

The UK's Membership of the UN in the Event of Scottish Independence

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Summary

The evidence, reviewed below, indicates that under general international law and UN law the UK's position should be one of continuation in terms of UN membership, including permanent membership of the UN Security Council (UNSC). As a new state, Scotland would have to apply for UN membership, which should be straightforward. The (new) UK's position would be that of successor state to the (old) UK's entitling it to continue UN membership, and there are a number of precedents in UN practice to support this. However, international law on succession of states is limited and contested and, while UN precedents on membership in such situations provide some clarity, the law in this area is largely a product of practice and, in any such unstructured legal system, new precedents may well emerge as the political context changes.

While legally the UK's case for continued UN membership (including permanent membership) is relatively strong, the danger is that politically, unless the situation is managed (so that the other permanent members and key states raise no objections), Scottish independence could potentially be used by the non-permanent members of the UNSC and the rest of the UN membership (especially those states pushing to become new permanent members), to revisit the issue of permanent membership and wider UNSC

reform (a debate that has been rumbling since the early 1990s). It is noticeable that at the recent annual session of the UN General Assembly, a number of heads of state and government spoke about the need for UN reform, particularly of the UNSC.

Although not a direct precedent, the UK government would be well-advised to look at the transition from the Soviet Union to Russia within the UN in 1991-92 as an example of managing the situation so as to ensure the UK's continued occupation of the permanent seat. Furthermore, it would support the UK's continuation of its UN seat (including its permanent membership) to have the support of the new Scottish government.

In summary, though the relevant law is in support of the UK retaining its position in the UN, diplomatic efforts would still be necessary to ensure that the occasion of the independence of Scotland is not used as a trigger for reform of the UNSC, which might lead to the UK losing its permanent membership. This assumes, of course, that the UK wishes to retain this status, for although it gives the UK tremendous influence and prestige it comes with onerous responsibilities. Furthermore, there are very strong arguments that the UNSC is overdue serious reform, with an increase in size to 20-25 member states to widen representation, the expansion of a more representative permanent membership with a restriction on veto rights (for example by requiring two or possibly three negative votes from the permanent membership for any decision to be blocked). The review below, however, assumes that the UK government would wish to retain its current status within the UN.

Succession of States in General International Law

If a state splits into two or more parts there is an issue of succession to the rights and obligations of the predecessor state by the new states, including membership of international organisations. Issues of succession in respect of treaty obligations are partially (and somewhat unsatisfactorily) covered by the Vienna Convention on Succession of States in Respect of Treaties 1978, adopted in the context of the large number of newly decolonized states. For this reason the Treaty does not cover situations where a state breaks up and one of the constituent state purports to take over the identity of the old state on dissolution, though the Treaty recognises that this could happen (Article 34). The Treaty's concern is the position of the newly independent and separating states, not with whether the predecessor state is continued by any of the successor states. Furthermore, the Treaty does not prejudice the rules of an international organisation on the acquisition of

membership or other relevant rules of the organisation (Article 4.a), and so the law discussed in the next section prevails.

The secession (which can be forceful or consensual) of part of a state does not automatically mean that the state ceases to exist. There are a number of precedents in international law and in UN law that strongly indicate that in the event of the partial break-up of the UK, with the independence of Scotland, the remaining state could legitimately claim to be successor to the UK and therefore entitled to continue its membership and status in the UN. This aspect of succession is supported by general international law. As stated by Schermers and Blokker, when a state splits into parts, the 'principal part is generally recognized as the successor of the larger state' (H.G. Schermers and N.M. Blokker, *International Institutional Law*, 5th ed., 2011, 91). For example, the separation of the Irish Free State from the United Kingdom in 1922, did not affect the status of the UK under general international law, though the state was reduced in territory and population, and changed formally from the United Kingdom of Great Britain and Ireland to the United Kingdom of Great Britain and Northern Ireland.

UN Practice and Law

Under UN law there is no provision in the UN Charter that deals with issues of state succession and membership of the UN; the relevant provisions stating that the membership of the UN shall consist of those original signatories to the Charter (Article 3), and shall be 'open to all other peace-loving states which accept the obligations contained in the present Charter' (Article 4.1).

As the following analysis will show, Scotland will, in all likelihood, be treated as a newly independent state within the UN, and in international law generally. As a newly independent state, Scotland would have to apply for membership of the UN, which would require positive resolutions from both the UNSC and UN General Assembly (UNGA) (Article 4.2). Such a process is not usually problematic for a state that is stable, has clear and settled borders and is in peaceful relations with other states. Scotland would meet all these requirements and should be accepted as a member of the UN and universally recognised as a state in a relatively short period of time.

