.

[49] www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf

'the Opinion' – forms the basis for the analysis contained in this paper and is referred to in detail in this and Chapter 3.[50]

2.8 This analysis has also been informed by the expertise of those sitting on the Advocate General's Forum,[51] which was established to discuss some of the key legal and constitutional issues surrounding the referendum on Scottish independence.

State formation in international law

2.9 Some background about the key legal concepts of state formation is necessary in order to understand these important questions.

2.10 As Professors Crawford and Boyle explain, a state is a legal entity which comprises a people settled in a territory under its own sovereign government and which possesses legal personality under international law.[52] States are the primary subjects of international law, meaning that they are able to enjoy and are bound by rights, duties and powers established in international law, and enter into relations with other states. When a new state comes into existence, by whatever means, it is of fundamental importance that it is recognised by other states. Recognition is a formal, political act, with important legal effects, by which a state accepts the existence of another sovereign state and thus its capacity to contract mutual rights and obligations on the international plane.

2.11 The UK recognises states in accordance with common international doctrine, which is that the entity claiming statehood should have, and seems likely to continue to have: a clearly defined territory with a population; a government which is able to exercise effective control over that territory; and independence in its external relations.[53]

2.12 Despite their technical titles, the concepts of state continuity and state succession in international law – considered comprehensively in the Opinion[54] – are relatively straightforward. Continuity applies where the same state continues to exist despite changes in its territory and population. What Professors Crawford and Boyle refer to as a 'continuator state'[55] therefore continues automatically to exercise the same rights, obligations and powers under international law as the predecessor state. State succession occurs when there is a change of sovereignty over a territory. It is defined in the Vienna Convention on Succession of States as "the replacement of one State by another in the responsibility for the international relations of territory".[56] A successor state, in contrast with a continuing state, does not automatically assume the rights, obligations and powers of the predecessor.[57]

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50 The Opinion can be found in full at Annex A.

51 Information on the Advocate General's Legal Forum can be found here: www.oag.gov.uk/oag/363.html

52 Crawford and Boyle, paragraph 52

53 The UK practice on recognition was set out in a parliamentary answer given by an FCO minister in 1989. *HC Written Answers for 16 November 1989*, volume 160 c.494W. These criteria are consistent with Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which describes the qualifications for statehood as "(a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other States".

54 Crawford and Boyle, paragraphs 16–24

55 This is the technical legal terminology used in the Opinion. In the rest of this paper the simpler terms 'remainder state' or 'continuing state' will be used for the sake of clarity, unless the technical term is required. In the event of independence, the UK without Scotland is referred to as the 'remainder of the UK' or the 'Continuing UK'.

56 Vienna Convention on Succession of States in respect of Treaties, Vienna, 23 August 1978: untreaty.un.org/cod/avl/ha/vcssrt/vcssrt.html

57 Crawford and Boyle, paragraph 24

2.13 This means that issues arising from succession do not arise for continuing states. They remain in the same legal position as the predecessor state. Continuing states, for example, do not have to re-negotiate existing treaties or reapply for membership of international organisations. By contrast, where a successor state is established this gives rise to a host of legal questions about the conditions of succession.[58]

The position of an independent Scottish state and the continuing UK in international law

2.14 Professors Crawford and Boyle set out three possible outcomes under international law for an independent Scotland:

- The remainder of the UK is the continuing state and would exercise the existing UK's international rights and obligations, and Scotland becomes a new successor state.[59]
- Two successor states are created and neither would continue the international legal personality of the UK, which would cease to exist.[60]
- The remainder of the UK is the continuing state and Scotland reverts to the status of the pre-1707 Scottish state.[61]

2.15 As the Opinion makes clear, the overwhelming weight of international precedent suggests that the first outcome is the most likely: **the remainder of the UK would be considered the continuing state and an independent Scotland would be a new state**.[62]

2.16 Professors Crawford and Boyle point to four factors that underpin this conclusion:

- First is **specific precedent**. The majority of cases in the 20th century demonstrate that continuity of one state rather than dissolution is the norm. Significant examples include the UK/Ireland (1922), British India (1947), Malaysia/Singapore (1965), Pakistan/ Bangladesh (1971–72), Union of Soviet Socialist Republics (USSR) (1990–91), Ethiopia/Eritrea (1993), Serbia/Montenegro (2006) and Sudan/South Sudan (2011).[63] The case of Ireland is the only direct example of the formation of an independent state from a territory within the UK.
- Second is the role of **population and territory**. According to Professors Crawford and Boyle, this has been an important determinant in other cases.[64] In the event of Scottish independence, the continuing UK would retain the majority of both the population (92 per cent) and the territory (68 per cent) of the UK, as well as retaining the UK's institutions of government. These facts would clearly support a claim to continuity with the UK.[65]

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58 Ibid.

59 Crawford and Boyle, paragraphs 50–70

60 Crawford and Boyle, paragraphs 71–94

61 Crawford and Boyle, paragraphs 95–115

62 There can be only one continuator state because, as a matter of law, the continuator is the same state as the predecessor. It is therefore not credible to suggest that Scotland could assert a right to be the continuator of the UK in preference to England, Wales and Northern Ireland, bearing in mind the fact that the remainder of the UK would retain the majority of the UK's territory, population and governmental institutions. Crawford and Boyle, paragraph 50. Nicola Sturgeon, Deputy First Minister, stated in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013 that Scotland "would ... inherit treaty obligations and so on" and that she is "arguing the position of co-equal states."

63 Crawford and Boyle, paragraphs 53–64

64 Crawford and Boyle, paragraph 68.1

65 Crawford and Boyle, paragraph 69

- Third is likely **recognition by other states**. As outlined in 2.10 above, this would be a critical factor. The Opinion references and concurs with previous statements made by the UK Government that the UK would be recognised as the continuing state by the rest of the international community in the event of Scottish independence.[66] Other expert authorities on legal and constitutional matters support this conclusion.[67] The UK's role in the international order would clearly be an important factor in this regard. The UK: is one of only five permanent members of the United Nations (UN) Security Council; is a nuclear weapons state under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT); is a key member of NATO; is a member of the EU; and has been involved in up to 14,000 treaties, multilateral and bilateral.[68] In the unlikely event that the UK should be regarded as a successor state, its extinction as a legal entity (which is what this would entail) would cause huge disruption within the international institutional framework, particularly in respect of the UN Security Council and the NPT.

- A final factor, closely related to the point about recognition, is a general requirement for **mutual consent** in the rare cases of dissolution to come about through negotiated separations. Professors Crawford and Boyle point out that dissolution into two new states is unlikely to be accepted by the international community in the case of Scotland and the UK unless the remainder of the UK agreed.[69] As outlined above, the Opinion notes that the UK Government has already stated its view that the international community would recognise the UK as the continuing state, and concurs with it.

2.17 On the final point, in practice, it is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK by voting the state out of existence. Therefore UK consent to the creation of two new states is unlikely.

2.18 The second of the three possible scenarios – that the UK's existence in international law would come to an end and two entirely new states would be created – has been advanced by the First Minister of Scotland, who has suggested that both new states

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66 Crawford and Boyle, paragraph 70

67 Written evidence from Dr Jo Eric Khushal Murkens, London School of Economics and Political Science Department of Law and Professor Robert Hazell, Director Constitution Unit School of Public Policy to the House of Lords Economic Affairs Committee, 24 September 2012: www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/643/m13.htm

Written evidence to the House of Commons Foreign Affairs Committee from Professor Nigel White, School of Law, University of Nottingham: www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/643/m14.htm

Oral evidence to the House of Commons Foreign Affairs Committee including Professor Matthew Craven, Professor of International Law and Dean of the Faculty of Law and Social Science, School of Oriental and African Studies: www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/uc643-i/uc64301.htm

68 The FCO online treaty database: www.fco.gov.uk/en/publications-and-documents/treaties/uk-treaties-online/. There were 13,988 treaty (as opposed to Memorandum of Understanding) records as at 25 January 2013; 10,813 of these are bilateral. Of that total, some 2,200 are EU treaties.

69 Crawford and Boyle, paragraph 93

would inherit "exactly the same international treaty rights and obligations".[70] It is not clear whether the Scottish Government is trying to suggest that both states would be 'continuators' of the UK. However, as already noted above in paragraph 2.14 (footnote 62), the analysis in the Opinion makes clear that this could not happen under any scenario – it is not legally possible.

2.19 Some academics and legal practitioners have also indicated that the creation of two successor states would be the most likely scenario.[71] However, in international practice there are only two recent cases of states that have dissolved without leaving a continuing state and neither of these cases is a direct precedent for the position of an independent Scotland. These are Czechoslovakia and the Federal Republic of Yugoslavia (FRY), and are considered below.

The two exceptional cases of dissolution in recent history

Czechoslovakia: In 1992–93, both of the constituent republics of Czechoslovakia agreed in advance that it would be dissolved and that the Czech Republic and Slovakia would be successor states. Neither claimed to continue its identity. However, as outlined in the Opinion, the UK Government has already stated its view that the international community would recognise the UK as the continuing state in the event of Scottish independence – a view with which Professors Crawford and Boyle agree. The parallels are also limited by the fact that there was no referendum – the separation was based on legislation which was a product of agreement between representatives of the two former constituent republics.

The Federal Republic of Yugoslavia: The second recent example is the dissolution of the former Yugoslavia into five states. The FRY claimed initially to be the 'continuator' of the Socialist Federal Republic of Yugoslavia (SFRY). However, this claim was not accepted by the other successor states of the former Yugoslavia or by the international community and would not apply in the case of Scotland and the UK, as made clear in the Opinion. There were several reasons for this. The circumstances of ethnic conflict in which the dissolution took place are evidently very different to those in the UK today, and there was a lack of separation agreements with the other former Yugoslav republics. The "federal government organs that represented the SFRY had also ceased to function".* Importantly, the UN Security Council considered that the state formerly known as the SFRY had ceased to exist and claims to the contrary had "not been generally accepted".

* Crawford and Boyle, paragraphs 79–92

2.20 Professors Crawford and Boyle conclude that these relatively rare examples of dissolution, dependent as they are on the specifics of each case, do not cast any doubt on the

[70] First Minister of Scotland, Alex Salmond speaking in an interview with Jon Snow, 26 November 2012: "Because the UK was formed by the international treaty that allied Scotland and England, if that Treaty is dissolved, as it would have to be, by agreement, post the 'Edinburgh Agreement' – it's not a secession we're talking about, it's an agreement that's been enshrined in the 'Edinburgh Agreement' that both sides will accept the result of the people – if that partnership is dissolved, as I think it should be ... then both parties to that stand equal to each other, and equal to any other relationships that they have." Scottish Government spokesperson quoted in *The Guardian*, 24 October 2012: "Scotland will inherit exactly the same international treaty rights and obligations as the rest of the UK, as equal successor states." Alex Salmond in an interview with Andrew Neil, in March 2012: "We'd be a successor state, one of two successor states." Nicola Sturgeon, Deputy First Minister, stated in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013 that Scotland "would ... inherit treaty obligations and so on" and that she is "arguing the position of co-equal states".

[71] Dr Andrew Blick, University of Kent and Senior Research Fellow at the Centre for Political and Constitutional Studies, King's College London: www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/uc643-i/uc64301.htm

conclusion that the most likely outcome is that the remainder of the UK would be recognised as continuing the international legal personality of the UK.[72]

2.21 The third possibility that has been suggested is that the status of Scotland before 1707 and the Acts of Union which formed the Kingdom of Great Britain would have relevance to the status of Scotland in the event of independence in the 21st century.[73] In the interview in November 2012 already cited (footnote 70), for example, the First Minister of Scotland stated that "because the UK was formed by the international Treaty that allied Scotland and England, if that treaty is dissolved, as it would have to be, by agreement … then ` both parties to that stand equal to each other, and equal to any other relationships that they have".

2.22 However, the Opinion makes clear that the status of Scotland and England in 1707 has no bearing on the determination of issues relating to continuity and succession under international law in the 21st century and in the event that Scotland were to separate from the UK.[74] The status of the continuing UK and Scotland in the event of Scottish independence would be determined according to the modern principles of international law described above. While there may be some debate about whether the Treaty and Acts of Union constituted a treaty as a matter of international law at the time that they were drafted, they ceased to have any effect in international law as Scotland ceased to be a separate state following the creation of the Kingdom of Great Britain.[75]

2.23 The Scottish Government may also be seeking to argue that an independent Scottish state could 'revert' to the pre-1707 Scottish state following independence. There are modern cases of 'reversion' but normally in very different circumstances, often involving illegal annexation of territory. Kuwait, following the ending of the Iraqi invasion in 1990–91, is one such example. There is little evidence to suggest that, even if such a claim were made in Scotland's case, it would have any specific legal consequences in international law after a gap of more than three centuries.[76] Pre-1707 Scotland was evidently not a member of the UN or the EU, nor was it a party to modern treaties. Moreover, and perhaps most importantly, regardless of the merits of the argument that Scotland could assert identity with the pre-1707 Scottish state, it would not affect the status of the remainder of the UK's claim to continuity in international law (as outlined in paragraph 2.15–2.16 above).[77] This means that, even in the unlikely event that the 'reversion' argument was accepted internationally in relation to Scotland, it would make little if any practical difference to the position of the continuing UK.

Conclusions from international law

2.24 Professors Crawford and Boyle conclude that the third model described above, while historically interesting, is unlikely to be correct. Even if it were, it would be of no practical consequence because it leaves the remainder of the UK as the continuing state. Equally the second model of dissolution is not, as their analysis has shown, a realistic scenario where any relevant precedent or legal argument can be advanced in its support.

2.25 The Opinion is therefore clear in its assessment that, in the event of Scottish independence the remainder of the UK would be considered the continuing state and Scotland would be

[72] Crawford and Boyle, paragraphs 65–70

[73] Op. cit., Alex Salmond speaking in an interview with Jon Snow, 26 November 2012

[74] Crawford and Boyle, paragraphs 109–115

[75] Ibid.

[76] Ibid.

[77] Ibid.

a new state.[78] It concurs with the UK Government's previously stated judgement that this situation would be recognised by the international community. That view is also consistent with the findings of in-depth work carried out by other leading constitutional experts.[79]

2.26 This is not an assessment that precludes Scottish independence. On the contrary, if people in Scotland vote for independence, Professors Crawford and Boyle have mapped out a clear legal route for Scotland to take its place in the global community of independent states. The objective and comprehensive analysis demonstrates what would happen in law if Scotland were to become independent. This is a good foundation for assessing the potential implications of independence. The UK's position as the continuing state gives rise to a number of practical consequences which are examined more fully in the following chapter.

The negotiations process and its parameters

2.27 Before examining those consequences, it is necessary first to explore the other major factor that would affect how an independent Scotland would come into being. As Professors Crawford and Boyle and other scholars have stated, a process of negotiations would be needed to establish a new Scottish state.[80] It is therefore worth exploring how the negotiations themselves might work, for the purposes of an informed debate.

2.28 It is not possible to predict with any confidence the precise way in which any such negotiations would play out now, because the circumstances in the event of a vote for independence in the referendum would be very different. However, drawing on constitutional practice within the UK, key principles in international law and relevant lessons from what has happened in other countries (albeit often under very different circumstances), six general conclusions can be established.

2.29 **First, while the negotiations took place Scotland would remain part of the UK with its own devolved Parliament and Government.** As the Scottish Government has said,[81] independence would not take effect immediately after the referendum. So for a time Scotland would continue, as before, under the same laws and legal framework.

2.30 **Second, the negotiations would be entered into in good faith.** Throughout history new states have come into being, often in a context of conflict or unrest. The situation in Scotland is different – both sides are committed to respecting the democratic wishes of people in Scotland, and the referendum result. In the event of a majority vote for independence, this would mean engaging in negotiations to give effect to the desire of people in Scotland to establish their own separate state.

2.31 **Third, the negotiations would be of a completely different nature to previous discussions within the UK about establishing or modifying the devolution settlement.** The Scottish Government has, in the past, drawn a comparison between the forthcoming independence referendum and the 1997 devolution referendum.[82] More recently, the Scottish Government has suggested that the discussions leading to the Edinburgh Agreement and transfer of powers for holding a referendum in 2014 would be

[78] Crawford and Boyle, paragraph 70

[79] Op. cit., Murkens, Hazell, White, Craven

[80] Crawford and Boyle, paragraph 47

[81] www.scotland.gov.uk/Resource/0038/00386122.pdf, page 28; Op. cit., *Scotland's Future*

[82] BBC News, 6 June 2011: A spokesman for Alex Salmond said: "Acknowledged experts have made the democratic position clear, and the people of Scotland have the right to choose independence on the basis of one referendum agreed by the Scottish Parliament, on a published proposal, which is then implemented – exactly as was done for devolution in 1997." See: www.bbc.co.uk/news/uk-scotland-13671907

a "template for a post-referendum transfer of powers from Westminster to Scotland".[83] However, there is a fundamental difference between the processes to establish and maintain devolution within the UK – which have altered the structure of government within a single state – and those that would be necessary to establish a new, independent Scottish state.

2.32 In 1997, the then UK Government was able to put a devolution proposal to establish a Scottish Parliament before voters in the knowledge that the UK Parliament could then enact the details based on discussion and a democratic vote involving representatives of the whole UK. As a result, the proposals published in a UK Government White Paper were endorsed in a referendum by people in Scotland, and these were swiftly enacted.

2.33 That process, and subsequent changes to the devolution settlement (including through the Scotland Act 2012 and under the Edinburgh Agreement), has involved the transfer of powers and responsibilities within a unitary UK state, which has a single international border and a single voice to represent its interests in the international community. No international organisations or other states have needed to be involved, then or since. The UK Government also acts on behalf of everyone in the UK in those matters.

2.34 The process for independence negotiations would be entirely different. It would involve discussion over the division of many of the responsibilities, institutions, processes, assets and liabilities that are currently shared throughout the whole of the UK across what would become an international frontier. It would involve two parties negotiating on behalf of what would become two separate states with their own citizens. Unlike in devolution discussions, it may require UK Government negotiators to prioritise the interests of those who would remain in the UK over people living in a part of what would become a separate state.

2.35 **Fourth, there would be legal and international complexities.** Some of the issues negotiated would be the subject of international law rules and principles, and/or to scrutiny by international actors (either institutions or other states). This would include, for example, determination of the maritime boundary and the allocation of national debts and assets (including the UK's fixed strategic defence assets). Many of the issues under negotiation would also be subject to EU law.[84]

2.36 The UK's status as the continuing state and Scotland's status as a successor state would have significant consequences for Scotland's role in international organisations. In the event of independence, the Scottish Government have suggested that the Scottish Parliament would have a leading role in passing legislation to give effect to independence. The Scottish Government has also implied that it would be within the UK Parliament's power to provide for "the transition of Scotland's status in the EU from membership as part of the UK to independent membership" and "for the continuing application to Scotland of international arrangements with other countries and international organisations".[85] But it would not be in the gift of the UK Parliament – or indeed the Scottish Parliament – to decide these matters. They would be determined by an independent Scottish state's position in international law as a successor state and by negotiations with international organisations.

2.37 These issues are explored fully in the following chapter but it is important to note that, in negotiating membership of the EU, an independent Scottish state would not automatically

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[83] Op. cit., *Scotland's Future*, page 3

[84] *Scottish Independence: A Practical Guide,* Jo Eric Murkens, Peter Jones and Michael Keating, 2002, page 79

[85] Op. cit., *Scotland's Future*, pages 15–16. "The constitutional platform will enable the transfer of sovereignty to Scotland" [in the matters outlined above].

'inherit' the UK's opt-outs, and this would have important domestic implications (for example in relation to currency and border controls).[86]

2.38 Negotiations would therefore be required between representatives of the continuing UK and an independent Scottish state on a host of complex and often interdependent issues, which may also require the involvement of other states and international organisations, such as the EU, in a number of important areas.

2.39 **Fifth – and partly for some of the reasons already discussed – the scale and complexity of the negotiations task would be considerable. The talks could take a long time.** As the UK is a highly integrated political, economic and social union, founded on a long shared history, many of the arrangements in place for governing the UK would need to be reviewed and decisions reached on if and how these may need to be divided.[87]

2.40 There are a number of high-level issues that would need to be discussed early in any separation negotiations. Some have already been mentioned, including the apportionment of debts and assets, and defence arrangements. Others are likely to include fiscal, economic and monetary policy, arrangements for national security, citizenship and border controls.[88] There would also be a huge range of other areas which would have to be covered in the talks, in both the international and domestic spheres.