It is worth noting that the UK, as one of the powers that shaped the Charter, a founding member and a permanent member, is in a position of strength in the UN, especially when considering that any formal change to the UN Charter can only be undertaken with the agreement of all the permanent members (Article 108). However, it would be very difficult for the (new)UK to resist change if it were to be isolated with the vast majority of member states pushing for a change to the permanent membership. The inability of the UNSC to take any effective measures in the face of crimes against humanity being committed in Syria has once again re-opened the debate about reforming the UNSC to make it both more effective and more representative. It is therefore politically a difficult time to manage a smooth transition in UK membership within the UN in the event of Scottish independence, although it unlikely that there will ever be a good time.

In order to determine issues of succession in the case of UN membership it is necessary to look to customary international law formed within the UN – that is to look for consistent patterns of practice accompanied by evidence that member states are conforming out of a sense of obligation. According to Conforti there is a generally recognised principle of customary international law that the ‘mere loss or breaking off of part of the territory or of the population residing there does not determine the extinction of a State’. He states further that the ‘breaking off, by not involving the extinction of the State, has no effect on membership of the United Nations The standing as a member of the United Nations, held by the State which suffers the breaking off, remains unchanged’, while the territory that has broken off will have to apply for UN membership and more widely seek recognition of its statehood by other states (B. Conforti, *The Law and Practice of the United Nations*, 3rd ed., 2005, 44-5).

The example given in the manuals is the separation of Pakistan from India in 1947, when India kept its membership of the UN, which it had held since 1945, while Pakistan applied and gained membership as a new member under the procedure for membership application in Article 4 of the UN Charter. There are other similar precedents in terms of UN membership (Egypt continuing the membership of the UAR upon the secession of Syria in 1961; the current Malaysia continuing the membership of former Malaysia upon the secession of Singapore in 1969; the current Pakistan continuing the membership of the old Pakistan with the independence of Bangladesh in 1971; Serbia continuing the membership of Serbia and Montenegro with the independence of Montenegro in 2006; and Sudan continuing UN membership with the independence of South Sudan in 2011).

This consistent and accepted practice suggests that when a relatively smaller part of an existing state breaks off and claims statehood, the remaining state (whose governmental organisation, remaining territory and population, are otherwise largely unaffected) is seen as the successor of the old state and entitled to continue the membership of the old state. Furthermore, the seceding state has to apply for membership as a new state, unless (as in the exceptional case of Syria in 1961), it previously held membership of the UN.

As early as 1947 (in the context of the partition of India), a legal opinion of the UN Assistant Secretary General for Legal Affairs was approved by the UN Secretary General, and made public. The opinion made it clear that 'from the viewpoint of international law, the situation is one in which a part of an existing State breaks off and becomes a new State', so that there was 'no change in the international status of India; it continues as a State with all the treaty rights and obligations, and consequently, with all the rights and obligations of Membership of the United Nations'. The breaking off did not 'affect the international personality of India, or its status in the United Nations'. Pakistan, as the 'territory which breaks off' was a 'new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations' (United Nations Press Release PM/473, 12 August 1947; also in UN Doc A/CN.4/149 and ADD.1, 3 December 1962).

This position was reinforced by the UNGA's Sixth (Legal) Committee in 1947 when asked by the First Committee for clarification on the applicable legal rules when a state divided. The Sixth Committee agreed:

1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member 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 not 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.

4. It was agreed by the Sixth Committee that these principles are to be transmitted to the First Committee as suitable to give general guidance to the United Nations in connexion with future cases, with the understanding that each case will be considered in accordance with its particular circumstances (UN Doc A/C.1/212, 8 October 1947; also found in UN Doc A/CN.4/149 and ADD 1, 3 December 1962).

Produced as general principles applicable to future cases, the above review of UN practice from India in 1947 to Sudan in 2011, shows that the above legal opinion has been adopted as a general rule in the UN. This legal opinion and consistent line of practice would support the continuation in UN membership from the old UK (including Scotland) to the new UK (absent Scotland). This line can be distinguished from other cases such as the consensual break up of Czechoslovakia in December 1992, where that state ceased to exist legally and factually, and the two newly emergent Czech and Slovak Republics applied afresh for UN membership. This was an exceptional case; the norm is for the state, which has suffered a break-off of part of its territory, to continue UN membership, while the entity breaking off and claiming statehood has to apply for membership.