2.41 This means that the negotiations could take time. The Scottish Government has stated that independence would not immediately follow a referendum and envisages that negotiations would be complete in time to establish an independent Scottish state by March 2016.[89] The importance of Scotland's position in relation to the EU and the implications for a whole range of key issues, from currency to fish quotas, would mean that the length of time that EU negotiations took would be a determining factor for the length of negotiations overall. The duration of the negotiations is therefore impossible to predict now.[90]

2.42 The dissolution of Czechoslovakia took place in very different circumstances, but some relevant parallels may be drawn and these are examined in the following box.

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[86] This is explored fully in Chapter 3, paragraph 3.39.

[87] Op. cit., Murkens, Jones and Keating, page 79

[88] See for further details, 'Czechs and Slovaks Define Post-Divorce Relations', Pehe, *RFE Research Report* Volume 1,. 13 November 1992

[89] Op. cit,, *Scotland's Future*, page 16

[90] This point is evident from a paper published by Sir David Edward, former European Court of Justice judge. While his views on the question of Scotland's EU membership differ from those presented in this paper, he points out that: "The length and complexity of the negotiation and ratification process cannot be predicted in advance. In part, it would depend on the goodwill of those involved."
See: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx

The process of dissolution in Czechoslovakia

The circumstances of Czechoslovakia in the early 1990s were clearly very different to those in the UK today. Czechoslovakia had a shorter, less integrated federal partnership, and had been under Soviet domination for four decades. In practice, this meant dissolution took place while many of the things that we take for granted in the UK (for example a free market, democratic government) were only then being established.* There were other crucial differences. First, two entirely new states were created through dissolution. This meant that neither state continued, in contrast to what would be the case for the UK in the event of Scottish independence. Second, there was a strong desire on the part of the international community to accept a solution that avoided a risk of conflict. Finally, Czechoslovakia was not a member of the EU.

However, while the negotiations process that took place cannot provide a template for what would happen in the event of Scottish independence, there are some interesting points to note. The dissolution required 31 overarching treaties and around 2,000 sub-agreements between the two parties.** Priority matters requiring negotiation included monetary arrangements, border regulations and residency requirements, mutual recognition of documents issued by either republic, the use of archives, social security arrangements, the employment of citizens from either country in the other, healthcare services and environmental protection.†

Although the dissolution took legal effect within just six months of agreement upon separation, many important outstanding issues were not resolved until 2000, some seven years after the split.‡ Given the differences in historical context, size, level of integration and international position of Czechoslovakia compared with the UK, it is likely that both the number of issues to be addressed and the time required to negotiate them would be considerably greater in the event of Scottish independence.

* For further details, see: 'Slovak Nationalism and the Break-Up of Czechoslovakia', Paal Sigurd Hilde, *Europe-Asia Studies* Volume 51, Number 4, 1999, pages 647–656 moduly.outly.cz/posycze1/Hilde_Paul_1999.PDF

** *Issues Around Scottish Independence,* David Sinclair, Constitution Unit, University College London, 1999. : www.ucl.ac.uk/spp/publications/unit-publications/51.pdf; Professor Robert Hazell, Constitution Unit, University College London, writing in *The Guardian*, 29 July 2008: www.guardian.co.uk/commentisfree/2008/jul/29/snp.scotland; 'The Dissolution of the Czech and Slovak Federal Republic', 1993, cited in *The Breakup of Czechoslovakia, Research Paper*, R. Young, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1994, page 42

† See, for further details, 'Czechs and Slovaks Define Post-Divorce Relations', Petie, *RFE Research Report* Volume 1, Number 45, 13 November 1992

‡ *Scottish Independence: A Practical Guide,* Jo Eric Murkens, Peter Jones and Michael Keating, 2002, pages 99 and 211

2.43 **Finally, the negotiations cannot be conducted in advance of the referendum.** The analysis here assessing the nature, complexity and duration of independence negotiations might appear to make a case for setting out some agreements in advance of the referendum superficially attractive. On a closer examination, however, this is not a realistic option.

2.44 Under paragraph 30 of the Edinburgh Agreement, both the UK Government and Scottish Government are committed to continuing to work together in good faith in light of the outcome of the referendum, whatever it is. As the UK Government has already stated, this means that in the event of a majority vote for independence, the UK Government would

engage in a process to bring it about.[91] But that does not mean that representatives of the continuing UK would or could facilitate everything that the Scottish Government has said it hopes to achieve through independence or that the details of that process can be spelled out now.

2.45 Both governments agree that there can be no 'pre-negotiations' on what the terms of independence might be before the referendum takes place.[92] For the UK Government's part, this is because of a profoundly important principle arising from the fact that the UK Government is one of Scotland's two governments. UK Government ministers represent the whole of the UK, including Scotland, and serve the interests of all its citizens. As such, the UK Government has direct responsibility for many of the key areas likely to feature heavily in post-referendum negotiations, and must continue to represent the interests of people in Scotland now.

2.46 In any negotiations following a vote for independence in the referendum, it would be the role of representatives of an independent Scottish state to seek the optimum arrangements for those who would live in it. Similarly, the role of the representatives of the UK would be to represent the interests of those who would remain in England, Wales and Northern Ireland. Until the outcome of the referendum is known, neither the UK Government nor the Scottish Government has a mandate to carry out these negotiations. For the UK Government it would mean abrogating its responsibilities as part of the Government of Scotland. For the Scottish Government, it would mean assuming positions on reserved matters that are the responsibility of the UK Government without any mandate to do so.

2.47 As the Secretary of State for Scotland has said, it is for that reason the UK Government cannot, in good faith, plan for or hold negotiations before the referendum, where it would potentially be required to put the interests of the people of the rest of the UK above those of the interests of people in Scotland.[93] To do so now would be to start unpicking the fabric of the UK before people in Scotland had exercised their democratic right to choose whether to remain part of it or not.

2.48 As the Scottish Government has said, the process itself and the timetable for establishing a new independent Scottish state would also need to be agreed between the UK and Scottish Governments after the referendum.[94]

2.49 That is not to say that there cannot be some clarity about the process that would be followed in the aftermath of a referendum. The account given in this chapter of the parameters in which any negotiations would take place is an important factor in providing for an informed debate.

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[91] Secretary of State for Scotland, Rt Hon. Michael Moore MP, 18 December 2012, Lords Select Committee on Economic Affairs: The Economic Implications for the United Kingdom of Scottish Independence, page 4: www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/ucEAC20121218Ev20.pdf

[92] Letter from Deputy First Minister, Nicola Sturgeon MSP, to Deputy Prime Minister, Rt Hon. Nick Clegg MP, December 2012

[93] "The UK Government works for the whole of the UK, including Scotland, and we are deeply committed to the United Kingdom. I and my ministerial colleagues represent the whole of the UK; we cannot – and should not – negotiate or plan in the interests of only one part of it." Michael Moore MP, Secretary of State for Scotland, January 2012

[94] Op. cit., *Scotland's Future*, page 5

Conclusion

2.50 The analysis in this chapter points to a highly significant conclusion. Professors Crawford and Boyle are clear that the legal position on state formation means that the remainder of the UK would continue as the same state and Scotland would form a new state. This has some important implications for the continuing UK, which would retain the same rights, obligations and powers on the international stage. Domestically, the implications of independence for the continuing UK would also be limited. By contrast, independence would require Scotland to seek new international and domestic arrangements to replace or replicate those that currently exist in Scotland as of right. These are explored in the next chapter.

2.51 The post-referendum negotiations would also be critical in determining what those new arrangements would be. Those negotiations cannot begin until after the referendum, and this means that inevitably there will be some uncertainty on the details of independence before the referendum.

2.52 The uncertainty around those negotiations does not preclude an informed debate – rather it calls for recognition of what it is possible to say conclusively now.

Chapter 3:
Implications of independence: legal and practical issues at home and abroad

Summary

International organisations and treaties

- The findings of the legal Opinion show that as the continuing state, the United Kingdom's (UK) membership of international organisations (including the European Union (EU), the North Atlantic Treaty Organization (NATO), the International Monetary Fund (IMF), the G8 and G20) and treaties would be largely unaffected by Scottish independence.
- By contrast, an independent Scottish state would be required to apply and/or negotiate to become a member of whichever international organisations it wished to join as a new state. In some cases this would be straightforward; in others, notably the EU, it would not. It would not, as the Scottish Government has suggested, be within the gift of the Scottish Parliament or the UK Parliament to decide these matters.[95]
- The outcome of negotiations between international bodies and other states would have a significant impact on the governance of an independent Scottish state, for example in relation to its arrangements for defence, trade and border controls. The question of an independent Scotland's membership of the EU would be very complex and of fundamental importance given the range of legal, economic and social policy issues flowing from it.

EU membership

- Conclusions from the legal Opinion indicate that as the remainder of the UK would be the same state as the existing UK with the same international rights and obligations, its EU membership would continue. Crucially, it would continue on existing terms, including all the UK's current opt-outs (for example, on currency or the rebate).
- There is no prospect that an independent Scottish state would automatically become a new member of the EU upon independence because there is no explicit provision for this process in the EU's own membership rules. Neither would an independent Scotland automatically 'inherit' the UK's opt-outs.

[95] Op. cit., *Scotland's Future*, pages 10 and 15–16

- In practice, rather than being purely a matter of law, the mechanism for an independent Scotland becoming a Member State of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States.
- The key point is that the process would be very complex and involve detailed discussions. The timing and – more importantly – outcome of these negotiations simply cannot be predicted now.

Domestic implications

- It would be primarily up to representatives of the new independent Scottish state to decide what domestic arrangements they would seek to establish for governing Scotland.
- But one important factor in determining those arrangements arises from the position regarding the EU. Whatever the process that would have to be agreed for negotiating Scotland's EU membership, the potential loss of the current UK opt-outs would have significant consequences.
- A second crucial factor relates to the institutions supporting a new Scottish state. The legal position is clear that the bodies that support the UK now – for example the Bank of England – would continue to operate on behalf of the remainder of the UK on the same basis as before Scottish independence. Any requests by an independent Scottish state to make use of them would require the agreement of the continuing UK and would need to form part of the negotiations process.
- Finally, unpicking the UK's institutional and governmental framework would be an enormous task. As an indication of the scale and complexity involved, in order to perform the same functions that are currently provided by the UK, the government of an independent Scottish state may need to create up to four times as many Scottish public organisations as currently exist.

Independence for Scotland – the international dimension

3.1 The previous chapter examined the underlying law and practice of how a new Scottish state would come into being – based on the expert Opinion provided by Professors Crawford and Boyle – and the parameters of the negotiations process required to bring this about. This chapter examines the international and domestic implications that arise from this analysis.

3.2 It is worth starting with a consideration of some of the key international implications that flow from the legal position of an independent Scottish state and the continuing UK in the event of independence. This is because the outcome of negotiations with international bodies and other states would have a significant impact on the governance of an independent Scottish state. That would include, for example, its arrangements for defence, trade and border controls. The question of an independent Scotland's membership of the EU would be very complex and of fundamental importance given the range of legal, economic and social policy issues flowing from it and therefore merits detailed consideration.

Membership of international organisations

3.3 The UK occupies a unique position in international affairs: the product of its history, culture, economic weight, military strength and position at the centre of a series of overlapping networks.[96] As evidenced in Chapter 2, since the remainder of the UK would be the continuing state it would automatically retain the rights, obligations and powers of the UK under international law. The detailed Opinion published alongside this paper also makes clear that the remainder of the UK would therefore be regarded as continuing the UK's membership of all international organisations of which it is currently a member.[97]

3.4 This includes the UK's permanent membership of the United Nations (UN) Security Council and its status as a 'nuclear weapons State' under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The recognition of Russia as the continuing state of the USSR sets a clear precedent in this regard. The remainder of the UK would also continue the UK's membership of other organisations such as NATO, the IMF and the EU (albeit with some necessary adjustments within the EU consequent upon its reduced population and territory).[98] The central role the UK plays in some of these organisations is explored in the box below.

[96] The UK's international links can be seen in the DHL *Global Interconnectedness Index 2011*: www.dhl.com/content/dam/flash/g0/gci/download/DHL_GlobalConnectednessIndex.pdf

[97] Crawford and Boyle, paragraph 70

[98] An example of matters falling within such potential 'adjustments' are contained within EU Protocol (No 36) on Transitional Provisions. This Protocol covers such matters as transitional Council voting weights, allocation of members of the Economic and Social Committee and allocation of members of the Committee of the Regions. Alterations may also need to be made in secondary legislation to change the number of Members of the European Parliament in line with a change in the remainder of the UK's population.

The UK's membership of international organisations

United Nations (UN): The UK is one of five permanent members of the UN Security Council. Permanent membership of the Security Council gives the UK a strong voice in world affairs and a veto over Security Council resolutions. The UK is therefore central to one of the most important collective decision-making bodies in international affairs and a member of all the UN's Specialised Agencies. Its influence, and the size of the UK's contributions to the UN budget, ensure that the UK can make a significant contribution to institutional reform, helping the UN work effectively for its members.

European Union (EU): The UK is one of the EU's largest Member States, a fact reflected in the composition of the EU's two legislative bodies: the Council of the European Union and the European Parliament (EP). The UK also has a set of opt-outs in important areas that are not available to most Member States or new applicants (see box on page 50 for details).

North Atlantic Treaty Organization (NATO): The NATO alliance has been the cornerstone of the UK's defence for decades. Being one of NATO's largest members means that the UK has significant influence within the alliance, as well as recourse to the collective resources and security the alliance provides to members. It forms the bedrock of the UK's defence through members' assurance of collective defence against attack, as well as delivering crisis management capability and operations to address threats worldwide that might affect NATO members (e.g. Afghanistan, the Balkans and anti-piracy off the Horn of Africa).

G7/G8/G20: As one of the world's largest economies, the UK is a member of the G7, G8 and G20. Within these bodies the UK has the power to shape responses to global issues, and played a leading role in the response to the financial crisis. Its membership contributes to the UK's strong voice in world affairs, from economic, finance and trade policy, to social, security and environmental issues.

International Monetary Fund (IMF): The UK is a founding member of the IMF, one of the most important financial institutions in the world. It is one of eight members with a single seat on the Executive Board, enabling the UK Government to influence its priorities. Through its role in the IMF, the UK helps to foster global monetary co-operation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

3.5 For successor states, like a potential independent Scotland, the rules and practices of individual bodies govern the terms on which they may join international organisations. As Professors Crawford and Boyle make clear, in principle, an independent Scottish state would therefore be required to apply to become a member of whichever international organisations it wished to join as a new state.[99] In some cases the question of an independent Scotland's membership would be likely to be straightforward; in others, notably the EU, it would not.

3.6 As the Opinion points out, the UN Charter, for example, makes no provision for succession to membership and a new state such as an independent Scotland would need to be formally admitted in its own name. This is consistent with international practice regarding successor states, from Pakistan and Burma in 1947 to the case of South Sudan in 2011.[100] In practice, accession to the UN would almost certainly be straightforward in the circumstances of Scottish independence, particularly if the continuing state – the remainder of the UK – supported the application, which it would. As the five permanent

[99] Crawford and Boyle, paragraph 133

[100] Ibid., paragraphs 126–33

members of the UN Security Council are fixed by Article 23 of the UN Charter, an independent Scottish state would not be a permanent member of the Security Council.

3.7 Membership of some other international organisations depends on meeting the relevant criteria. For example, if an independent Scottish state decided that it wanted to be a member of NATO, the North Atlantic Council (NAC), on which all 28 member states are represented, would need to decide whether or not it would meet the criteria for membership.[101] Decisions of the NAC are agreed upon on the basis of unanimity. There is therefore no guarantee that an independent Scottish state could automatically join NATO should it so wish.

3.8 It is therefore evident from the Opinion that an independent Scottish state would not be able to 'inherit'[102] membership of key international organisations and – through them – the UK's pre-eminent position in international affairs, its global impact and reach. Future Scotland analysis papers in the series will examine the UK's membership of key international organisations in further depth, and how Scotland contributes to and gains from them through the UK.

3.9 The question of an independent Scotland's membership of the EU would be very complex and of fundamental importance, given the range of legal, economic and social policy issues flowing from it. It is therefore considered separately below.

EU membership

3.10 The Opinion states that, in principle, the rules of international law apply to the EU as to any other international organisation.[103] Since it is clear that under international law the remainder of the UK would be the same state as the UK with the same international rights and obligations, its EU membership would continue.

3.11 The EU is founded on the EU Treaties which apply to Member States who have agreed and ratified them. Under the provisions of those Treaties, the UK is one of those Member States and would continue to be so even in the event of the loss of some of its territory.[104] No treaty amendments would therefore be required simply as a result of a change to the territory of the UK.

3.12 Crucially, the UK's membership of the EU would continue on existing terms. That would include retaining the UK's opt-outs on, for example, currency, or the UK rebate (explained in the box below), although there would need to be technical adjustments consequent upon the reduction in the UK's population.[105]

[101] Further details on the requirements for NATO membership and the accession process can be found here: www.nato.int/cps/en/natolive/topics_49212.htm

[102] Recently the Scottish Government's Cabinet Secretary for Culture and External Affairs referred to an independent Scotland coming "into the EU as our own independent member inheriting the responsibilities that the UK has", interview on BBC *Good Morning Scotland*, 28 January 2013. The Deputy First Minister made similar points in a 13 December 2012 statement to the Scottish Parliament: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&mode=pdf, and in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013: Scotland "would ... inherit treaty obligations and so on".

[103] Crawford and Boyle, paragraphs 145–51

[104] Ibid.

[105] As explained in footnote 98 above.

The UK's membership of the EU

The UK is one of the EU's largest Member States, a fact reflected in the composition of the EU's two legislative bodies: the Council of the European Union and the European Parliament (EP). The UK has the equal highest number of votes in the Council (29) and the third largest EP delegation (73 Members of the European Parliament).

The UK has a set of opt-outs in important areas that are not available to most Member States and there is no provision for them to apply to new members. These include opt-outs from the European single currency, the euro, which allows it to keep sterling as its currency, and from the Schengen travel area, which allows it to maintain control of its own borders and immigration policy.

The UK has also negotiated a rebate from the EU budget, worth some £3 billion to the British taxpayer in 2011.

3.13 The key issue therefore relates to an independent Scotland's membership of the EU. As outlined in the Opinion, an independent Scottish state could not automatically[106] become a new member of the EU upon independence because there is no explicit provision for this process in the EU's own membership rules.[107] Neither would an independent Scottish state automatically 'inherit' the UK's opt-outs.[108]

3.14 However, as there is no precedent for one part of a Member State becoming independent and then seeking to become a Member State of the EU in its own right, it is not possible to say with any certainty now what such a process would entail in the event of Scottish independence or how long this might take.[109] In practice, rather than being purely a matter of law, the mechanism for an independent Scotland becoming a Member State of the EU would depend on the outcome of negotiations[110] and on the attitude of other Member States and the EU institutions. Nobody can say with certainty now what the outcome of those negotiations would be.

3.15 Since an independent Scotland would be a new state, as Professors Crawford and Boyle make clear in their Opinion, "it is difficult to see how Scotland could evade the accession process for new states in the EU Treaties".[111] According to Article 49 of the Treaty of the European Union, new states need to apply for membership, obtain unanimous support of the European Council for this request and have membership approved through an accession treaty, ratified by the parliaments of all the Member States.[112]

3.16 The President of the European Commission, the executive arm of the EU, has made an important intervention which has implications for this debate. He said:

> The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be

[106] The Scottish Government has indicated that this would be the case in relation to EU membership. Deputy First Minister Nicola Sturgeon at the Scottish Parliament European and External Relations Committee 11 December 2007: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=1295&i=5786&c=227428&s=automatic

[107] Crawford and Boyle, paragraph 152. Sir David Edward in 'Scotland and the European Union', paragraph 16 also states: "there would be no automaticity of result": www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx

[108] Crawford and Boyle, paragraph 166

[109] Ibid., paragraph 152

[110] Ibid., paragraphs 152 and 156

[111] Ibid., paragraph 154

[112] Ibid., paragraphs 152–84

part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.[113]

3.17 There is an alternative view put forward by some, including the Scottish Government, as well as experts such as the eminent Scottish jurist and former European Court of Justice judge Sir David Edward. This view regards the EU as different from other international organisations because it has its own autonomous body of law.[114] According to this view, the fact that EU law is currently applicable to Scotland (for example, the people of Scotland are currently EU citizens) could have a bearing on the process by which an independent Scottish state could become a member of the EU. In particular, it is argued that there would be an obligation on the continuing UK and other Member States to negotiate the necessary amendments to the treaties prior to independence to enable Scotland to take its place as a Member State and ensure that the existing individual rights of EU citizens were protected.[115]

3.18 It is conceivable that the Court of Justice of the European Union, which is responsible for interpreting EU law, might attach weight to this argument if a case relating to the establishment of a new Scottish state ever came before it. However, as Professors Crawford and Boyle set out, it is unlikely that the Court would ever have an opportunity to consider this matter.[116]

3.19 What is clear on either analysis is that negotiations would have to take place for an independent Scotland to become an EU Member State. The resulting agreement would require the unanimous consent of all existing Member States. There is no way of knowing how long this process would take, but the complexities of the situation suggest that it is likely to take a considerable period of time.

3.20 The outcome of negotiations concerning an independent Scottish state's position in the EU is as uncertain as the process. While it is not possible to say now what would happen in the event of independence, there are two possible scenarios:

- terms are negotiated that representatives of the new Scottish state deem acceptable for EU membership, even if they are less favourable than those Scotland has within the UK; or
- the negotiations do not reach an acceptable arrangement.

3.21 In summary, the UK Government has already said that the most likely consequence for Scotland of leaving the UK is that, as a new state, it would have to apply for EU membership.[117] Overall, having given proper consideration to the evidence and apparently

[113] Letter to the Lords Economic Affairs Committee, 10 December 2012

[114] Deputy First Minister, Nicola Sturgeon: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&i=69449&c=1400991&s=europe; Sir David Edward, a member of the Advocate General's expert Legal Forum, presented a paper setting out these arguments to the group in its meeting in October 2012. A version of this paper can be found on the Scottish Constitutional Futures website: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx; Andrew Scott, Professor of European Union Studies and Co-Director of the Europa Institute in the School of Law at the University of Edinburgh: www.publications.parliament.uk/pa/cm201213/cmselect/cmscotaf/139/120516.htm

[115] Sir David Edward: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx, paragraph 19

[116] Crawford and Boyle, paragraphs 167–83

[117] Speech given by the Advocate General for Scotland, 2 October 2012

competing viewpoints, it is clear that there would not be an automatic or seamless transition from Scotland being an integral part of the UK to becoming an independent Member State of the EU.[118] Some form of application would be required and negotiations on terms of membership would have to ensue. While these negotiations could take place alongside other negotiations leading up to independence, they would inevitably be complex, could well be lengthy and any ensuing treaty of accession would require ratification by all Member States and an independent Scottish state.

International treaties

3.22 International treaties constitute a major source of international law and are critical to establishing the respective rights and obligations of states in relation to many political, economic, military, environmental and other matters. They lie behind virtually every aspect of human activity with an international dimension, from television programme exchange to war and peace; from regional fishing arrangements to contractual obligations and copyright. The UK has been involved in up to 14,000 treaties, bilateral and multilateral, and as the continuing state in the event of Scottish independence all existing UK treaties would continue to apply to the remainder of the UK.

3.23 These treaties are important. They matter to citizens – for example, consular treaties enable UK nationals to get help when they have problems abroad. They matter to business – treaties such as air services agreements allow airlines to operate routes between the UK and partner states, enabling companies to develop across continents and provide new services. Other agreements also help the police and security services keep the UK and its citizens safe by facilitating co-operation across international borders, for example.

3.24 To the extent that a new independent Scottish state wished to succeed to the international obligations of the UK, this would mean that it would have to go through a process of becoming a party to (or confirming its participation in) however many of those treaties, currently applicable to the UK, it wished to join.

3.25 While there are overlaps between them, it may be helpful to think of treaties as falling into three broad categories:

- treaties to which any state can take formal action to become a party as of right, simply by virtue of being an independent state. This includes many multilateral treaties, for example dealing with human rights or humanitarian issues (such as the Geneva Conventions for the Protection of War Victims) or conventions relating to terrorism;
- treaties establishing international or inter-governmental organisations for which there are particular entry or membership criteria or procedures. Agreements establishing the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD) and NATO are examples. These treaties may require negotiations with any new state to determine particular terms of membership relating to that state. The EU is another example of a treaty-based organisation, as explained above; and
- treaties to which a new state might wish to succeed or to conclude with other states, but which may require renegotiation of terms, in particular in this context UK bilateral treaties. Succession to such agreements by a new state would require the agreement of the other state that is party to the treaty. Examples include extradition treaties, mutual legal assistance treaties, double taxation treaties, tax information exchange agreements and aviation agreements.

[118] Sir David Edward, op. cit., paragraphs 16 and 22; Crawford and Boyle, paragraphs 154–6

3.26 As is the case with membership of international organisations, in some areas the process for an independent Scottish state becoming party to existing treaties would be straightforward, but in other cases an independent Scottish state may face some complex issues that would take time to resolve.

3.27 For example, once it became a member of the UN an independent Scottish state could, should it wish to do so, seek to become a party to whichever of the 500 plus treaties deposited with the Secretary General to the UN in which it was eligible to participate. This process should be relatively straightforward for an independent Scottish state.

3.28 Equally, there may be some treaties that an independent Scottish state wished to accede to (or confirm its participation in) where re-negotiations of terms could take some time to reach. For example, the UK currently has agreements on extradition in place with more than 100 countries, either by way of multilateral extradition conventions or agreements, or under bilateral extradition treaties. Negotiating an extradition treaty is a resource-intensive task. The time frame for negotiations can vary greatly and may take a number of years depending on the states involved and the context of the negotiations.[119] But the benefit of having these treaties is that requests do not have to be considered on a case-by-case basis, which can take a significant amount of time. Some examples of each category of treaty to which the UK is party and what they involve are examined more fully in the box opposite.

Examples of different types of treaty

UN treaties: Examples of UN treaties to which a new Scottish state would be entitled to succeed as of right would include the International Covenant on Civil and Political Rights, which guarantees basic human rights for all, the UN Convention Against Torture, or the International Convention for the Suppression of the Financing of Terrorism. Succession to these treaties ensures the protection of citizens under international law as soon as a new state comes into being.

North Atlantic Treaty (multilateral): Before a state can become a party to the North Atlantic Treaty and join NATO, it must meet the criteria for membership. These are set by the North Atlantic Council (NAC), on which all member states are represented. Decisions of the NAC are agreed upon on the basis of unanimity. Should it wish to apply to join, the decision on whether an independent Scottish state could become a member of NATO would need to take careful account of its defence policy, including its intended budget, capabilities, missions and objectives. As NATO is a nuclear alliance, an independent Scottish state's position on nuclear weapons would be a significant factor in determining its membership.

Extradition treaties (bilateral): An extradition treaty governs the process where one territory or state surrenders a suspected or convicted criminal to another territory or state. The UK has extradition relations with more than 100 territories (extradition policy is reserved*). An independent Scottish state would need to define its own extradition policy and create legislation to replace current UK extradition acts before deciding whether it wants to negotiate bilateral treaties with other states. Extradition with European countries would be an issue for negotiation in relation to EU membership.

* Extradition procedures for Scotland differ from the rest of the UK because of its separate legal system. Cases are prosecuted by the Crown Office rather than the Crown Prosecution Service and Scottish ministers make the final decision on whether to extradite an individual.

[119] While treaties with some countries (e.g. Algeria) have taken less than a year to conclude, the UK's extradition treaty with the United States, once agreed, took over four years to ratify.

3.29 The principles governing treaty succession are considered above in relation to existing treaties to which the UK is party and new agreements that an independent Scottish state may wish to conclude with other states or international organisations. A complex set of other cross-border agreements would also need to be reached to replace the existing internal processes governing the UK.

3.30 Arrangements would be needed to cover crucial matters such as intelligence sharing, as well as a wide range of other important practical issues, from securing energy supply to ensuring that transport links operate effectively or providing access to broadcasting content. These would be necessary to ensure that where co-operation was sensible and in the interests of both states it could continue across borders.

Domestic implications

3.31 The UK is a highly integrated and well-established multi-nation state. Under devolution, responsibility for governing Scotland is shared between the UK Government and the Scottish Government. All of the powers and responsibilities of the UK in Scotland would therefore become the responsibility of a new independent Scottish state in the event of independence.

3.32 That would include: security, defence and intelligence; tax administration and welfare expenditure; foreign policy; key parts of energy and transport policy; and a range of other areas including, crucially, macroeconomic policy and monetary policy.

3.33 It would be primarily up to representatives of a new Scottish state to decide what arrangements they would look to establish for governing Scotland. But one important factor in determining those arrangements arises from the position in relation to the EU. Whatever the process that would have to be agreed for negotiating Scotland's EU membership, the potential loss of the current UK opt-outs would have significant consequences.

3.34 A second factor relates to the institutions supporting a new Scottish state and how this would be affected by separation from the UK. Some constitutional background is necessary for an understanding of this important issue. In the UK, the Westminster Parliament is sovereign and the body of law enacted by it forms the basis of the UK's law and practices. At the time Scottish independence became operative, UK parliamentary sovereignty would continue to apply unchanged in the remainder of the UK. The UK Parliament's jurisdiction would no longer extend to an independent Scottish state.

3.35 The laws passed by the UK Parliament would therefore continue to apply in the remainder of the UK as before, unless they were altered by Parliament itself in the course of enacting Scottish independence. This is what happened when the Irish Free State was formed from within the UK in 1922 (an arrangement that allows Ireland to continue to use some UK legislation to the present day). It would be open to an independent Scottish state to continue to apply some or all of the body of reserved laws passed by the UK Parliament, unless and until the Scottish Parliament decided to repeal them. However, an independent Scottish state could not unilaterally retain functions of UK institutions in relation to Scotland, as discussed below.

3.36 The bodies that support the UK in its present form would therefore continue, after Scottish independence, to undertake their functions on behalf of the remainder of the UK. To take two examples:

- **The three security and intelligence agencies:** The Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ) operate lawfully within the UK, and abroad on its behalf, under UK Acts of Parliament passed in 1989 and 1994. Should Scotland become independent the automatic position in law would be that they would continue to operate on the same basis, except that they would have no authority or obligation to act on behalf of an independent Scottish state.

- **The Bank of England:** The Bank's powers are governed by a number of statutes including the Bank of England Acts passed in 1694, 1946 and 1998, the Banking Act 2009 and the Financial Services Act 2012 (from April 2013). As with the security and intelligence agencies, it would continue as before. Under its current constitutional arrangements, the Bank's functions and objectives in relation to monetary policy and financial stability relate to the UK as a whole – including Scotland. Under independence, the Bank's functions and objectives would relate to the continuing UK only. So the Bank would no longer have to consider, for example, the stability of the Scottish financial system – unless and until the Scottish financial position impacted on the continuing UK's financial position, in which case it would be relevant in the same way as any other international trading partner.

3.37 It would be open to representatives of an independent Scottish state to seek to make use of arrangements now operative within the UK should they so wish, although any proposals would need to be considered carefully and may not be straightforward or necessarily in the interests of the continuing UK. The Scottish Government has said that it would be minded to do so, and has made specific reference to the Bank of England and the UK's currency.[120,] Proposals for a formal currency union or for an independent Scottish state to have recourse to the Bank of England's functions could form part of independence negotiations should representatives of an independent Scottish state want to table them, but they would require the agreement of the continuing UK and would be on the condition that they satisfied the economic interests of both parties.

3.38 Some further examination of possible arrangements in an independent Scottish state for currency and border controls illustrates why this analysis is important for understanding how an independent Scotland might work.

The example of currency

3.39 Under EU rules, all new Member States are required to agree to adopting the euro in future unless they negotiate a specific opt-out, as the UK has done. The question of an independent Scotland's EU membership is considered in detail in the analysis of the legal Opinion above, which makes clear that it is far from certain that an independent Scottish state would be able to secure such an opt-out.

[120] Scottish Government Finance Secretary John Swinney, 11 June 2012: "Our framework is one of monetary union with the rest of the UK. Retaining the pound under independence is something that I believe is in the interests of Scotland, the rest of the UK and the stability of Sterling itself." He has also argued that the Bank is "as much Scotland's as anybody else's", BBC News, 11 December 2012: www.bbc.co.uk/news/uk-scotland-scotland-politics-20675705

3.40 The Scottish Government has suggested that an independent Scotland would retain use of sterling.[121] As leading economists have pointed out,[122] if representatives of an independent Scottish state wanted to do this without launching a new currency that would be pegged to the pound, they could either unilaterally adopt the pound, or seek an agreement with the continuing UK for a formal currency union. Under the first option, an independent Scottish state would not be able to have a say in its monetary policy.

3.41 For the Bank of England to include an independent Scottish state in its area of responsibility there would need to be a formal sterling currency union between the continuing UK and an independent Scotland. Forming a formal sterling currency union with the UK would be subject to negotiations between representatives of an independent Scottish state and the continuing UK, and would only be possible if both parties managed to reach an agreement on conditions for the currency union, which satisfied their economic interests. At this stage it is not possible to know what the outcome of such negotiations would be.

3.42 As recent experience of the euro area has shown, it is extremely challenging to combine a formal currency union with full fiscal independence. In practice, negotiations would have to cover arrangements on fiscal policy and financial stability and would be likely to limit any Scottish Government's control over spending and borrowing in a future independent Scottish state.

3.43 A new Scottish currency, either floating or pegged, is not an option currently supported by the Scottish Government and for that reason is not considered here. What this brief analysis demonstrates is that there is no straightforward option or guarantee that Scotland would enjoy similar benefits under independence to those it gains from being part of the UK, with a full monetary, fiscal and political union. The forthcoming Scotland analysis paper on currency will explore this issue in detail.

The example of borders

3.44 An independent Scottish state would be responsible for deciding on the best arrangements to put in place for the control and protection of its borders. It would need to take decisions on how to manage the flow of both people and goods across those borders, and then implement those decisions.

3.45 As mentioned above, the Scottish Government has stated that representatives of an independent Scottish state would seek to maintain the terms of the UK's current EU membership.[123] A critical opt-out that the UK has secured relates to the Schengen free movement area, which abolishes all internal borders within the EU and imposes a common visa and border policy on its members.[124] Membership of the Schengen area has

[121] 'Opportunities for Scotland's Economy', John Swinney, Glasgow Caledonian University, 11 June 2012: www.scotland.gov.uk/News/Releases/2012/06/Scotland-Economy11062012; Alex Salmond, *Today*, BBC Radio 4, 16 January 2013; Nicola Sturgeon, speaking at a *Times* and BBC debate in late May 2012

[122] Professor John Kay's evidence to the House of Lords Committee on Economic Affairs, 22 May 2012: www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/ucEAC20120522Ev2.pdf

[123] The Scottish National Party publication *Your Scotland, Your Future* (January 2012) has made clear that this is its policy in relation to borders: "Like many countries, Scotland has a land border. When we cross to and from England, there are no checks or delays – no customs posts or immigration officers demanding passports. That's the way it has always been, because of the arrangements that exist here in the British Isles between the nations of the UK and Ireland. And that's the way it will stay after independence."

[124] Iceland, Norway, Switzerland and Liechtenstein have also joined the Schengen area, although they are not EU Member States.

been part of the EU legal framework since 1997 and all new members of the EU since this time have been required to join the Schengen area.

3.46 Following the analysis of Scotland's EU membership in paragraphs 3.10 – 3.21, it is by no means certain that an independent Scottish state would be able to negotiate similar opt-outs from Schengen membership to those enjoyed by the UK and the Republic of Ireland. If an independent Scottish state were required to join the Schengen area as part of its EU membership, it would therefore have to implement the border and immigration policies required by the EU. As the UK has no intention of joining the Schengen area, this would involve border controls between Scotland and the continuing UK in order to meet EU rules protecting the security of the Schengen area[125] and for the UK to maintain controls at its frontiers, as allowed for by the Treaty of Amsterdam.[126]

3.47 The UK is a member of the Common Travel Area (CTA). The CTA is the free movement zone that allows people to travel between the UK, the Republic of Ireland, the Isle of Man and the Channel Islands without internal borders for immigration purposes. The CTA arrangement works because its members continue to collaborate on border policies and practices.

3.48 The current Scottish Government has indicated that it would want an independent Scottish state to be in the CTA.[127] However, membership of the CTA would need to be negotiated with the continuing UK and all existing CTA members.

3.49 Membership of the Schengen area is not compatible with membership of the CTA. Therefore, if an independent Scottish state was required to join the Schengen area under the terms of EU membership it would not be able to be a member of the CTA. Even if an independent Scottish state was able to negotiate an opt-out from Schengen and successfully negotiated to become part of the CTA, which cannot be predicted with any certainty, it would be required to collaborate with other CTA members, including the continuing UK, on border and immigration policies to maintain the integrity and security of the CTA area.

Other practical issues

3.50 The division of liabilities and assets is a significant part of any negotiations to create a new state, and would also have to be settled by negotiation. Although there are some general principles of international law that could impact upon this matter there is no clear consensus in international practice as to the precise allocation of national debt in circumstances of state separation or dissolution. However, there would be an expectation that an independent Scottish state would take on an equitable share of the UK's national debt. How an 'equitable share' would be calculated is open to question and would have to be negotiated. The continuing UK would approach negotiations in good faith and, in the interests of its citizens, would need to seek to ensure that a fair settlement applied to assets and liabilities (such as national debt).

3.51 For particular fixed assets, such as government buildings, the territory in which they are situated would be a significant factor to be taken into consideration in the discussions. The future of the UK's nuclear weapons and facilities would be an important issue to be

[125] ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

[126] eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html

[127] Deputy First Minister Nicola Sturgeon's statement to Scottish Parliament on an independent Scotland's continuing membership of the EU, 13 December 2012, in which she indicated that: "Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the rest of the UK in the common travel area". See: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&i=69449&c=1400991&s=common%20travel%20area

resolved. Under international law (the NPT), an independent Scottish state would not be recognised as a state entitled to possess a nuclear deterrent. A forthcoming paper in the Scotland analysis programme will examine the specific issues relating to the UK's current provision of defence and security for all its citizens, and the potential implications of Scottish independence.

3.52 In the majority of areas it is therefore not possible to say with confidence what the outcome would be following the process of negotiations. Notwithstanding some unfortunate but unavoidable uncertainty, two things are clear. First, the UK would enter those negotiations as the continuing state, and the laws and institutions of the UK would continue to be those of the remainder of the UK in the event of independence. Whether and how they would operate in an independent Scottish state would be for negotiation. Second, unpicking the UK's institutional and governmental framework would be a huge task. Some extent of the scale and complexity of the challenge can be given.

Machinery of government, laws and regulations

3.53 The UK has a well- and long-established system of government. It has areas of law in reserved areas, which are well integrated with Scots law in devolved areas. Were Scotland to become independent, the UK's constitution, laws and institutions would remain in place. Inevitably some changes would be required as a consequence of Scotland leaving the UK (for example the UK would need to change the number of MPs in the House of Commons, as in the event of independence there would be no MPs representing constituencies in Scotland).

3.54 As well as deciding what laws and regulations, if any, it wished to retain, an independent Scottish state would also need to establish new institutions or significantly expand capacity in existing ones in order to assume functions that are currently reserved to the UK Government. There would inevitably be transitional costs in doing so.

3.55 To give an indication of the scale of the task, around 490,000 staff[128] are employed in over 230 UK central government organisations.[129] Over 140 of these organisations perform functions for Scotland which are reserved to the UK Government. That figure includes key UK Government departments, such as the Foreign and Commonwealth Office and the Ministry of Defence. It also includes bodies that oversee important activities for the whole of the UK, from regulating communications, energy companies and railways to promoting the UK abroad.[130] These statistics do not include public corporations and corporate bodies, which may need to be replicated at some cost. The figures also exclude nearly 60 advisory and other bodies that are also responsible for matters throughout the UK.[131]

[128] Civil Service figures from the Office for National Statistics (ONS), Table 10: www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-279128; executive non-departmental public body (NDPB) figures from Cabinet Office analysis and Insight monthly workforce Management Information survey. On a full-time equivalent (FTE) basis.

[129] These comprise ministerial and non-ministerial departments, executive agencies, and crown and executive non-departmental public bodies. These bodies cover a wide range of functions, many employing hundreds or thousands of people. Some employ small numbers and have a narrower remit.

[130] It excludes those bodies that would not have any direct relevance to an independent Scottish state, like the Arts Council England, English Heritage or the Environment Agency.

[131] These bodies tend to employ small numbers or are staffed by unpaid experts, but they cover a wide range of functions that would need to be considered and potentially replicated in some form by the government of an independent Scottish state.

3.56 Overall, in order to perform the same functions that are currently provided by the UK, the government of an independent Scottish state may therefore need to create up to four times as many Scottish public organisations as currently exist.[132]

Conclusion

3.57 This analysis has illustrated the profound practical significance of the conclusion of the legal Opinion outlined in Chapter 2 that Scotland would become a new state while the remainder of the UK would carry on as before.

3.58 In the international arena, it means that an independent Scottish state would not automatically 'inherit' the UK's position in global affairs, and there would be considerable uncertainty about the nature of its relationship with the EU.