However, none of the instances of UN practice discussed so far involved a permanent member. Of the five permanent members (P5), there have been membership issues involving two of them – China and Russia, but only the Russian case can be seen as relevant to the UK. The issue with China was that, from 1945-71, the UN only accepted the credentials of the Nationalist government in Taiwan as representatives of China, over the representatives of the People's Republic of China. From 1971, as a result of a change in US policy towards China, the permanent Chinese seat has been taken by the representatives of the People's Republic of China. In essence this reflected the (continuing) dispute about which regime represented China, with both regimes claiming to be the legitimate government of one China. With no attempted claim to independence by Taiwan, thereby purporting to secede from China, the situation is not directly relevant to the UK's position at the UN in the event of Scottish independence.

It is worth noting that Article 23 of the UN Charter still lists the permanent members of the UN as 'the Republic of China' and not 'the People's Republic of China'. It also still lists 'the Union of Soviet Socialist Republics' and not the 'Russian Federation', as well as 'the United Kingdom of Great Britain and Northern Ireland', 'France' and the 'United States of America'. The principal reason why China and Russia have not insisted on a formal name change in

Article 23 is the danger of opening up debates about permanent membership since such changes would require formal amendment of the Charter (Articles 108-109).

A transition from the current UK to a smaller UK following Scottish independence might not involve a significant name change as a state, a relatively minor issue, but one that might be relevant. The new UK could not claim to be the 'United Kingdom of Great Britain and Northern Ireland', since the Kingdom of Great Britain was created by the Union of England (and Wales) and Scotland. However, the new UK could legitimately claim to be a successor to that state, and could reinforce that claim by pointing to factors such as an unchanged form of government, the majority of the territory and population of the old state, and that it remained a United Kingdom of England, Wales and Northern Ireland. In all likelihood the name would not be changed in the UN Charter, but this has not been an issue in relation to China and Russia. The UK's position, along with the other permanent members of the UNSC, as a recognised nuclear weapon state under the Nuclear Non Proliferation Treaty of 1968 (the cornerstone of arms control law), would further support its continuation of permanent membership in the UNSC, given that the new UK would succeed to the old UK's rights and obligations under the 1968 Treaty.

The succession of Russia to the Soviet Union's permanent seat in 1992 is, on the one hand, not a direct precedent for the UK because it was arguably the case that Russia, after the dismemberment of the Soviet Union, was legally and factually so different from the USSR that it should not have been treated automatically as the successor state but, on the other hand, is relevant because it involved succession within the P5.

Critics of Russian succession to Soviet membership within the UN also point to the way in which the Federal Republic of Yugoslavia (FRY or Serbia and Montenegro) was not treated as successor to the Socialist Federal Republic of Yugoslavia (SFRY) later in 1992, including within the UN where the FRY was required to apply for UN membership. However, the case of Yugoslavia should be distinguished from that of the Soviet Union for two reasons: firstly, the largely consensual nature of the break-up of the Soviet Union, which included support by the former Soviet Republics for Russian succession to UN membership including permanent membership, in contrast to the violent dissolution of Yugoslavia; and, secondly, the treatment of the SRFY/FRY was part of the UN's response the situation in the former Yugoslavia as a threat to international peace and security.

This still leaves the problem of the Soviet Union being in reality a different state to Russia, but those difficulties were overcome by the UN member states accepting Russia as successor to the Soviet Union and, therefore, as entitled to continue to occupy the permanent seat in the UNSC. This was achieved by creating a diplomatic window in which President Boris Yeltsin formally informed the UN, in a letter of 24 December 1991 to the UN Secretary General, that the 'membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and other organs and organizations of the United Nations system, is being continued by the Russian Federation ... with the support of the countries of the Commonwealth of Independent States ...'. This was followed in January 1992 by President Yeltsin attending a Special Summit of the Security Council at the level of Heads of State and Government, which accepted the presence of the President and the Russian Federation. Any question marks over Russian membership were left unanswered because a challenge to continued Russian membership would have caused a constitutional crisis at the UN involving a reconsideration of the pact at the heart of the UN Charter.

Conclusion

Although a new UK would have a much stronger legal claim to be a successor to the old UK than Russia did to the Soviet Union, it should learn from that episode by securing support for its continued occupation of the permanent seat in the UNSC, not only from Scotland but also from the remainder of the permanent membership (who have no real interest in upsetting their position), and other key states (for instance Germany and Japan). This would help prevent any groundswell within the UN membership for changes to the UK to be the trigger for wider UN reform. Just as the Commonwealth of Independent States supported the Russian position so the European Union might be persuaded to support the UK. A danger is that countries such as India, Brazil, Nigeria, South Africa and Egypt (all aspiring to permanent membership along with Germany and Japan) might see any such attempt as a step too far to preserve an outdated status quo within the UN.