3.59 In the domestic sphere, proposals to continue with arrangements that Scotland currently has within the UK would be the subject of negotiations with the remainder of the UK and the EU in the event of Scottish independence.

[132] Some 27,000 FTE staff (Civil Service figures from ONS, Table 10: www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-279128) work in around 50 Scottish Government organisations (Scottish Government: www.scotland.gov.uk/Topics/Government/public-bodies/about/Bodies).

Conclusion

4.1 The Acts of Union of 1707 united the parliaments of Scotland and England and resulted in the formation of a single parliament of Great Britain at Westminster and a single, unified United Kingdom (UK) state. Although smaller in population and geography than England, Scotland has played an indispensable role in the development of the multi-nation UK, from the contributions its citizens have made to establishing democracy and the rule of law, to the development of modern industrial and financial systems, to philosophy, culture, sport and the arts.

4.2 Scotland and the rest of the UK are highly integrated and interdependent. Over the centuries, the UK has developed and flourished, its constitution, laws and institutions underpinning one of the most successful partnerships of nations in history.

4.3 Devolution gives Scotland the best of both worlds. It means that the Scottish Parliament and Scottish Government are empowered to take decisions so that specific Scottish needs are addressed. This has enabled successive governments to make choices on behalf of people in Scotland over a range of important domestic policy issues, including health, education and policing. In some cases, decisions taken or issues prioritised in Scotland have varied from the rest of the UK – this is the practical and beneficial outcome of devolution.

4.4 However, devolution also means that, in areas where the greater scale, security, level of integration and influence of the whole UK can help Scotland to punch above its weight, take advantage of opportunities and pool resources and risks, decisions can be made on a UK-wide basis with Scottish involvement.

4.5 People in Scotland need accurate information in order to make an informed decision about the critical question of the future of the UK and Scotland's place within it when they come to vote in the referendum in 2014.

4.6 This paper provides analysis of how devolution operates today and what it offers to people in Scotland and the whole of the UK. It also provides a robust legal basis for one of the most important issues that is central to the debate ahead of the referendum – namely that in the event of independence the UK would be the continuing state and Scotland would have to form a new state.

4.7 It is the current Scottish Government that is proposing independence. It is therefore incumbent on the Scottish Government to take account of the legal issues and some unavoidable uncertainties about what can be said now concerning the details of independence as part of making a well-evidenced case to the people of Scotland.

4.8 For its part, the UK Government will comprehensively examine how Scotland contributes to and benefits from being part of the UK. Throughout the course of 2013 and 2014, the Scotland analysis programme will look in more depth at the key issues at stake, building on the underlying legal issues outlined here.

4.9 This programme will also examine some of the potential implications of Scottish independence – where these can be identified. In doing so, it aims to ensure that, when people in Scotland come to make their choice in 2014, it is in full knowledge of how the UK works and what the implications of leaving it may be.

Annex A
Opinion: Referendum on the Independence of Scotland – International Law Aspects

Professor James Crawford SC
Professor Alan Boyle

Contents

Part I:
Executive summary

1. If Scotland were to become independent after the referendum planned for late 2014, it would be with the UK's agreement rather than by unilateral secession. In practice, its status in international law and that of the remainder of the UK (rUK) would depend on what arrangements the two governments made between themselves before and after the referendum, and on whether other states accepted their positions on such matters as continuity and succession. But there are a number of legal considerations.

2. First of all, the status of Scotland before the union of 1707 would be of little or no relevance. In particular, the *Treaty of Union*, considered with or without the *Acts of Union*, does not currently sound as a treaty in international law.

3. The three possible outcomes for the status of Scotland and the rUK in international law following Scottish independence are as follows, from most to least probable.

    3.1 Most likely, the rUK would be considered the continuator of the UK for all international purposes and Scotland a new state. This has been the most common outcome in the case of separation, as evidenced, for example, by the acceptance of Russia as the continuator of the Union of Soviet Socialist Republics (USSR) despite its political collapse. The fact that the rUK would retain most of the UK's territory and population and that its governmental institutions would continue uninterrupted would count in its favour. So, importantly, would the acquiescence of other states in any claim of continuity. Since the rUK would be the *same state* as the UK, questions of state succession would arise only for Scotland.

    3.2 Some states have dissolved entirely into new states, leaving no continuator. But the most recent instances of this are the result either of an agreement between the states involved, one of which might otherwise have been considered the continuator state (Czechoslovakia), or of prolonged resistance by other successor states and third states to a claim of continuity in circumstances of ethnic conflict (the Socialist Federal Republic of Yugoslavia). This outcome would be likely only if the UK were to agree to it.

    3.3 Reversion to a previous independent state such as the pre-1707 Scottish state may not be excluded. But it normally depends on conditions that are absent here, such as the unwilling subjugation of the former state. Some apparent exceptions are illusory or are political assertions with no legal consequences. In any event, the passage of such a long period of time would make it difficult for Scotland to assert identity with the pre-1707 Scottish state for legal purposes, and even if it did so that would not affect the status of the rUK as continuing the legal personality of the UK.

4. The rules of state succession to treaties generally do not apply to membership of international organisations; instead, membership depends on the particular rules and practices of the organisation. In the UN, for example, the rUK would continue the UK's membership – including its permanent seat on the Security Council – and Scotland would be expected to join as a new state.

5. Scotland would also be expected to join the Council of Europe as a new state, though the *European Convention on Human Rights* would probably continue to apply to Scotland uninterrupted without the need for Scotland to ratify it in its own right.

6. Within the EU, there is no precedent for what happens when a metropolitan part of a current Member State becomes independent, so it is necessary to speculate.

    6.1 Since the rUK would be the same state as the UK, its EU membership would continue. Indeed, the EU treaties impliedly preclude 'automatic' withdrawal by a state. There might have to be an adjustment to the UK's terms of membership to reflect its reduction in territory and population, but this could be done without the UK ceasing to be an EU Member State.

    6.2 On the face of it, Scotland would be required to accede to the EU as a new state, which would require negotiations on the terms of its membership, including on the subjects of the UK's current opt-outs. The EU treaties make no provision for succession to membership. Certain provisions of the EU treaties would require amendment. If Scotland were somehow to become an EU member in its own right automatically, it is not clear how adjustments to the relative positions of Member States could be willed into being without negotiations. Nor would it be clear on what terms it would be a member.

    6.3 Some have argued that the rights conferred on individuals by EU citizenship might influence the European Court of Justice (ECJ) to somehow resist this outcome. But this is a matter for speculation and does not have a clear precedent in EU law. It would also require the issue to somehow come before the ECJ, which may be unlikely.

7. In any event, Scotland's position within the EU is likely to be shaped more by any agreements between the parties than by pre-existing principles of EU law.

Part II:
The purpose and structure of this advice

8. On 5 May 2011, the Scottish National Party (SNP) won a majority of seats in the Scottish Parliament. The Scottish Government formed by the SNP wishes to hold a referendum on the independence of Scotland from the United Kingdom of Great Britain and Northern Ireland (UK). On 15 October 2012, the UK and Scottish governments signed an agreement 'to work together to ensure that a referendum on Scottish independence can take place' that states, among other things, that it should 'have a clear legal base', 'be conducted so as to command the confidence of parliaments, governments and people' and 'deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect'. The agreement envisages that the Scottish Parliament will legislate for a referendum to take place by the end of 2014.[1]

9. Three departments of the UK Government – the Foreign and Commonwealth Office, the Cabinet Office and the Office of the Advocate General for Scotland – have jointly instructed us to advise in connection with the proposed referendum.

10. We are asked to advise on two questions:

    10.1 the status of Scotland and the rUK in international law after Scottish independence, in particular '(a) the strength of the position that the rUK would be treated as a continuation of the United Kingdom as a matter of international law and an independent Scotland would be a successor state'; and

    10.2 after Scottish independence '(b) the principles which would apply to determining the position of the rUK and an independent Scotland within international organisations, in particular the European Union'.

11. We are instructed that this advice has two principal purposes.

12. First, the UK Government has announced a programme of work to inform and support the debate on Scotland's future in advance of the referendum. One strand of the programme will examine Scotland's position in the wider world, including membership of the European Union and other international organisations. The matters in this advice may also affect other strands of the programme, including defence, currency, monetary policy, nationality and border control. The programme will result in the publication of detailed evidence and analysis to assess the benefits of Scotland remaining part of the UK.

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[1] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012, www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf.

13. Second, the Foreign Secretary is expected to give evidence to an inquiry by the Foreign Affairs Committee of the House of Commons into 'whether Scottish separation would have an impact on the future foreign policy of the UK and that of an independent Scotland'. The Foreign and Commonwealth Office has already submitted a written memorandum arguing that Scotland and the UK both benefit from union.

14. This advice is premised on the assumption that if Scotland becomes independent then it will be with the UK's agreement rather than by means of a unilateral secession.

15. This advice has three substantive parts. In Part III, we explain the general principles of state continuity and succession and define certain terms. In Part IV, we consider the status of Scotland and the rUK following independence. This involves an analysis both of the historical status of Scotland and the UK and of recent state practice. In Part V, we consider the principles that would apply following independence to determine the position of the rUK and Scotland in the EU and other international organisations.

Part III:
Principles of state continuity and succession

16. The first question concerns whether the rUK would be treated as the continuator state of the UK and Scotland as a successor state. The second question is one of state succession and depends on the answer to the first.

17. It will initially be helpful to explain the concepts of state continuity and state succession. In international law there is a fundamental distinction between the two.

18. The term 'state continuity' denotes cases where the same state continues to exist despite changes in its territory and population. The central case of continuity is where a state retains substantially the same territory and the same structure or system of government over a certain period. In other cases it can be harder to determine state continuity.

19. The notion of state continuity has been criticised as misleading, as overly general or as giving a false impression of objectivity. Because there are no well-defined criteria for the extinction of states, subjective factors such as a state's own claim to continuity may be pertinent or even determinative. But the notion is well established and arguably even logically required by the distinction between states and governments. This advice will assume the existence of the notion of state continuity but will consider below, in light of state practice, the relevance of subjective factors such as state claims and recognition.[2]

20. The term 'state succession' refers to the complex of legal issues that arise when there is a change of sovereignty over a territory. The *Vienna Convention on Succession of States in Respect of Treaties* and the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts* define 'succession of States' as 'the replacement of one State by another in the responsibility for the international relations of territory'.[3]

21. The law of state succession does not purport to regulate the process of the transfer of sovereignty or the creation of statehood. It is premised on the assumption that a change of sovereignty has occurred in accordance with international law, but otherwise applies regardless of how that change of sovereignty occurs. What it deals with are the *consequences* of a change of sovereignty in fields such as succession to treaties, state property, archives and debts and the nationality of natural or legal persons.

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[2] See Crawford J, *The Creation of States in International Law* (2nd edn, 2006) 667–72; Crawford J, *Brownlie's Principles of Public International Law* (8th edn, 2012) 426–7.

[3] *Vienna Convention on Succession of States in Respect of Treaties*, 23 August 1978, 1946 UNTS 3, Art 2(1)(b); *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, 7 April 1983, (1983) 24 ILM 306, Art 2(1)(a).

22. Several terms that are common in this area of law are used throughout this advice:

    22.1 'Secession' is the process by which a group seeks to separate itself from the state to which it belongs and to create a new state on part of that state's territory. It is essentially a unilateral process.

    22.2 A bilateral and consensual process by which a state confers independence on a territory and people by legislative or other means may be called 'negotiated independence'. It can also be called 'devolution', but since that term is used in a different sense to describe the relationship between the UK and its constituent parts, we will use the term 'negotiated independence' for this purpose.

    22.3 Many instances of both secession and negotiated independence in state practice concern colonial territories: geographically separate territories that are dependent on and subordinate to another state. These fall under *UN Charter* Chapters XI (non-self-governing territories) and XII (trust territories). Article 74 uses the term 'metropolitan' in contradistinction to non-self-governing territories to refer to the administering state. Colonial peoples have a right to self-determination that is distinct from any right of the people of the metropolitan state. Partly for this reason, states have generally been less reluctant to recognise secession by colonial territories. Since Scotland is part of the metropolitan UK, state practice that depends on the colonial status of territories is of little or no relevance.

    22.4 A state that has acquired a territory, or an entirely new state that comes into existence following a change of sovereignty, is called a 'successor state'.

    22.5 A state that has lost territory is called a 'predecessor state'.

    22.6 If the predecessor state retains its legal identity and existence despite a significant change in its circumstances such as a loss of territory or population, it may be called a 'continuator state'. This contrasts with 'successor state' in that a continuator state is regarded as legally identical with the predecessor state. The first question could thus be framed as whether the rUK would be the *same state* as the UK.

23. Under *UN Charter* Article 4, only 'States' can be admitted to UN membership. States do not have to seek UN membership, though all new states since 1945 have done so.[4] The practice of the General Assembly and Security Council in admitting new states to membership and acknowledging the continuing membership of established states has been influential in ascertaining their status and will be noted below in discussing state practice on state continuity and succession.

24. If the same state continues to exist, even if there are changes to its government, territory or people, the question of state succession to particular rights and obligations does not arise. That is to say: the question of continuity precedes that of succession.[5] So if the UK continues in existence, state succession will be irrelevant for it. A conclusion that Scotland would be a new state would, in contrast, give rise to a host of questions about state succession (mostly falling outside this advice).

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[4] Of states existing in 1945, only the Vatican City (assuming it is a state) is not a UN member, though the Holy See is a permanent observer. Every widely recognised state that has come into existence since 1945 has sought UN admission. On UN admission practice, see Crawford (2nd edn, 2006), 179–90.

[5] *Brownlie's Principles* (8th edn, 2012) 426–7.

Part IV:
The status of Scotland and the remainder of the UK in international law

25. The future status of Scotland and the rUK does not depend on their historical status. In particular, the character of the union of 1707 would not determine the outcome of Scottish independence. This point will be discussed first, before considering three possible outcomes of Scottish independence: the continuation of the UK and the creation of a new state; the dissolution of the UK and the creation of two new states; and reversion to one or both of the states existing before the union of Scotland and England in 1707.

(1) The historical status of Scotland and the UK

26. From 1603, when the Stuart King James VI of Scotland inherited the English throne, Scotland and England (and its colony Ireland) shared the same monarch.

27. There is little reason to doubt that between that date and 1707, England and Scotland remained separate states. They had separate constitutional systems, despite sharing a monarch. For instance, Scotland affirmed its different rules of succession in the *Succession Act 1682* (Scotland). It also had international relations with England, even after 1603, and the English Parliament levied customs dues on Scottish exports.[6]

28. Devine suggests that 'Scotland was far from being an independent state' in that 'Scottish foreign policy had moved with James [IV] to London in 1603 and there was a great grievance that thereafter foreign policy for both kingdoms was exclusively designed to suit English needs'. But the Darien Project in Panama – the failed Scottish investment launched in 1695 that partly precipitated the union – does evidence a separate Scottish foreign policy, at least to some extent.[7] And Queen Anne's ministry in London was also 'forced to accept' the *Act anent Peace and War 1704* (Scotland),[8] despite, Devine notes, 'the fact that its whole emphasis suggested a separate and autonomous foreign policy'.[9] It provided that 'after Her Majesty's Decease, and failing Heirs of her Body, no person being King or Queen of Scotland and England shall have the sole power of making War with any Prince, Potentate or State whatsoever without consent of [the Scottish] Parliament'.

29. It is also true that James VI proclaimed himself king of 'Great Britain' in 1604, but that was probably unconstitutional and was not followed by his Stuart successors. The English Parliament refused to alter the name of the kingdom on the ground, among others, that 'the alteration of the name of the Kingdom doth inevitably and infallibly draw on the

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6 Devine TM, *The Scottish Nation, 1700–2000* (1999) xxii.

7 Ibid xxii, 5–6.

8 'Anent' means 'about'.

9 Devine, (1999) 7.

erection of a new kingdom or state, and a dissolution or extinguishment of the old'.[10] English judges advised that the change of name, since it had substantive consequences, required parliamentary approval.[11]

30. Later attempts to unite England and Scotland by both the Stuarts and Oliver Cromwell foundered. Only in 1707 was a lasting union between them effected.

31. On 22 July 1706, commissioners appointed by the English and Scottish parliaments agreed on 25 articles comprising the *Treaty of Union*. On 16 January 1707, the Scottish Parliament approved the articles, along with certain amendments made in the course of debate, in the *Union with England Act 1707* (Scotland). On 28 January 1707, having been presented with the *Treaty of Union* and the *Scottish Act*, the English Parliament passed the *Union with Scotland Act 1706* (England). It approved the terms of the *Scottish Act* without amendment (the two Acts together being the *Acts of Union*).[12] The Kingdom of Great Britain was constituted on 1 May 1707.

32. The significance of the union is debated. There are two questions relevant to this advice: whether it created a new state and whether the *Treaty of Union*, considered with or without the *Acts of Union*, still constitutes a treaty in international law.

(a) Whether the union of 1707 created a new state

33. There are two possible answers to this question. It is a question not of the position of Scotland within domestic law – under which Scotland clearly retained a distinct constitutional status, in particular a separate legal system – but of how the union of 1707 should be treated as a matter of *international* law.

34. One view is that the union created a new state, Great Britain, into which the international identities of Scotland and England merged and which was distinct from both. Lord McNair writes: 'England and Scotland ceased to exist as international persons and become the unitary State of Great Britain.'[13] This view has been relied on in UK courts: *MacCormick v Lord Advocate*.[14]

35. An alternative view is that as a matter of international law England continued, albeit under a new name and regardless of the position in domestic law, and was simply enlarged to incorporate Scotland. In support of this view, among other things:

    35.1 Scottish members joined Parliament at Westminster, but there was no new election of its *English* members. This was in accordance with the *Acts of Union* Article XXII.

    35.2 Treaties concluded by England appear to have survived to bind Great Britain. Parry and Hopkins cite the *Treaty of Alliance with Portugal*[15] as the oldest 'British' treaty, and it is generally accepted as being such, even though it was concluded by

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[10] Cited by Dicey AV and Rait R, *Thoughts on the Union between England and Scotland* (1920) 121.

[11] They advised that without such approval, existing writs and warrants issued in the name of the King of England would become invalid. James VI sought to avoid this in his proclamation of 15 November 1604 by excepting 'legal proceedings, instruments and assurances of particular parties who, by the said alteration, may be prejudiced': see Bindoff ST, 'The Stuarts and their style' (1945) 60 *Eng Hist R* 192, 195.

[12] At that time England still used the Julian Calendar. By the Gregorian Calendar now used – and used at the time in Scotland – the *Union with Scotland Act 1706* (England) was also enacted in 1707.

[13] McNair AD, *The Law of Treaties: British Practice and Opinions* (1938) 40. Cf Smith TB, 'The Union of 1707 as fundamental law' (1957) *Public Law* 99, 99: 'the separate kingdoms of Scotland and England merged in the new State of Great Britain, and ceased to exist as persons for purposes of public international law'.

[14] [1953] SC 396, 411.

[15] 16 June 1373, 1 BSP 462.

England. They suggest that no treaty between Scotland and a third state survives (though Scotland concluded treaties, for example with France, the Pope and Scandinavian states).[16]

35.3 England's diplomatic representation in the rest of Europe continued uninterrupted. The *Acts of Union* Article XXIV appears to acknowledge this in retaining the Great Seal of England for transitional purposes.

36. We note that the incorporation of Wales under laws culminating in the *Laws in Wales Act 1536* (England) and of Ireland, previously a colony, under the *Union with Ireland Act 1801* (GB) and the *Act of Union 1800* (Ireland) did not affect state continuity. Despite its similarity to the union of 1707, Scottish and English writers unite in seeing the incorporation of Ireland not as the creation of a new state but as an accretion without any consequences in international law.

37. For the purpose of this advice, it is not necessary to decide between these two views of the union of 1707. Whether or not England was also extinguished by the union, Scotland certainly was extinguished as a matter of international law, by merger either into an enlarged and renamed England or into an entirely new state.

38. It is therefore misleading to speak of Scotland (or similarly of England, Wales, Northern Ireland or the isle of Great Britain) as if it were an entity already possessing international personality in its own right or some other relevant international status, regardless of what status it may have as a matter of UK domestic law.

39. It may also be misleading to speak of dissolving the 'union' effected by the incorporation of those territories: whatever the position historically or politically or in domestic law, in international law the position of the UK does not necessarily differ from that of a state formed in some way other than by a 'union'. (This point is pursued below in discussing whether Scotland could revert to the pre-1707 Scottish state.)

(b) Whether the **Treaty of Union** sounds in international law

40. Despite its name, it is not obvious that the *Treaty of Union* did and does sound as a treaty in international law. Certainly there was a negotiation between England and Scotland, and it was subsequently referred to as a 'treaty' in both *Acts of Union*. But the Scottish Parliament, in enacting the *Scottish Act of Union*, then unilaterally amended its provisions. It is therefore unlikely that it constituted a treaty in itself.

41. Smith has argued that although the *Treaty of Union* itself is just a 'record of negotiations' between the commissioners that the Scottish Parliament later debated and amended, the subsequent 'complex of exchanged Acts of the two Parliaments' does constitute a treaty, albeit one concluded in an unorthodox way. On this view, the *Scottish Act of Union*, in providing that none of its articles would be binding until approved by Queen Anne with the English Parliament's authority, was in effect 'the offer of Treaty terms by the Scottish Queen in Parliament to the English Queen in Parliament', and the registration of Queen Anne's command of the English Exemplification under the Great Seal of England without objection in the books of the Scottish Parliament then brought the treaty into force.[17]

42. But there is no need to express a concluded view on whether the *Treaty* or *Acts of Union* ever constituted a treaty in the international law sense. Smith's view was that '[t]wo international persons disappeared in 1707 – the obligants under the treaty – and a new

[16] Parry C and Hopkins C, *An Index of British Treaties, 1101–1968* (1970) 18.

[17] Smith, 'The Union of 1707 as fundamental law' (1957) *Public Law* 99.

international person took their place' which, though perhaps 'bound in constitutional law by the conditions of its own creation, could not in public international law be bound by a treaty to which it was not a party'.[18] Wicks agrees:

> The requirement that a treaty be 'governed by international law' is a little difficult to apply to the 1707 agreement, because the parties to it ceased to exist on May 1. There was never the opportunity for the agreement to be governed by international law. This cannot realistically be regarded as representing an obstacle to the agreement amounting to a 'treaty', however. The entire purpose of the complex negotiations of 1707 was to enact a legal agreement between the two independent states of England and Scotland. As such it was a validly concluded international treaty, albeit for a very brief time. As the parties ceased to exist in May 1707, the treaty has been of no legal significance since that date. Its main significance today is as a possible source of title for the new state created in 1707.[19]

43. The same result follows from the alternative possibility, discussed above, that Great Britain was the continuator of England rather than a new state. The *Vienna Convention on the Law of Treaties* Article 2 (though anachronous here) defines 'treaty' as an agreement 'concluded between States'.[20] If one of the two parties to the treaty ceased to exist as a state in May 1707, it can no longer sound in international law. The situation is perhaps comparable to the *Treaty of Waitangi* between the UK and certain Māori chiefs, which on one view (by no means uncontested but still useful by way of analogy) was an international treaty under which an independent state ceded its sovereignty.[21] This view relies on the assumption that there could have been a treaty and yet the resulting constitutional system could still be identified with only one of the two parties, England, at the expense of the other – which is certainly possible.

44. Consistently with the view that the *Treaty* and *Acts of Union* no longer sound as a treaty, even if they ever were one, Parliament soon afterwards enacted legislation amending it: the *Union with Scotland (Amendment) Act 1707* (GB), which abolished the separate English and Scottish privy councils and created a new Privy Council of Great Britain. The *Acts of Union* Article IX had provided that the Queen 'may Continue a Privy Council in Scotland … until the Parliament of Great Britain shall think fit to alter it'.

45. The UK Parliament has since amended or repealed multiple other provisions of the Acts of Union, such as those providing for Scottish representation in Parliament or concerning religion.

46. Indeed, in 1999 the UK Government suggested to the Committee for Privileges that the UK Parliament had 'complete sovereignty' to amend even those articles of the *Acts of Union* that 'are expressed to be entrenched for all time (such as the creation of the United Kingdom, the succession of the Monarchy, the Scottish Courts and the Church of Scotland)'.[22] The existence of such 'entrenched' provisions is a matter for domestic constitutional law and need not be dealt with here. The fact that at least some provisions are open to amendment by the UK Parliament is enough to reinforce the conclusion that neither the *Treaty* nor the *Acts of Union* currently operate as a treaty in international law.[23]

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[18] Ibid 106.

[19] Wicks E, 'A new constitution for a new state? The 1707 Union of England and Scotland' (2001) 117 *Law Quarterly Review* 109.

[20] 22 May 1969, 1155 UNTS 331.

[21] See Kingsbury B, 'The Treaty of Waitangi: Some international law aspects' in Kawharu IH (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 121.

[22] Case for Her Majesty's Government, Committee for Privileges, September 1999, § 62, www.publications.parliament.uk/pa/ld199899/ldselect/ldprivi/106i/106i08.htm.

[23] *Vienna Convention on the Law of Treaties* Art 39 provides 'A treaty may be amended by agreement between the parties'. This is nonsensical if there is only one extant party or none at all.

(2) Possible outcomes of Scottish independence

47. The assumption that if Scotland becomes independent then it will be with the UK's agreement is not determinative of Scotland's or the rUK's status following independence. Negotiations between the UK and Scotland and the views of other states might well shape that status.

48. This is also true of matters of succession more generally. The multilateral peace treaties that constituted new states in 1815, 1919–23 and 1947 all dealt with succession problems. For example, the *Treaty of Saint-Germain-en-Laye*[24] provided for the responsibility of the successor states of Austria-Hungary for its public debts. Unilateral declarations can also be significant. Thus when Egypt and Syria formed the United Arab Republic, its Foreign Minister informed the UN Secretary-General that 'all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law'.[25] Although such a unilateral declaration could not bind other states, other states acquiesced in that position.[26] The continuation of UN membership, though certainly not determinative, is a useful indicator of whether other states accept a state's claim of continuity or require it to rejoin as a new state (as they did with the Federal Republic of Yugoslavia).

49. There are three possible outcomes of negotiated Scottish independence in international law: (a) one state that is the continuator of the UK and one new state; (b) two new states (neither of which is the continuator of the UK, which would be extinct); and (c) one state that is the continuator of the UK and one state which reverts to the status of the pre-1707 Scottish state. We will discuss each possibility in turn.[27]

(a) One continuator state and one new state

50. Logically there are two possibilities: either Scotland *or* the rUK could be considered the continuator state of the UK and the other considered a new state. But the former possibility cannot be seriously entertained. It will be evident, without further elucidation, that none of the factors relevant to state continuity discussed below counts in favour of it. We will therefore focus on the possibility that the rUK – comprised of England, Wales and Northern Ireland – would be the continuator state of the UK and an independent Scotland a new state. This is the position of the UK Government and the position on which we have been particularly asked to advise.

51. Situations where one of the states existing after secession or negotiated independence is considered the continuator state are the most common in state practice. We will consider them chronologically and then draw some preliminary conclusions about the likelihood of the same outcome occurring if Scotland becomes independent.

52. In general, state practice shows that continuity depends on the criteria for statehood: a state is the same if it involves what may be regarded as the same independent territorial and governmental unit at the relevant times, despite changes in its population, territory or system of government.[28]

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[24] 10 September 1919, 226 CTS 8, Art 203.

[25] International Law Commission *Ybk* 1958/II, 77.

[26] See *Brownlie's Principles* (8th edn, 2012) 424–5.

[27] It is not (and in our view cannot be) suggested that the existing links between England, Wales and Northern Ireland would be affected by Scottish independence.

[28] See further Crawford (2nd edn, 2006) 667–72.

(i) State practice

53. The presumption of continuity despite even drastic territorial change is illustrated by imperial powers that have lost territory – including the UK itself, whose continuity is not questioned despite its loss of not one but two global empires. Likewise, Turkey was regarded as the continuator of the Ottoman Empire after 1918.[29] France's continuity was not questioned despite the loss of Algeria, which unlike other more definitively colonial territories had been assimilated into metropolitan France, at least according to French law. For the most part, however, colonial or quasi-colonial cases are of little relevance here, since Scotland (as opposed to Australia, Canada, India or other former British territories) is part of the metropolitan UK rather than a colony.

54. After the partition of British India in 1947, the Dominion of India was treated as the same entity and Pakistan as a new state, though there is some uncertainty about whether British India had already become an independent state before partition rather than a colonial territory still subordinate to the UK.

    54.1 After partition, the Dominion of India retained most of British India's territory and population and continued its founding membership of the UN. But Pakistan (having initially claimed that its membership should also be automatic) applied for membership in its own right on 15 August 1947.[30]

    54.2 The British Indian government, though constitutionally distinct from the UK, was subordinate to the UK Cabinet and Parliament, at least until the exchange of ambassadors that took place a few months before ostensible independence (and partition) in 1947, and its founding membership of the UN was an anomalous status.[31] Against this: in *Murarka v Buckrack Bros*, a US Circuit Court of Appeal held that the exchange of ambassadors had 'amounted at least to de facto recognition, if not more. To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away'.[32]

55. Singapore's separation from Malaysia in 1965 is a clearer case. Malaysia retained its international identity and UN membership and Singapore was admitted as a new state.[33] This occurred pursuant to a separation agreement that referred to Singapore as 'an independent and sovereign state and nation separate from and independent of Malaysia and so recognized by the Government of Malaysia'.[34] The separation agreement assumed the continuity of Malaysia.

56. After the separation of Bangladesh from Pakistan, the remaining territory, which comprised the former West Pakistan, was also considered the continuator state.

    56.1 In March 1971, the Pakistani government suspended the National Assembly – in which an East Pakistani political party, the Awami League, had won an absolute majority – and instigated martial rule in East Pakistan. The following month the Awami League proclaimed the independence of Bangladesh on the territory

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[29] *Ottoman Debt Arbitration* (1925) 3 ILR 42; *Roselius & Co v Karsten & Turkish Republic* (1926) 3 ILR 35.

[30] (1947–48) *UNYB* 39–40. It was admitted on 30 September 1947: SC Res 29 (1947); GA Res 108 (1947).

[31] See Crawford (2nd edn, 2006) 366–7. Cf the independence of Senegal outside the previously constituted Mali Federation: see ibid 392.

[32] *Murarka v Buckrack Bros* (1953) 20 ILR 53.

[33] SC Res 213 (1965); GA Res 2010 (1965).

[34] *Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State*, 7 August 1965, 563 UNTS 89. See further Crawford (2nd edn, 2006) 392–3.

formerly comprising East Pakistan. By the end of the subsequent Indo-Pakistani war, the Awami League substantially controlled that territory. Between the end of the war and February 1972, 28 states recognised Bangladesh.

56.2 This was a definite case of secession – forcible and unilateral – rather than negotiated independence. That may have contributed to the acceptance of the rest of Pakistan as the continuator state: its institutions were substantially unchanged, and it retained the majority of the predecessor state's territory. These factors may have been especially important in this case given that, unusually, Pakistan was the smaller unit by population, though only slightly: in 1975 its population was 68,483,000, whereas Bangladesh's was 70,582,000.[35]

56.3 Pakistan's UN membership continued, whereas Bangladesh was eventually admitted to the UN separately, on 17 September 1974.[36]

57. A particularly pertinent example of state practice is the dissolution of the USSR in 1990–91. Several of its former constituent republics, comprising a significant part – though not a majority – of Soviet territory, became newly independent states. The largest unit, the Russian Federation, was after initial uncertainty regarded as continuing the legal personality of the USSR. This example illustrates several considerations.[37]

57.1 In a political sense, it was uncontroversial that the USSR had come to an end: the *Minsk Protocol* between Russia, Belarus and Ukraine stated that 'the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists';[38] the *Alma Ata Protocol* between Russia and ten other former Soviet republics, that 'with the establishment of the Commonwealth of Independent States, the [USSR] ceases to exist'.[39] Although some authors at the time regarded this as determinative,[40] hindsight has made clear that it is not: the political extinction of a state does not necessarily extend to the legal realm. Thus as Shaw notes, 'it is clear from all the circumstances' that the position expressed in these instruments amounted to 'an essentially political statement not taken by either the parties themselves or by third states as constituting a proclamation of dissolution preventing claims by Russia of continuity'.[41]

57.2 On 24 December 1991, Russia wrote to the UN Secretary-General, illustrating the significance, in practice, of the position taken by a state itself on whether it constitutes the continuator state to an apparently dissolved union:

> the membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States. In this connection, I request that the name 'Russian Federation' should be used

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[35] This is the first year following Bangladesh's independence for which UN population statistics are available. They also show that what is now Bangladesh had a higher population than the rest of Pakistan in 1970: esa.un.org/unpd/wpp/unpp/panel_population.htm. Pakistan has since overtaken Bangladesh in population.

[36] SC Res 351 (1974); GA Res 3203 (1974).

[37] Crawford (2nd edn, 2006) 676–8.

[38] *Minsk Protocol*, 13 December 1991, 31 ILM 143, 3.

[39] *Alma Ata Protocol* (Russia, Ukraine, Belarus, Moldova, Azerbaijan, Armenia, Kazakhstan, Tajikistan, Kyrgyzstan, Turkmenistan, Uzbekistan), 8 January 1992, 31 ILM 148, 149.

[40] E.g. Blum YZ, 'Russia takes over the Soviet Union's seat at the United Nations' (1992) 3 *EJIL* 354; see further Crawford (2nd edn, 2006) 677 n 41.

[41] Shaw, 'State succession revisited' (1994) 5 *Finnish YBIL* 34, 49–50.

> in the United Nations in place of the name ['USSR']. The Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including financial obligations.[42]

57.3 The newly independent former Soviet republics all accepted this position, and no other state objected to it. The UK's position, for example, was that 'it was not necessary to reaccredit [the UK ambassador to the USSR], he just became the continuous representative to the continuum State, namely, Russia'.[43]

57.4 The European Communities (EC) declared that 'the international rights and obligations of the former USSR, including those under the United Nations Charter, will continue to be exercised by Russia' and 'welcome[d] the Russian Government's acceptance of these commitments and responsibilities'.[44] This is arguably consistent with two possibilities: that Russia was the continuator state of the USSR or that it was a new state that nonetheless succeeded to all the extinct USSR's rights and obligations. But in general it is accepted that Russia was indeed the continuator state. The acquiescence of other states in its claim to that effect was rapid and unquestioning.

57.5 The result was that Russia continued the USSR's membership of the UN, including its permanent membership of the Security Council.

57.6 The other former Soviet republics joined the UN separately in 1991 or 1992, except Belarus and Ukraine. Anomalously, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic (like British India) had already become original members in 1945, despite being constituent republics of the USSR. After independence they simply notified the UN of changes of name. But any ostensible continuity of those states with former entities has not been consistently observed: since 1991 they have both acceded to treaties to which they were apparently already parties. For instance, the *New York Convention* included them as parties in 1958.[45]

58. A case of unilateral secession that was later accepted by the predecessor state is Eritrea. In 1962, Ethiopia had abolished a federal arrangement with the former Italian colony of Eritrea, entered into under UN auspices in 1962. Following a military campaign for independence sustained for many years, the Eritrean People's Liberation Front assisted in overthrowing the military regime in Addis Ababa. The subsequent Transitional Government of Ethiopia accepted Eritrea's right of self-determination. In a plebiscite in 1993, 99.8% voted in favour of Eritrean independence. The new state of Eritrea was admitted to the UN that same year with the support of the Transitional Government of Ethiopia.[46] Ethiopia continued its UN membership.[47]

59. Another recent case is the dissolution of the State Union of Serbia and Montenegro (Serbia-Montenegro) in 2006. It was governed by a *Constitutional Charter* adopted in 2002. Article 2 stated that it was 'based on the equality of the two member states'. Article 60 dealt expressly with 'Breaking Away from the State Union'. It set out certain requirements for breaking away, including a referendum, and then stated:

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[42] UN Doc 1991/RUSSIA, Appendix, 24 December 1991, 31 ILM 138.

[43] Statement of Assistant Under-Secretary of State, FCO, Parliamentary Papers, 1991–92, Paper 21-II, 197, 15 January 1992, (1992) 63 *BYIL* 652.

[44] Declaration of the European Communities, 23 December 1991, *EC Bull* 12, 121 (1991).

[45] *New York Convention*, 10 June 1958, 330 UNTS 3.

[46] SC Res 828 (1993); GA Res 47/230 (1993).

[47] See Crawford (2nd edn, 2006) 402–3.

> Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244 [on the international presence in Kosovo], would concern and apply in their entirety to Serbia as the successor.
>
> A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state.
>
> Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia.[48]

60. The term 'successor state' may be misleading. Its juxtaposition with 'newly independent state' and the statement that the state breaking away from Serbia-Montenegro 'shall not inherit the right to international personality' suggest that the 'successor state' was expected to continue the legal personality of Serbia-Montenegro. That is to say: the intention of the *Constitutional Charter* appears to have been that the unit not breaking away from Serbia-Montenegro would be the continuator state.

61. Whether, had Serbia invoked the procedure, the much smaller Montenegro would have been the continuator state might be doubted. But in the event it was Montenegro that invoked the referendum procedure and broke away. The position adopted by all states involved was that Serbia was the continuator state. On 5 June 2006, two days after Montenegro declared independence, the Serbian Assembly adopted a declaration 'On Obligations of public authorities of the Republic of Serbia as State which continues the State and legal identity of the State Union of Serbia and Montenegro'.[49] Its membership of the UN continued, and Montenegro was admitted in its own right.[50]

62. The most recent instance of state continuity despite secession is Sudan following South Sudan's independence. As in the case of Eritrea, after years of war a referendum was held in 2011 that resulted in independence. The new state was then admitted separately to the UN while Sudan continued its membership.[51] Like Eritrea, the new state comprised a minority of the predecessor state's territory and population.

63. Cases such as Korea – superficially comparable in that on one view the Democratic People's Republic of Korea (North Korea) is a separate state formed by secession from the Republic of Korea (South Korea) – are complicated by competing claims over the same territory and so have little relevance here as state practice.[52]

64. Other recent state practice in which it is harder to discern a continuator state, such as the dissolution of Czechoslovakia, is discussed below.

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[48] *Constitutional Charter of the State Union of Serbia and Montenegro*. An English version is available on the website of the Serbian Ministry of Foreign Affairs: www.mfa.gov.rs/Facts/const_scg.pdf.

[49] Cited in 'Republic of Serbia: Compliance with obligations and commitments and implementation of the post-accession co-operation programme', 18 December 2006, CoE Doc SG/Inf(2006)15, wcd.coe.int/ViewDoc.jsp?id=1068027.

[50] SC Res 1691 (2006); GA Res 60/264 (2006).

[51] SC Res 1999 (2011); GA Res 65/308 (2011).

[52] See Crawford (2nd edn, 2006) 466–72.

(ii) Applicability to Scotland and the remainder of the UK

65. There is one further example of state practice of direct relevance to the UK: the separation of 26 Irish counties in 1922 to form the Irish Free State, which was treated just as a change in territory rather than a break in the UK's continuity. There is no indication in the *Articles of Agreement for a Treaty between Great Britain and Ireland* of 6 December 1921[53] that either party questioned the UK's continuity; on the contrary, it appears to have been premised on the personality of the UK continuing uninterrupted.

66. In that case the state eventually changed its name – from the United Kingdom of Great Britain and Ireland to the United Kingdom of Great Britain and Northern Ireland – though not until five years later, under the *Royal and Parliamentary Titles Act 1927* (UK).[54]

67. There are countless other examples to suggest that no weight can be put on such changes of name.[55] Of the above cases, Russia and Serbia were treated as continuator states despite their different names, each having been the largest unit in a federal arrangement. The example of 1922 suggests that no consequences for state continuity would likewise follow from Scottish independence whether or not the rUK chose to retain the words 'Great Britain and Northern Ireland' in its name rather than changing them to, say, 'England, Wales and Northern Ireland'.

68. The state practice just recounted also indicates that Scotland's independence would have the same outcome for the UK as the Irish Free State's did in 1922. We can draw several conclusions from it about which factors influence state continuity:

    68.1 In almost all the above cases, the continuator state was the unit retaining the majority of the predecessor state's population and territory. This is true of the Dominion of India, Malaysia, Russia, Ethiopia, Serbia and Sudan. The exception is the former West Pakistan, whose territory was larger but whose population was smaller than that of Bangladesh at the date of secession. But the difference in population size was relatively minor, and the central government was based in and dominated by West Pakistan.

    68.2 In all the above cases, the continuator state retained substantially the same governmental institutions as the predecessor state. Arguably, Russia and Serbia are again partial exceptions in that the constitutions of the USSR and Serbia-Montenegro did not continue. But it is not suggested that *all* the institutions of government must continue – on the contrary, even the revolutionary overthrow of a governmental system does not affect state continuity.[56] The continuity of governmental institutions is merely one indicator. But it gives rise to a particularly strong presumption of state continuity. Indeed, it probably explains the continuity the Federal Republic of Germany (FRG) after German unification 1990: the FRG and the German Democratic Republic (GDR) did not merge into a single new state but instead the *Länder* that previously constituted the GDR (plus Berlin) became part of the FRG under its existing constitution.[57] The same view is usually taken of

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[53] Available at: multitext.ucc.ie/d/Articles_of_Agreement_as_signed_6_December_1921.

[54] The change was implied in the Act rather than express: s 2(1) provided 'Parliament shall hereafter be known as and styled the Parliament of the United Kingdom of Great Britain and Northern Ireland'; s 2(2) provided 'In every Act passed and public document issued after the passing of this Act the expression "United Kingdom" shall, unless the context otherwise requires, mean Great Britain and Northern Ireland.'

[55] See Crawford (2nd edn, 2006) 680 n 54.

[56] See ibid 678–80.

[57] Papanfuss D, 'The fate of the international treaties of the GDR within the framework of German unification' (1998) 92 AJIL 469, 487.

the enlargement of Sardinia-Piedmont by absorbing other Italian states into what became the Kingdom of Italy during the *Risorgimento* of 1848–70: the Sardinian constitution remained in force throughout that period.[58]

68.3 In cases of peacefully negotiated independence (Singapore's from Malaysia and Montenegro's from Serbia-Montenegro), the parties negotiated terms of state succession that expressly or impliedly identified a continuator state.

68.4 In the other cases, the positions of Pakistan, Russia, Ethiopia and Sudan in continuing the identity of their predecessor states were not questioned by the seceding states, by other states or by organs of the UN. Even in the case of the Dominion of India, although Pakistan initially claimed that it could automatically continue British India's UN membership, it did not pursue that claim and applied for membership in its own right.

68.5 In all the above cases, the continuator state was able to continue the UN membership of the predecessor state, whereas the new state submitted a new application for UN membership.

69. All of these factors count in favour of the rUK being the continuator state of the UK: if Scotland became independent, the rUK would retain about 92% of the UK's population, more than two-thirds of its territory, and its principal governmental institutions, since the UK Parliament, the UK Supreme Court and its government departments are located in London. The precedent of the separation of most of Ireland also indicates that the UK would survive another, comparable loss of territory, regardless of whether it changed its name (or flag) to acknowledge the loss of Scotland.

70. In our view, it can be expected that the weight of international opinion would favour recognising the rUK as the continuator. The Foreign and Commonwealth Office has already written in its memorandum to the Foreign Affairs Committee that the 'overwhelming weight of international precedent suggests that [the rUK] would continue to exercise the existing UK's international rights and obligations, and that an independent Scotland would be a new state' and that the UK Government 'judges that this situation would be recognized by the international community'.[59] We agree with that judgement.

(b) Two new states

71. Nonetheless, the alternatives should be briefly considered. In one scenario, the predecessor state would become extinct and two entirely new states would be created. Neither Scotland nor the rUK would be the continuator state of the UK; the law of state succession, subject to negotiations, would determine which of the former UK's rights and obligations each of the two new states succeeded to.

72. It is not always clear whether situations fall into this category. There was no consensus in judicial or treaty practice, for example, on the status of the two former constituent parts of the Dual Monarchy of Austria and Hungary (Austria-Hungary) when they separated after the First World War. The *Treaty of Saint-Germain-en-Laye* with Austria and the *Treaty of Trianon* with Hungary[60] assumed the continuity of Austria and Hungary with the respective

[58] See Marek K, *Identity and Continuity of States in Public International Law* (1955), 191–8; Crawford (2nd edn, 2006) 673.

[59] Written evidence from the Foreign and Commonwealth Office (SCO 8), Foreign Affairs Committee inquiry into the foreign policy implications of and for a separate Scotland, 24 September 2012, § 9, www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/643/contents.htm.

[60] 4 June 1920, 6 LNTS 188.

former constituent parts of Austria-Hungary. But if, as Marek argues, those constituent parts had not possessed separate international status before 1918, such continuity was not possible.[61]

73. Two examples are often cited as clearer cases of the dissolution of a predecessor state into new states, none of which is the continuator state: Czechoslovakia in 1992–93 and the Socialist Federal Republic of Yugoslavia (SFRY) and its successor states in the 1990s.

(i) State practice: Czechoslovakia

74. The Czech and Slovak Federal Republic (Czechoslovakia) ceased to exist at midnight on 31 December 1992 on the basis not of a plebiscite or referendum but solely of legislation. The Czechoslovak Foreign Ministry had announced that 'the Czech and Slovak Federal Republic as well as [Czechoslovak] membership of the United Nations will cease to exist on December 31, 1992'.[62] Two new states were created on its former territory, the Czech Republic and Slovakia, both of which promptly applied for membership of international organisations and were admitted to the UN in January 1993.[63]

75. A substantial body of treaty obligations survived Czechoslovakia's extinction. The prime ministers of both new states wrote to the UK Prime Minister that they regarded 'Treaties and Agreements in force to which the United Kingdom and [Czechoslovakia] were parties as remaining in force' between the UK and their respective states.[64]

76. Notable about this situation is that the extinction of Czechoslovakia was effected by the consent of both new states; neither claimed to continue its identity. Nor does any other state appear to have doubted its extinction. This illustrates again the importance of any claims of state continuity and their acceptance by other states.

77. This is especially so when we consider that there might have been a different result in the absence of agreement. The Czech Republic retained 66% of Czechoslovakia's population, 62% of its territory and 71% of its economic resources.[65] Malenovsky suggests that it was only the agreement between the two former constituent republics that established the dissolution of Czechoslovakia and that the situation might have been characterised as a secession by Slovakia,[66] which would have been consistent with the factors indicating state continuity discussed above.

78. So Czechoslovakia should not be taken as detracting from the general presumption in favour of state continuity despite changes in territory. The outcome of its dissolution depended on agreement. This serves to reinforce the importance of negotiations in predetermining the consequences of independence.

(ii) State practice: the Socialist Federal Republic of Yugoslavia

79. Until 1991 the SFRY was comprised of six constituent republics. Slovenia declared independence on 25 June 1991 and Croatia the following day. Two others did the same during the ensuing war: Macedonia on 25 September 1991 and Bosnia-Herzegovina on

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61 Marek (1955) 199–236; see further Crawford (2nd edn, 2006) 675 n 36.

62 Quoted in Scharf MP, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28 *Cornell ILJ* 29, 65 n 192.

63 SC Res 800 and 801 (1993); GA Res 41/221 and 47/222 (1993).

64 (1994) *BYIL* 587.

65 Williams PR, 'State succession and the international financial institutions: political criteria v. protection of outstanding financial obligations' (1994) 43 *ICLQ* 776, 785.

66 Malenovsky J, 'Problèmes juridiques liés à la partition de la Tchécoslovaquie' (1993) 39 *AFDI* 305, 317–18.

3 March 1992.[67] The two remaining republics, Serbia and Montenegro, adopted a new constitution under the name Federal Republic of Yugoslavia (FRY) and declared on 27 April 1992 that the FRY 'continu[ed] the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia'.[68]

80. Whether the FRY was indeed the continuator state of the SFRY remained controversial until 2000.[69]

81. The FRY relied on several factors to support its position:

    81.1 Serbia and Montenegro had constituted the largest part of the SFRY's population and territory (though not a majority) and its historical and geographical core.

    81.2 The independence of the four other republics did not take place simultaneously but through a series of separations from the predecessor state, leaving Serbia and Montenegro as its only remaining constituent parts.

    81.3 The FRY controlled all but one of the former SFRY's missions abroad.

    81.4 The former SFRY's UN membership (which the FRY claimed to continue) was not regarded as having been terminated, the SFRY's flag continued to fly outside UN offices, and the FRY continued to pay financial contributions to the UN, though it was excluded from participation in the UN's principal organs.

82. On the other hand, the FRY did not conclude any separation agreements with the other former Yugoslav republics, and other states took exception to its claim. The UK stated that it was 'one of the successor states of the [SFRY]'.[70] The federal government organs that represented the SFRY had also ceased to function.[71]

83. UN organs took slightly different positions. The Security Council considered 'that the state formerly known as the [SFRY had] ceased to exist' and that 'the claim by the [FRY] to continue automatically the membership of the former [SFRY] in the United Nations has not been generally accepted'.[72] The General Assembly declined to state this in such plain terms but nonetheless did not allow the FRY to automatically take over the SFRY's seat. The Secretariat took a nuanced position: that 'the only practical consequence' of the General Assembly's resolution that the FRY should apply for UN membership was that it could not '*participate* in the work of the General Assembly'.[73]

84. The Arbitration Commission on the Former Yugoslavia stated on 29 November 1991 that 'the [SFRY] is in the process of dissolution'[74] and on 4 July 1992 that it 'no longer exists'.[75]

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[67] See Lampe J, *Yugoslavia as History: Twice There was a Country* (2nd edn, 2000), esp 364, 371.

[68] Declaration of the Assemblies of Serbia, Montenegro and the FRY, 27 April 1992, S/23877, annex, 2 (1992), cited in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Provisional Measures, ICJ Rep 1993 p 3, 15.

[69] The FRY, having dropped its claim to continuity, changed its name to the State Union of Serbia and Montenegro in 2003. See Crawford (2nd edn, 2006) 707–14.

[70] FCO telegram, 11 April 1996, reprinted at (1996) 67 *BYIL* 719.

[71] Degan V-D, 'Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)' (1999) 279 *Recueil des Cours* 199, 285–92; Marek (1955) 153–5.

[72] SC Res 757 (1992).

[73] Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, UN Doc A/47/485, Annex.

[74] *Opinion 1*, 29 November 1991, 92 ILR 162, 162–3.

[75] *Opinion 8*, 4 July 1992, 92 ILR 199, 202. See also *Opinion 9*, 4 July 1992, 92 ILR 203; *Opinion 10*, 4 July 1992, 92 ILR 206.

85. The International Court, after initially referring to the FRY's status within the UN as '*sui generis*' and declining to state outright whether it was the continuator state of the SFRY, held in 2000 that that '*sui generis* position could not have amounted to its membership',[76] implying that – at least viewed in hindsight – the FRY did not succeed to the SFRY's membership of the UN. The result was that between 1992 and 2000 the FRY's status in the UN remained unclear and could shed little light on its claim to continuity, except insofar as it illustrated other states' resistance to that claim.

86. What clarified the situation was partly the positions of other states and international institutions and partly the FRY's own eventual acquiescence. In November 2000 it was admitted to UN membership. An *Agreement on Succession Issues* which it entered into on 29 June 2001 posited, consistently with its abandonment of its claim to continuity, 'the sovereign equality of the five successor States to the former [SFRY]'.[77]

87. In other words: in a case as unclear as the break-up of the SFRY, the distinction between the dissolution of the predecessor state and a series of secessions that leaves its core intact may be in the eye of the beholder. Ultimately, since a position must be taken one way or the other, the perception of other parties may be crucial.

88. The contrast with the break-up of the USSR is stark. In both cases it was the constituent units of a federation that declared independence, leaving the remaining constituent unit or units intact and in partial control of former federal government organs. But Russia, unlike the FRY, accounted for the great majority of the predecessor state's territory and population, and the other former Soviet republics and other states and international organisations acquiesced in its claim of continuity.

89. One factor that influenced perceptions in this case was that the FRY was engaged in a war with the other successor states. To have recognised it as the continuator of the state from which the other belligerent parties had declared independence might have allowed it to characterise the conflict as a *civil* war. That might have given it a moral and legal advantage in pursuing what others might instead have seen as an *irredentist* war, fought in the guise of the former federal state both through its ostensibly national army and through surrogates such as the Serbs of Bosnia-Herzegovina.

90. These considerations are irrelevant to situations of negotiated independence such as that envisaged for Scotland to which, we firmly expect, other states would not object.

91. It cannot be concluded from the dissolution of the SFRY, given the complex and lengthy series of events that occurred before the position became clear, that it represents some general category of cases in which a predecessor state will dissolve entirely and leave no continuator state.

92. In fact it illustrates this even more forcefully than Czechoslovakia: in that case the parties agreed that the predecessor state would dissolve, whereas here even a claim of continuity as strong in some respects as the FRY's was not sustainable in the face of opposition both by other successor states and by other states and international organisations.

(iii) Applicability to Scotland and the remainder of the UK

93. Though superficially comparable to the Czech Republic, the rUK would differ in that, far from agreeing to the dissolution of the UK, it would claim continuity. And, though superficially comparable to the FRY, it would differ again in that there is no obvious reason – such as a conflict in which continuity would grant it a moral or legal advantage – for other states or international organisations to dispute its claim.

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[76] *Legality of the Use of Force (Serbia and Montenegro v Belgium)*, ICJ Rep 2004 279, 310.

[77] (2002) 41 ILM 3.

94. The state practice on the dissolution of predecessor states into two or more entirely new states thus does not cast doubt on the preliminary conclusion drawn above: that the rUK would be considered the continuator state of the UK. On the contrary: assuming that the UK would be in a position to negotiate the terms of Scottish independence and that Scotland and other states would probably accept the rUK's claim to be the continuator of the UK, it strengthens that conclusion.

(c) Reversion to the Scottish state existing before 1707

95. Could an independent Scotland be considered not an entirely new state but a continuator of the pre-1707 Scottish state? And what consequences would that have for the rUK? One legal basis for such a claim might be reversion. Scott, for example, writes that 'the UK was created by the *Treaty of Union* between Scotland and England. If one party decides to withdraw from the Treaty, then Scotland and England revert to their previous status as independent countries'.[78] Whether or not the UK is the continuator state of England, Scotland *was* extinguished in 1707, so this possibility may not depend on Scott's view that the UK was created by the *Treaty of Union*.

96. The authority on reversion in international law is not straightforward. The term has multiple meanings, several of which can be left aside as inapplicable:[79]

96.1 'Reversion' might refer to a right of reversion by treaty, as Scott's comment might be taken as implying. But we have already concluded that the *Treaty* and *Acts of Union* no longer have any relevance in international law. And in any event, there is no express right to reversion. Article 1 actually states the opposite: that England and Scotland 'shall ... for ever after be united into one Kingdom'.

96.2 It might refer to the reversion of territorial enclaves such as Kowloon or the Panama Canal Zone. This might be a consideration if the rUK wishes to retain rights to an enclave within what is now Scotland (such as the naval base at Faslane).

96.3 It might refer to what is called *postliminium*. This evolved by analogy to the Roman legal principle of reversion of persons or property to their status or ownership before capture by an enemy or alien nation. On one, broad formulation, reversion might occur where a state is completely subjugated – even despite a peace treaty or the extinction of the state – provided the subjugated people has not voluntarily submitted and has merely ceased to resist. But even then reversion would be possible only in such a situation and only for a relatively brief period, since after that the people's consent to subjugation might be presumed. Neither criterion applies to Scotland.

96.4 There are some indications, though dubious, that a reversion to sovereignty may be possible following decolonisation. If reversion is possible on this basis, the reverting entity would have to be identical with the pre-colonial state. There is no clear instance of this occurring. In any event, since Scotland is part of the metropolitan UK rather than a colony whose sovereignty has been suppressed or extinguished, even if such a principle exists it is not applicable.

97. Other claims of continuity despite sometimes lengthy intermissions relate to states whose annexation was effective but clearly illegal (as distinct from reversion after an annexation that accorded with the international law of the day). In these cases the formal legal identity of the state may be preserved by the relevant rules of international law. Examples include

[78] Scott P, *Scotland in Europe: Dialogue with a Sceptical Friend* (1992) 41–2.

[79] See Crawford (2nd edn, 2006) 695–9.

Ethiopia (annexed by Italy); Austria and Czechoslovakia (by Germany); and Kuwait (by Iraq).[80] Since the principles of international law involved depend on the fact of illegal annexation – which is not applicable to Scotland – there is also no need to discuss these cases in detail. The three Baltic states, discussed below, may also fall into this category.

98. This leaves only a small number of eclectic examples of apparent reversion, which are discussed below, followed by some conclusions for Scotland and the UK.

(i) State practice

99. There is little state practice on what might be called situations of identity without continuity: the possibility that a state that has been voluntarily suppressed or extinguished for a period may be re-established on the same or substantially the same territory as the former state and regarded for relevant purposes as the same entity.

100. One possible example of a voluntary union is the United Arab Republic (UAR):

100.1 Syria and Egypt formed the UAR as an ostensibly unitary state in 1958. By acquiescence and agreement, the international obligations of *both* former states continued to bind the UAR with respect to the relevant territory.

100.2 In 1961, Syria withdrew. The former obligations of both states continued in force. Egypt, which retained the UAR's name for several years, continued to be a UN member. Taken on its own, this might suggest that it was a continuator state. But Syria's UN membership also continued without the need for formal readmission.[81] No other state objected to this seemingly anomalous arrangement, which might have implied that Syria had reverted to its earlier status.

100.3 But the better view is that the UAR was never the unitary state it purported to be. Instead it was a loose association whose existence was not inconsistent with the continuing international personality of its constituent units.[82] It is comparable to the Senegambia Confederation between Senegal and the Gambia (1982–89), under which both states retained their 'independence and sovereignty', and the even looser Libya–Morocco Federation (1984–86).[83] Austria-Hungary during the period of dual monarchy might also fall into this category if it is correct (as discussed above) that Austria and Hungary had separate legal personalities.

100.4 That is to say: Syria's international personality never ceased to exist.

101. After the political collapse of the USSR, the three Baltic states – Estonia, Latvia and Lithuania – claimed to continue the identity of the pre-1940 Baltic states, which the USSR had effectively annexed. To some extent other states accepted these claims. For example, the EC declared that it 'warmly welcomes the restoration of the sovereignty and independence of the Baltic States which they lost in 1940. They have consistently regarded the democratically elected parliaments and governments of these states as the legitimate representatives of the Baltic peoples'.[84] The UK later stated that it 'never

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[80] See ibid 691–2.

[81] Young R, 'The state of Syria: Old or new?' (1962) 56 *AJIL* 482. See further Scharf, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28 *Cornell ILJ* 29, 37.

[82] See Crawford (2nd edn, 2006) 489.

[83] Agreement Concerning the Establishment of a Senegambia Confederation, 17 December 1981, 1261 UNTS 331; Libya–Morocco Federation Agreement, 13 August 1984, reprinted in (1984–85) 17 *Africa Contemporary Record: Annual Survey of Documents* C 20. See further Crawford (2nd edn, 2006) 490.

[84] Declaration at the Brussels EC Extraordinary Ministerial Meeting, 27 August 1991, (1991) 62 *BYIL* 558.

recognised *de jure* the annexation of the Baltic states in 1940, although *de facto* they were a part of the Soviet Union from 1940 until 1991'.[85]

102. What these statements suggest is that their formal legal identity of the Baltic states, rather than being extinguished in 1940 and then revived in 1991, was preserved throughout that period. It was significant that Russia's control, though effective, was tainted by illegality. This places the Baltic states in the same category as the more fleeting cases of illegal but effective annexation mentioned above and suggests that in such circumstances even the passage of fifty years may not displace the presumption of continuity. As Koskenniemi notes:

> It is always possible to challenge the application of whatever succession rules might otherwise seem valid by the argument that despite the effectiveness of ... possession no statehood or legitimate transfer of sovereignty has resulted as the criteria for the establishment of statehood (lawful possession) have not been met. That is the argument that enabled the Russian Federation to step into the shoes of the Soviet Union while excluding the passing of the rights and obligations of the Soviet era to the Baltic republics after the re-establishment of their independence in 1991.[86]

103. But even if this is indeed what happened, the consequences of the reappearance of the Baltic states were few. All or almost all the manifestations of the pre-1940 Baltic states disappeared after their effective submergence into the USSR. A few diplomatic and consular remnants continued to be treated as having some official status, though their governments did not continue in exile.[87] Lehto posits that the 'doctrine of *desuetude*' led to the termination of most or all of their pre-1940 treaties.[88] The result was that whether the post-1991 Baltic states continued the identity of the pre-1940 Baltic states had almost no practical effect. For example, the UN not having existed in 1940, they joined it as new members on 17 September 1991.[89]

104. Finally, there is a category of assertions of state continuity made in the 20th century despite even longer intermissions. These have an even more fictional air.

105. The constitutions adopted by Croatia and Macedonia after their independence asserted continuity with entities long predating the SFRY.[90] The FRY accepted these assertions and, in exchange, Croatia and Macedonia stated that the FRY was related to the Serbian state recognised by the Congress of Berlin (which reorganised the Balkans after the Russo-Turkish War). The Croatian–FRY exchange, for example, stated:

> Proceeding from the historical fact that Serbia and Montenegro existed as independent States before the creation of Yugoslavia, and bearing in mind the fact that Yugoslavia has continued the international legal personality of these States, the Republic of Croatia notes the existence of the State continuity of the Federal Republic of Yugoslavia. Proceeding from the historical fact of the existence of the

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[85] Statement of Parliamentary Under-Secretary of State, FCO, 581 *HL Deb* col 1187, 21 July 1997.

[86] Koskenniemi M, 'The present state of research carried out by the English-speaking section of the Centre for Studies and Research of the Hague Academy of International Law' in Koskenniemi (ed), *La succession d'états: La codification à l'Épreuve des faits* (1996) 89, 127.

[87] Grant TD, 'United States practice relating to the Baltic States, 1940–2000' (2001) 1 *Baltic YBIL* 23, 41–9.

[88] Lehto M, 'Succession of states in the former Soviet Union: Arrangements concerning the bilateral treaties of Finland and the USSR' (1993) 4 *Finnish YBIL* 194, 214–17. See further Crawford (2nd edn, 2006) 689, 691, 703.

[89] SC Res 709, 710 and 711 (1991); GA Res 46/4, 46/5 and 46/6 (1991).

[90] See Crawford (2nd edn, 2006) 690.

> various forms of statal organization of Croatia in the past, the Federal Republic of Yugoslavia notes the existence of the continuity of the Croatian statehood.[91]

106. Sahović notes that these exchanges were crafted so as to produce few legal consequences. In particular, they segregated issues of state succession from the statements about 'continuity'.[92] This suggests that the continuity they purported to recognise was a matter of national or historical identity rather than international law.

107. Poland effectively ceased to exist from its partition in 1795 until 1918. Thereafter Polish courts made claims of identity, but they were not recognised by other states.[93]

108. On the identity of the Kingdom of Bohemia and Moravia with Czechoslovakia, despite a gap from 1620 to 1918, Malenovsky writes: '*l'affirmation de sa continuité au bout de trois siècles de rupture ne dépassait pas les limites d'une fiction juridique*'.[94]

(ii) Applicability to Scotland and implications for the remainder of the UK

109. Once we leave aside plainly inapplicable categories of reversion, there is little or nothing to suggest that Scotland could identify itself with the pre-1707 Scottish state in a manner which would have any specific legal consequence for the issue on which we are asked to advise.

110. Even if the case of the UAR is treated as a genuine example of reversion, it differs from that of the UK in that the union was rather nominal and existed for less than four years. It seems unlikely that the principle could encompass situations of voluntary incorporation into a metropolitan state for a much longer period.

111. Cases of annexation that other states have treated as being illegal are even less apposite to Scotland. The Baltic states may seem atypical in that they apparently reappeared after a period – forty years – that lasted much longer than, say, Iraq's more fleeting occupation of Kuwait. But if that is indeed what happened, the principle nonetheless rests on the preservation of their identity throughout a period of illegal annexation. It is not applicable to a voluntary union. Given the few legal consequences that followed from the Baltic states' claims, they might also be seen as having been primarily political rather than legal assertions.

112. The pre-1707 Scottish state is comparable to the Kingdom of Bohemia and Moravia in that a claim of continuity would have to overcome a gap of more than three centuries. Claims of continuity over such longer periods that do not depend on an annexation being illegal under the international law of the day have an even more plainly non-legal character. In the case of the exchanges of recognition between Croatia, Macedonia and the FRY, these states even took steps to segregate them from any legal consequences for state succession.

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[91] Agreement on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia, 8 April 1996, S/1996/291, Annex, 17 April 1996, 35 ILM 1246, 1248, Art 4. See also Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia, 23 August 1996, A/51/318, A/1996/706, Annex, 29 August 1996, 35 ILM 1219, 1221 (1996), Art 5.

[92] Sahović M, 'La reconnaissance mutuelle entre les républiques de l'ex-Yougoslavie' (1996) 42 *AFDI* 228, 231–2.

[93] *Republic v Felsenstadt* (1922) 1 ILR 33; *Republic v Weisholc* (1919) 1 ILR 472; *Republic v Pantol* (1922) 1 ILR 35; Dörr O, *Inkorporation* 204–5.

[94] '[T]he assertion of its continuity after three centuries of rupture did not go beyond the bounds of a legal fiction': Malenovsky, 'Problèmes juridiques liés à la partition de la Tchécoslovaquie' (1993) 39 *AFDI* 305, 311–12.

113. More practically, it seems that Scotland would have little to gain from asserting a *legal* claim of continuity with the pre-1707 Scottish state, as distinct from claiming it as a matter of national or historical identity. Scott suggests that after reverting, Scotland and England 'would both inherit the other treaty rights and obligations of the United Kingdom and that includes membership of the European Community'.[95] But that does not follow as a matter of law. Like the pre-1940 Baltic states, the pre-1707 Scottish state was not a member of the EU – or of the UN. Whether Scotland would succeed to the UK's membership of the EU is a separate question from whether it can revert to a former state: see Part V below.

114. Any assertion of reversion by Scotland (even if generally accepted) would have no consequences for the rUK's status. For the reasons discussed above, the UK may already be the continuator of the pre-1707 English state, and its territory has since also expanded to include Northern Ireland. But in any event, the state practice discussed above does not condition the claim to continuity of the 'rump state' upon the reversion to sovereignty of the separating entity. These are quite separate questions, as shown by the case of Russia and the Baltic states.

115. We conclude that Scottish reversion would not be legally relevant to the questions we are asked to advise on, and in particular that it would be inconsequential for the rUK.

[95] Scott (1992) 41–2.

Part V:
Scotland and the remainder of the UK in international organisations

116. This Part will begin by considering the position of Scotland and the rUK in international organisations generally. It will then consider the special cases of the *European Convention on Human Rights* and the European Union.

117. These are matters of state succession and are conceptually separate from and subsequent to the determination of the status of the rUK and Scotland as continuator or new states.

118. The discussion below is premised on the conclusion drawn in Part IV: that the rUK would be the continuator state of the UK and Scotland would be a new state.

(1) International organisations generally

119. Insofar as any claim by the SNP or Scottish Government that Scotland would remain a member of international organisations is based on the *Vienna Convention on Succession of States in Respect of Treaties* of 1978, it can be dismissed as, at best, inconclusive.

120. Articles 34 and 35 of the 1978 Convention provide as follows:

> *Article 34*
> *Succession of States in cases of separation of parts of a State*
>
> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
>
> (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.
>
> 2. Paragraph 1 does not apply if:
>
> (a) the States concerned otherwise agree; or
>
> (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 35
Position if a State continues after separation of part of its territory

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

(a) the States concerned otherwise agree;

(b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

(c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

121. The exceptions in Article 34(2)(b) and Article 35(c) might well apply to a treaty constituting an international organisation. Automatic accession might, for example, be incompatible with the objects and purposes set out in the *Treaty on European Union* (*TEU*)[96] Articles 2 and 3 and elsewhere. Automatic accession might also 'radically change' the conditions for the operation of the EU treaties insofar as those conditions include the existence of particular Member States or the relative size of their territory or population.

122. But it is not necessary to consider whether those exceptions cover Scotland's or the rUK's membership of that or any other international organisation, because the *Vienna Convention on Succession of States in Respect of Treaties* Article 4 expressly states:

Article 4
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to the effects of a succession of States in respect of:

(a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

123. This makes it clear that the effect of state succession on membership of an international organisation depends on the relevant rules of that organisation.

124. It is doubtful whether the *Vienna Convention on Succession of States in Respect of Treaties* would be relevant to Scotland and the rUK in any event, since the UK is not a party. Few EU members are: only Cyprus, the Czech Republic, Estonia, Poland, Slovakia and Slovenia (plus acceding EU member Croatia).[97] Shaw comments that whether Article 34 'constitutes a rule of customary law is ... unclear, but in the vast majority of situations

[96] Original version: 7 February 1992, (1992) 31 ILM 253. Consolidated version: (2010) *OJ* C83/01.

[97] See treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en.

the matter is likely to be regulated by specific arrangements'.[98] For example, Russia alone (the continuator) continued the USSR's participation in many treaties. Its successor states (new states that, under Article 34, would nonetheless also be expected to succeed to them) did not always do so in practice, though most agreed generally to fulfil international obligations arising from treaties of the USSR[99] and some entered into more specific arrangements.[100]

125. In contrast, Article 4 accords with the prevailing view that principles of state succession to treaties have no application to membership of international organisations. Instead it depends on the particular constitution or rules of the organisation.[101]

126. This is illustrated by the state practice recounted in Part IV on the UN. The *UN Charter* makes no provision for succession to membership. Article 4(2) simply states:

> 1. Membership of the United Nations is open to all other peace-loving states ['other' meaning other than original members] which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> 2. The admission of any such state to membership of the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

127. In other words: it falls to the Security Council and General Assembly to apply the conditions for membership in Article 4(1). In practice political considerations often intrude into admission decisions.[102] But in 1947, following the debate about whether Pakistan could succeed to British India's membership, the Sixth Committee of the General Assembly adopted the following principles as embodying its views on the legal rules 'to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject':

> 1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
>
> 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or no they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
>
> 3. Beyond that, each case must be judged according to its merits.[103]

128. Thus if a state is a continuator state then its UN membership will continue, whereas a new state must be formally admitted to membership.

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[98] Shaw M, *International Law* (6th edn, 2008) 980–1.

[99] *Alma Ata Protocol* (Russia, Ukraine, Belarus, Moldova, Azerbaijan, Armenia, Kazakhstan, Tajikistan, Kyrgyzstan, Turkmenistan, Uzbekistan), 8 January 1992, 31 ILM 148, 149.

[100] See Crawford (2nd edn, 2006) 678 n 45; Shaw (6th edn, 2008) 976–7.

[101] See *Brownlie's Principles* (8th edn, 2012) 442–3.

[102] See Crawford (2nd edn, 2006) 179–90.

[103] (1947–48) *UNYB* 39–40.

129. Practice has been mostly consistent in requiring new states to join the UN in their own right, at least once a consensus has emerged on disputed questions of continuity: Pakistan (in 1947); Singapore; Bangladesh; the former Soviet republics other than Russia (and Belarus and Ukraine, which were, anomalously, already members in their own right); Eritrea; the Czech Republic and Slovakia; the former constituent parts of the SFRY (including eventually the FRY: in 2000); Montenegro; and South Sudan. Conversely, the continuator states in those cases did not have to rejoin.

130. The only apparent exception – Syria after leaving the UAR – has already been noted as a special case with little weight as state practice. If that exception sheds any further light on the likelihood that Scotland or the rUK would be required to join the UN, it is on the significance of acquiescence by other states to a state's continuing membership.

131. That acquiescence is particularly relevant to the UK insofar as a precedent was set when Russia continued to occupy the USSR's permanent seat on the Security Council, even though *UN Charter* Article 23 allocates it to 'the Union of Soviet Socialist Republics'. In our view, if other states accepted the rUK as the continuator state they would accept its retention of the UK's permanent seat.

132. So there may be no general rule in international law governing succession to membership of international organisations. But at least in the case of the UN, Scotland would be required to join as a new state whereas the rUK would retain the UK's membership – including its permanent seat on the Security Council.

133. Although it would depend on the relevant organisation's rules, *prima facie* Scotland would also be required to join other international organisations as a new state.

(2) The Council of Europe and the *European Convention on Human Rights*

134. The UK is a member of the Council of Europe and a state party to the *European Convention on Human Rights* (*ECHR*).[104] Although the two questions are distinct, in practice they are connected in two ways. First, eligibility to sign and ratify the *ECHR* depends on being a member of the Council of Europe.[105] Second, a state cannot now become a member of the Council of Europe without also becoming or agreeing to become a party to the *ECHR*. The Parliamentary Assembly of the Council of Europe resolved in 1994 'that accession to the Council of Europe must go together with becoming a party to the [*ECHR*]' and 'therefore considers that the ratification procedure should normally be completed within one year after accession to the Statute and signature of the Convention'.[106] Thus membership of the Council of Europe and of the *ECHR* are now linked even more closely. But, as demonstrated below, in accordance with the practice this does not mean that a state cannot become a party to the *ECHR* by way of succession.

[104] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, ETS 5 (as amended).

[105] *ECHR*, Art 58(1). Under Art 58(2), the EU may accede to the Convention. There is no other provision for accession.

[106] Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994).

135. The relevant provisions of the *Statute of the Council of Europe* state:[107]

> *Article 2*
>
> The members of the Council of Europe are the Parties to this Statute.
>
> *Article 3*
>
> Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.
>
> *Article 4*
>
> Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.
>
> *Article 16*
>
> The Committee of Ministers shall, subject to the provisions of Articles 24, 28, 30, 32, 33 and 35, relating to the powers of the Consultative Assembly, decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. For this purpose the Committee of Ministers shall adopt such financial and administrative arrangements as may be necessary.

136. There is an express provision for withdrawal (Article 7) but none for state succession. There are, however, two precedents: the dissolution of Czechoslovakia (alluded to below) and, more recently and more relevantly, the independence of Montenegro.

137. Serbia-Montenegro was a member of the Council of Europe and a state party to the *ECHR*. On 16 June 2006, the Committee of Ministers of the Council of Europe, referring to a letter from Serbia stating that it would continue its membership in accordance with the *Constitutional Charter* of Serbia-Montenegro (quoted at paragraph 59 above), 'noted that the Republic of Serbia is continuing the membership of Serbia and Montenegro in the Council of Europe with effect from 3 June 2006'.[108] In contrast, Montenegro submitted a request for accession to the Council of Europe, the request was accepted, and on 11 May 2007, it ratified the *Statute of the Council of Europe*.[109] That is to say: Serbia's membership continued and Montenegro joined the Council of Europe as a new state in accordance with *Statute of the Council of Europe* Article 4.

138. As for Montenegro's position under the *ECHR*, the Committee of Ministers decided:[110]

> having regard to their decision to invite the Republic of Montenegro to become a member of the Council of Europe and to the declaration by that state of its intention to succeed to those conventions to which the State Union of Serbia and Montenegro had been a Party or Signatory and to consider itself bound, as from 6 June 2006, to the European Convention for the Protection of Human Rights and Fundamental

[107] *Statute of the Council of Europe*, 5 May 1949, ETS 1.

[108] CoE Doc CM/Del/Dec(2006)967/2.3aE / 16 June 2006, wcd.coe.int/ViewDoc.jsp?id=1011241&Site=COE.

[109] See conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG.

[110] CoE Doc CM/Del/Dec(2007)994bis/2.1aE / 14 May 2007, wcd.coe.int/ViewDoc.jsp?id=1131531&Site=CM.

Freedoms and Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto and to the European Convention on the Suppression of Terrorism,

a. decided that the Republic of Montenegro is to be regarded as a Party to the European Convention on Human Rights and its Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto with effect from 6 June 2006 … .

139. This was confirmed in *Bijelić v Montenegro and Serbia*,[111] which concerned an application under the *ECHR* originally brought against Serbia-Montenegro in the European Court of Human Rights. After Montenegro declared independence, the applicants indicated that they wished to proceed against both Montenegro and Serbia. The Court held that the *ECHR* had been 'continuously in force' in Montenegro, despite its independence, for reasons best conveyed by quoting them in full:[112]

139.1 The Court notes at the outset that the Committee of Ministers has the power under Articles 4 and 16 of the Statute of the Council of Europe to invite a State to join the organisation as well as to decide 'all matters relating to … [the Council's] … internal organisation and arrangements' … . The Court, however, notwithstanding Article 54 of the Convention, has the sole competence under Article 32 thereof to determine all issues concerning 'the interpretation and application of the Convention', including those involving its temporal jurisdiction and/or the compatibility of the applicants' complaints *ratione personae*.

139.2 With this in mind … the Court observes, as regards the present case, that:

(i) the only reasonable interpretation of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro … , the wording of Article 44 of the Montenegrin Right to a Trial within a Reasonable Time Act … and indeed the Montenegrin Government's own observations, would all suggest that Montenegro should be considered bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro;

(ii) the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention;

(iii) although the circumstances of the creation of the Czech and Slovak Republics as separate States were clearly not identical to the present case, the Court's response to this situation is relevant: namely, notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court's practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993 … .

[111] App 11890/05, 28 April 2009, ECtHR.

[112] Ibid §§ 67–9.

139.3 In view of the above, given the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession ... the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter.

140. The consequences of Scottish independence are likely to be the same: the rUK will simply continue the UK's membership of the Council of Europe and continue to be a state party to the *ECHR*. Scotland will probably have to accede to the Council of Europe as a new member, but the application of the *ECHR* to Scotland will continue uninterrupted. As the reference to the earlier precedent of Czechoslovakia indicates, even if both the rUK and Scotland were considered new states, the *ECHR* would similarly still continue to apply uninterrupted.

141. Given that the Committee of Ministers and the Court both had regard to Montenegro's own legislation and declarations, it is possible that the result might be different if Scotland were to express a contrary intention. Even then, the Court's comment that fundamental rights 'belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession' suggests that if that situation arose the Court might well still resist the conclusion that the *ECHR* would cease to apply.

(3) The European Union

142. In principle the comments made above about the *Vienna Convention on Succession of States in Respect of Treaties* and admission to international organisations apply equally to the EU: Scotland would not automatically join on independence unless the EU's rules had that result. It is true that the EU is a 'new legal order of international law'[113] and that internally the relations of the Member States and their peoples in matters covered by the European treaties are governed by European law, as determined ultimately by the ECJ, and not by general international law. Nonetheless, such treatment derives from treaties which are concluded by Member States on a basis of unanimity, in the same manner as other treaties. The question of whether a state is a member of the EU has hitherto been treated as a matter of international law,[114] just as the question of the territorial extent of a state has been.[115]

143. There is no clear precedent for a metropolitan part of an EU Member State becoming independent and then either claiming automatic membership or seeking in its own right to join the EU (or its predecessor organisations: we will refer to all its incarnations taken together as the 'EU'). Nor has a state ever withdrawn from the EU. Only the idiosyncratic cases of Algeria and Greenland can provide even approximate guidance.

144. In practice, to an even greater extent than questions of state continuity or membership of the UN, the consequences of Scottish independence within the EU will depend on the attitude of other EU Member States and organs, and on negotiations. This means that the following discussion must necessarily be somewhat speculative.

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[113] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[114] Cf Answer given by Mr Barroso on behalf of the Commission, 28 August 2012, www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN (quoted below).

[115] Case 148/77, *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, § 10 (discussed below).

(a) The position of the remainder of the UK in the EU

145. Assuming that the rUK would be generally acknowledged to be the continuator state of the UK – that is to say: the same state as an existing EU member – it seems unlikely that anyone would suggest that its EU membership could somehow lapse as a consequence of the loss of population and territory occasioned by Scottish independence.

146. Two previous withdrawals of parts of states from the EU, both before the *TEU*, did not affect the membership of those states themselves:

146.1 Algeria was ostensibly a part of metropolitan France – and constituted the majority of its territory – before its independence in 1962 and was therefore part of the European Economic Community (EEC). It did not seek to remain part of the EEC. Nor did its withdrawal affect France's membership. Its relationship with the EEC was eventually resolved by a co-operation agreement.[116] Since in reality it was more like a colony than like the rest of metropolitan France, this precedent is of little weight in determining the consequences for the rUK. In particular, despite the position in French law, the EEC never recognised Algeria as part of its territory but treated it like other dependent territories.[117]

146.2 From 1979, Greenland had autonomy but remained part of Denmark and therefore of what was then the EC. In 1985, it voted to withdraw from the EC. This did not affect Denmark's membership. But since Greenland did not become independent (and still has not: it is now an autonomous country within the Kingdom of Denmark), this case too is of only limited relevance. One respect in which it is relevant is that the EC treaties were amended to alter their territorial scope.

147. The *TEU*, as amended by the *Treaty of Lisbon* in 2007,[118] now deals expressly with the possibility of withdrawal. Article 50(1) permits a Member State to withdraw from the EU, but Article 50(2)–(3) then sets out a procedure for such a withdrawal, including a requirement to negotiate a withdrawal agreement:

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

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[116] *EEC–Algeria Cooperation Agreement*, 26 April 1976, (1978) *OJ* L263/2.

[117] See Lane R, 'Scotland in Europe' in Finnie W, et al (eds) *Edinburgh Essays in Public Law* (1991) 143, 150.

[118] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (2007) *OJ* C306/01.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

   A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

148. Although this anticipates that the EU treaties might cease to apply to a state even without a withdrawal agreement, it still requires notification to the European Council and the passage of two years. The word 'shall' implies that this is mandatory.

149. For the UK to continue as a state after Scottish independence yet somehow to withdraw automatically from the EU would seemingly conflict with this provision, which is the only express one in the EU treaties on withdrawal from membership. This adds to the likelihood that the rUK would continue to be a member of the EU.

150. It does not follow that the rUK's position in the EU would be unaffected by Scottish independence. The consequent reduction in its territory and population could affect any of the UK's terms of membership that depend on those factors. Some might be matters for negotiation, though presumably the UK would have little scope to resist proportionate reductions.

151. The unification of Germany in 1990 should also be mentioned. At the time Member States agreed to avoid specifically amending the EC treaties to reflect the enlargement of the FRG's territory and population. For the FRG, this expedited enlargement; for the other Member States, it implied the FRG's acceptance of the existing apportionment of voting weight and other matters.[119] Since the question was effectively avoided, it is of little use as a precedent.

(b) Scotland's position in the EU

152. Scotland's position within the EU will depend on the EU's own legal order. But there are no legal rules within the EU that specifically govern whether it can automatically succeed to membership (as distinct from the non-legal considerations that might govern any negotiated outcome – which might be more important in practice).

153. On the face of the EU treaties and other indications, it seems likely that Scotland would be required to join the EU as a new Member State. We will discuss its position from this perspective first. We will then go on to note the possible complications that may arise if the ECJ were to attach some independent significance to EU citizenship in the form of individual rights.

(i) The position under the EU treaties

154. Assuming that Scotland would be recognised as a new state, albeit a successor state to the UK, it is difficult to see how Scotland could evade the accession process for new states in the EU treaties. *TEU* Article 49 provides:

> Any European State which respects the values referred to in Article 2 [i.e. 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights …'] and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments

[119] See Jacqué J-P, 'German unification and the European Community' (1991) 2 *EJIL* 1.

> shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

155. In other words: a state must apply for membership, the relevant organs of the EU must consider it in accordance with certain procedural requirements, and the existing EU Member States and the applicant state must unanimously ratify a treaty on its admission.

156. Whether the accession process could be varied in Scotland's case, given that it is already subject to EU law as part of the UK, might be a subject for negotiations. But the ultimate result of Scotland's accession would probably be the same: a treaty making any amendments to the EU treaties required by an increase in membership.

157. The *Treaty Concerning the Accession of Croatia to the European Union* is indicative of the amendments that must still be made to the EU treaties on the accession of a new state now the EU treaties have been amended by the *Treaty of Lisbon*. Most fundamentally, on ratification by the existing Member States it will insert Croatia into *TEU* Article 52,[120] which states, referring to both that treaty and the *Treaty on the Functioning of the European Union* (*TFEU*):[121] 'The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic [and so on, listing the current member states by their official names].' Other amendments made for Croatia's accession include adjustments to the number of ECJ judges and to the capital and board of directors of the European Investment Bank.

158. Similar amendments would be required for Scotland to become an EU Member State.

159. In contrast, beyond the list of Member States in *TEU* Article 52 and the special status of certain overseas countries and territories under *TFEU* Article 355, the EU treaties do not define the territory of EU Member States. In *Hansen v Hauptzollamt Flensburg*, the ECJ held that it followed from a previous incarnation of those two provisions (*Treaty establishing the European Economic Community* Article 227) that 'the status of the French overseas departments within the Community is primarily defined by reference to the French constitution under which, as the French Government has stated, the overseas departments are an integral part of the Republic'.[122] This confirms that more generally a Member State's territory depends on that Member State's own constitution, not on the EU treaties. No treaty amendment is therefore required simply as a result of a change to the borders of a state's territory.

160. This suggests that it is open to the UK to change the territorial scope of the treaties unilaterally by granting Scotland independence. The treaties would continue to apply to the reduced territory of the rUK but would, on their face, cease to apply to an independent Scotland unless amended.

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[120] *Treaty Concerning the Accession of Croatia to the European Union*, 9 December 2011, Art 13.

[121] Consolidated version: (2010) *OJ* C83/47.

[122] Case 148/77, *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, § 10.

160.1 The *Vienna Convention on the Law of Treaties* Article 29 provides: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory' – this leaves open whether the EU treaties can be taken to evidence a different intention.

160.2 At the time the *European Coal and Steel Community Treaty* entered into force, the Saar was part of France. In 1957, it was returned to the FRG under a bilateral treaty. The same day, the members of the European Coal and Steel Community (ECSC) signed a treaty recognising the territorial change (though it remained unratified by Italy and the Netherlands for almost two years). This suggests that the EU treaties – if the same approach is still applicable, despite the development of the ECSC into the EU – might apply only to the territory of a Member State at the time of its accession or ratification rather to than its 'entire territory' at any given time, even if that territory is increased or reduced.[123]

160.3 MacCormick has argued: '[t]he Greenland precedent is of decisive importance, for it shows that as a matter of European law a territory cannot sever itself unilaterally from the constitutional jurisdiction of the European Communities (or, now, the European Union) simply by means of a change of the constitutional relationships within a member state'.[124] But it is not at all of decisive importance here; it concerned a change to the constitutional relationships *within* Denmark, not to Denmark's international borders. Even if the body of EC law would have continued to apply to Greenland without a negotiated withdrawal from the EC, it does not follow that it would continue to apply to Scotland if it became an entirely new state.[125]

160.4 When the FRG enlarged in 1990, EC Member States took the view that the treaties applied to its expanded territory without being specifically amended. But some have argued that the *Protocol to the EEC Treaty on German Internal Trade and Connected Problems* already acknowledged the possibility of future German reunification. On any view Germany was an unusual case, complicated by questions about whether the FRG is the continuator of the former *Reich* and by the political considerations that influenced the states involved.[126]

161. Ziller argues, consistent with the precedent of German reunification:

> The territorial scope of application of EU law can be changed unilaterally by a member state giving independence (decolonisation) to a territory or incorporating a territory. Decolonisation has not meant a dramatic change for numerous territories, because of the definition of the territorial scope of the treaties: In the biggest number of cases, association on the basis of the EC treaties themselves (as an OCT [Overseas Country and Territory]) has been replaced by association on the basis of a treaty between the EC and newly independent states (Yaounde/Lome Cotonou conventions). But increase in a member state's territory has clearly shown where the competence lies in delimiting the EC territory: The reunification of Germany, which legally speaking needed no approval of EC institutions and member states, was the decision solely of a member state and led to an increase of 4.66% in the territory submitted to EC law, and a new population of 16.5 million.[127]

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[123] See Lane, 'Scotland in Europe' in Finnie (1991) 143, 151.

[124] MacCormick, Letter to the *Glasgow Herald*, 1 June 1999, quoted in Murkens JE, 'Scotland's Place in Europe' (2001) 12, www.ucl.ac.uk/spp/publications/unit-publications/68.pdf.

[125] See further Lane, 'Scotland in Europe' in Finnie (1991) 143, 150–1.

[126] See ibid 143, 152.

[127] Ziller J, 'The European Union and the territorial scope of European territories' (2007) 38 *VUWLR* 51.

162. Even if the cession of the Saar is taken as the applicable precedent rather than Greenland or the *Länder* formerly comprising the GDR, it would still not follow that if a state's territory is *reduced* then the EU treaties can somehow continue to apply to the lost territory even if it no longer forms part of a current EU Member State. In any event, the emergence of an entirely new state is quite different from a change in the territory or internal constitutional arrangements of an existing Member State.

163. The conclusion that Scotland would have to accede to the EU as a new Member State is consistent with statements on the subject by EU officials.

163.1 In March 2004, Romano Prodi, then President of the European Commission, said in response to an MEP's question about whether a newly independent region of an EU Member State would have to reapply for EU membership:

> The European Communities and the European Union have been established by the relevant treaties among the Member States. The treaties apply to the Member States (Article 299 of the EC Treaty[128]). When a part of the territory of a Member State ceases to be a part of that state, e.g. because the territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.[129]

163.2 His successor José Manuel Barroso, though reluctant to speculate specifically on the secession of Scotland, gave a similar response when questioned on the topic by BBC News in September 2012:

> It [joining the European Union] is a procedure of international law. A state has to be a democracy first of all and that state has to apply to become a member of the European Union and all the other Member States have to give their consent. A new state, if it wants to join the European Union, has to apply to become a member of the European Union like any state. In fact I see no country leaving and I see many countries wanting to join.[130]

164. All this is not to suggest that it is *inconceivable* for Scotland automatically to be an EU member. The relevant EU organs or Member States might be willing to adjust the usual requirements for membership in the circumstances of Scotland's case. But that would be a decision for them, probably made on the basis of negotiations; it is not required as a matter of international law, nor, at least on its face, by the EU legal order.

165. This is also not to suggest that EU law would necessarily no longer operate in Scotland unless it acceded as a new state. In particular, depending on any arrangements made for the continuation of current UK law following Scottish independence, the *European Communities Act 1972* (UK) s 2(4) might continue to operate in Scotland. Stated in general terms: that section provides that domestic legislation 'shall be construed and have effect subject to' directly applicable EU law. But the continuation of EU law in Scotland would simply be a matter of domestic law. It would not cause Scotland or its citizens to have any rights or obligations under the EU treaties. That would depend on EU membership.

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[128] Now see *TEU* Art 52 and *TFEU* Art 355.

[129] Answer given by Mr Prodi on behalf of the Commission, 1 March 2004, (2004) *OJ* C84E/422.

[130] 'Scottish independence: EC President José Manuel Barroso on new states membership', BBC News, 12 September 2012, www.bbc.co.uk/news/uk-scotland-scotland-politics-19567650.

166. Assuming that Scotland would indeed have to accede to the EU as a new state, it would be a matter for the accession process whether it could do so on similar terms to the UK. There is no rule that, for example, it would somehow automatically be entitled to the UK's opt-outs from the euro or justice and home affairs. The terms of accession would have to be agreed with other Member States.

167. These preliminary conclusions are, however, subject to a caveat: the ECJ might be expected to resist allowing part of a current EU Member State to withdraw automatically from the EU, especially insofar as it would affect the individual rights of current EU citizens. This possibility is discussed below.

(ii) Potential complications

168. State practice supports the view that the nationality of a population follows a change of sovereignty, subject to any particular arrangements. Previous arrangements for succession, such as the peace treaties that reorganised certain European states after the First World War, have given nationals of the predecessor state a right of option. Rather than raise the prospect of statelessness, such arrangements have treated individuals as nationals of one state and terminated such nationality only if an individual exercises the option to that effect.[131]

169. The International Law Commission's *Articles on the Nationality of Natural Persons in Relation to the Succession of States*[132] take a similar approach. Article 4 provides that states shall take all appropriate measures to prevent statelessness. The Articles then deal specifically with the category into which the separation of Scotland from the UK is likely to fall:[133]

> *Article 24*
> *Attribution of the nationality of the successor State*
>
> When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:
>
> (*a*) persons concerned having their habitual residence in its territory; and
>
> (*b*) subject to the provisions of article 8:
>
> (i) persons concerned not covered by subparagraph (*a*) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;
>
> (ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (*a*) and (*b*) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

[131] See *Brownlie's Principles* (8th edn, 2012) 433–6.

[132] The General Assembly took note of the articles in GA Res 55/153 (2000), to which they are annexed.

[133] See also Arts 5 and 11 generally and Arts 22–3 on the dissolution of states.

Article 25
Withdrawal of the nationality of the predecessor State

1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

   (*a*) have their habitual residence in its territory;

   (*b*) are not covered by subparagraph (*a*) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

   (*c*) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26
Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of article 24 and paragraph 2 of article 25 who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

170. An arrangement of this kind might be envisaged for the UK. Depending on its terms, some of Scotland's population might retain UK nationality (and thus EU citizenship).

171. Nonetheless, the status of future Scottish nationals who do not also retain their UK nationality as current citizens of the EU does raise questions. It is conceivable that the ECJ might attach independent significance to EU citizenship in the form of individual rights. Although it is not necessary to discuss the content of any such rights, there is a real possibility that their existence might influence the ECJ in its approach to Scottish independence if Scotland did not become an EU Member State.

172. There is, of course, the preliminary question of how the ECJ would even have the opportunity to consider Scottish independence, and in particular to consider it on the basis only of existing EU law. In practice this is unlikely:

    172.1 A case relevant to Scottish independence would have to come before the ECJ. This might happen, for example, if an individual argued before a UK court that some action by the UK connected with Scottish independence was incompatible with EU law and if the UK court then made a preliminary reference to the ECJ. But whether this would happen and whether it would happen in time to influence the process of Scottish independence and EU accession may be doubtful.

    172.2 In any event, there is virtually no chance that the ECJ would be called on to consider the question on the basis solely of existing EU law. More likely, the UK, Scotland and the EU will negotiate and agree on arrangements for Scottish independence that would form the actual subject matter of any consideration by the ECJ. This view is strengthened by the fact that there is no express provision on the point in the

> EU treaties: it will probably be treated as *sui generis* matter to be dealt with by the member states, at least initially, rather than the ECJ.

173. Nevertheless, arguments have been made by others that appear to be premised on existing EU law rather than on any agreement that might be reached between the parties. It is not possible to do much more than speculate. But there seem to be two main lines of argument that the ECJ might consider, neither of which seems likely.

174. First, Lane, writing before the EC became the EU, concludes that Scottish independence would require the EC's concurrence and probably also negotiations in good faith:

> Independence in Europe for Scotland (and for England) can be brought about only if action at the national level proceeds concurrently with action at the Community level, thus producing, at the end of the day, an agreed result which necessarily includes the concurrence of the Community institutions and all member states. A Scotland bent upon independence grounded in the clear democratic support of the Scottish people would create a moral and, given the international law principle of self-determination, probably a legal obligation for all member states to negotiate in good faith in order to produce such a result, but this solution lies essentially in the domain of politics, not law. And that is a different matter.[134]

175. His suggestion that the principle of self-determination would create a legal obligation to negotiate in good faith is dubious. Outside the colonial context, the principle of self-determination is controversial. The Canadian Supreme Court has held that 'a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire'. In metropolitan territories such as Scotland, 'peoples are expected to achieve self-determination within the framework of their existing state' and a state that 'respects the principles of self-determination in its internal arrangements ... is entitled to maintain its territorial integrity under international law'.[135] This does not, of course, detract from Lane's point that if Scots voted for independence in a referendum, the parties might feel morally or politically obliged to smooth its path.

176. It also does not prejudge the position within the internal EU legal order. In *Van Gend en Loos*,[136] the ECJ held that what is now the EU 'constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'. In *Grzelczyk*,[137] it held that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.

177. An argument within EU law that the UK, in negotiating Scottish independence and perhaps its status within the EU, would be bound by a principle of good faith to act in a certain way – precisely what that way would be is a matter for speculation – would have to rely on a creative and expansive reading of EU treaty provisions that has no legal precedent. There is no provision that obviously gives rise to such a requirement.

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[134] Lane, 'Scotland in Europe' in Finnie (1991) 143, 154–5.

[135] *Reference re Secession of Quebec* (1998) 115 ILR 536, 594–5; *Brownlie's Principles* (8th edn, 2012) 141–2.

[136] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[137] Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, § 31.

178. Second, there is a more radical view, held for example by O'Neill, that Scotland's automatic succession to the EU is possible or even required by the EU legal order. O'Neill identifies several arguments supposedly supporting this view:[138]

178.1 In *Rottmann v Bavaria*, a German *Land* had withdrawn German nationality from a man who was also an Austrian national, with the effect that he also lost his Austrian nationality and hence his EU citizenship. The ECJ held that a Member State must exercise its powers to withdraw an individual's nationality compatibly with the principles of EU law (though it left open whether in the instant case, which involved fraud, it was proportionate to withdraw it).[139]

178.2 *TFEU* Article 20(1), which has the effect of precluding domestic measures that deprive EU citizens of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens, coupled with the rights conferred by the instruments mentioned above, might influence the ECJ to rule 'that Scotland and [the rUK] should *each* succeed to the UK's existing membership of the EU, but now as two States rather than as one'.

178.3 O'Neill also argues that if Scotland became independent without automatically succeeding to EU membership then that would be tantamount to a withdrawal outside the framework of *TEU* Article 50.

179. For the reasons already discussed, there is no basis in the EU treaties for the latter argument: Scottish independence would be an event without a clear precedent in EU law and is not clearly governed by any particular provisions of the EU treaties.

180. Nor do the arguments based on EU citizenship go far. They diverge from the apparent expectation of the European Commission, evident from the quotations above, that Scotland would have to accede to the EU as a new Member State. Barroso has also said, in response to a question stemming from a citizens' initiative to ensure that citizens of a future independent Catalan state would remain EU citizens:

> The Commission confirms that, in accordance with Article 20 of the [*TFEU*], EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU Member State). It also confirms that in the hypothetical event of a secession of a part of an EU Member State, the solution would have to be found and negotiated within the international legal order. Any other consideration related to the consequences of such event would be of a conjectural nature.[140]

181. This is consistent with *TFEU* Article 20(1), which states:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

182. That is to say: EU citizenship is stated to be contingent on the nationality of a Member State. This is reinforced by the *Declaration on Nationality of a Member State to the Treaty on European Union*, which was annexed to that treaty and which states: 'The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual posses the

[138] See further O'Neill A, 'A quarrel in a faraway country? Scotland, independence and the EU', 14 November 2011, eutopialaw.com/2011/11/14/685/.

[139] Case C-135/08, *Rottmann v Bavaria*, 2 March 2010.

[140] Answer given by Mr Barroso on behalf of the Commission, 28 August 2012, www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN.

nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.'[141]

183. In any event, despite these arguments, it is difficult to see how the ECJ could work around the need to incorporate Scotland into the EU treaties and to renegotiate its position relative to other Member States. There is no precedent for such a situation, and in practice the EU and its existing Member States would almost certainly attempt to avoid it. It is unlikely either that the ECJ would come to consider the question in the terms discussed above or that, if somehow it did, it would effectively usurp the role of the Member States in negotiating a political solution by taking an approach comparable to those suggested by Lane and O'Neill.

184. Of course, there might be a distinction between the position in public international law generally and the position in the EU legal order. Public international law (as already discussed) is the proper law for answering questions of state continuity and succession outside the specific context of the EU. Even if the ECJ were to take a different approach, that would not affect the status of the rUK and Scotland generally. It would only affect their position within the EU legal order.

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[141] (1992) *OJ* C191, 98.

Glossary

Accession	In the context of the European Union or other international organisations, accession is the process by which a state becomes a member of that body.
Continuing state or continuator	A state regarded as having the same international legal personality as the predecessor state despite a change in circumstances, such as a loss of territory or population.
Currency options	**Formal currency union:** where two or more independent states formally agree to share a single currency and common monetary institutions and policy settings (for example the euro area).
	Pegged currency: where an independent state manages the exchange rate of its currency against that of another, typically larger, state (most commonly sterling, the euro or the US dollar). Monetary authorities intervene to ensure that the exchange rate remains constant (or varies within a specified band) against the chosen currency (for example, Denmark fixes the value of the Danish krone against the euro within a narrow target band).
	Floating currency: where the value of an independent state's currency and its exchange rate with other currencies are driven by market demand for the currency (for example sterling, euro or dollar).
	Unilateral use of a foreign currency – commonly referred to as 'dollarisation' or, in the context of an independent Scottish state potentially adopting sterling, 'sterlingisation'. This is where a state unilaterally adopts the currency of another state without agreeing a formal union and without gaining a formal role in the institutions and policies that operate monetary policy (for example, Panama uses the US dollar unilaterally, outside of the formal area of responsibility of the Federal Reserve).
Dissolution	Where a state ceases to exist and divides into two or more new states, none of which is the continuing state.

International organisations	Organisations established under international law and possessing their own international legal personality (such as the United Nations, European Union and the North Atlantic Treaty Organization).
Jurisdiction	The area of control of a particular government or legal system.
Predecessor state	Where a state has been dissolved or where part of it has separated to become a new state (succession), the predecessor state is the state which existed prior to dissolution or succession.
Reversion	Where a state that has been suppressed or extinguished for a period is re-established on the same or similar territory as the former state and is regarded as the same legal entity.
Secession	The creation of a new state without the consent of the former sovereign state.
Sovereignty	The jurisdiction or legislative competence of a government over its territory and the permanent population living there.
State	A legal entity which comprises a people settled in a territory under its own sovereign government and which possesses legal personality under international law.
Succession/ successor state	The replacement of one state by another in the responsibility for the international relations of a territory previously belonging to the former state (for example, South Sudan was the successor state following its independence from Sudan).
Treaty	An international agreement concluded between states in written form and governed by international law.

Precise, agreed definitions do not exist for many legal and constitutional terms, and some may have multiple meanings depending on the context in which they are used (for example, whether they relate to international or domestic law). The explanations above are intended to be a guide for non-expert readers rather than a definitive statement of the UK Government's interpretation of these terms.

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