
**OPINION ON MATTERS RELATING TO INTERNATIONAL LEGAL ISSUES CONCERNING
THE RIGHT TO SELF-DETERMINATION FOR THE PEOPLE OF SCOTLAND**

Introduction

1. I am instructed by the Solicitors who act for Neale Hanvey MP in relation to certain matters concerning the international law of the right to self-determination.
2. The two issues on which I am asked to provide an Opinion are:
 - a. The arguments why the Supreme Court was mistaken in law by not upholding or indicating the fundamental right to self-determination for Scotland as a people and country within a State whether or not a referendum under the Scotland Act was the appropriate vehicle or accommodated its expression in a referendum.
 - b. An analysis of the international legal routes by which either the Scottish Government/Parliament, a Convention of elected representatives from Scotland, a majority of MPs or any other citizens' body could seek to secure a declaratory ruling on the issue of Scotland's right to independence, and the remedy available for challenging a resistant United Kingdom State that persists with denying that right to self-determination.
3. The Supreme Court decision to which this instruction refers is that of *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, delivered on 23 November 2022. It will be referred to here as the *Scottish Referendum Reference* case.
4. My Opinion is directed to the relevant international legal issues and not to any political, social or other issues which may be relevant, or directly to matters of Scottish or other United Kingdom [UK] domestic law.
5. This Opinion does not relate to any current litigation and has a limited purpose.

Summary

6. In my opinion, the right to self-determination applies to the people of Scotland. One form of exercise of that right is by secession from a State. Although international law only provides for secession in very limited circumstances, secession is not unlawful under international law.
7. In my opinion, the Supreme Court in the *Scottish Referendum Reference* case made two significant mistakes in its understanding of the application of international law in respect of the right to self-determination. First, in its reliance on the direct applicability to Scotland of the decision by the Supreme Court of Canada in *Reference re Secession of Québec* [1998] 2 SCR 217 and, second, in its reliance on a submission by the UK government to the International Court of Justice for its Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Rep.
8. In my opinion, there are few international legal routes for the people of Scotland to bring a claim to an international court or tribunal. This is because most possible routes require consent by the UK government. There is a possibility, if the support of another State is obtained, to seek a reference from the UN General Assembly to the ICJ for an advisory opinion. A unilateral declaration of secession is also possible, though it relies on international recognition for its effectiveness.

The Right to Self-Determination

9. It is necessary initially to clarify briefly what is the right to self-determination in international law and how it relates to a part of an existing state seeking to become independent from that state.
10. Two of the major multilateral international human rights treaties are the International Covenant on Civil and Political Rights 1966 [ICCPR] and the International Covenant on Economic, Social and Cultural Rights 1966 [ICESCR]. Both of these treaties have been ratified by at least 171 States (being over 88% of the 193 States which are members of the United Nations [UN]). Article 1 of each of these treaties is identical, and it provides in Article 1.1:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

11. This human right was set out as the very first Article in each Covenant and is the only common article guaranteeing human rights in both Covenants. This pre-eminent position was explained by the UN Human Rights Committee, being the monitoring body of the ICCPR:

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Article 1 apart from and before all of the other rights in the two Covenants.¹

12. The UK government has expressly accepted that the right to self-determination is a human right:

It is true that we [the UK] took the position in the 1960s that self-determination was a principle and not a right. However, in 1966 the two International Covenants - on Economic, Social and Cultural Rights, and on Civil and Political Rights - were adopted....my country [now] endorse[s] the right to self-determination in the sense of the [United Nations] Charter, the Covenants and the Friendly Relations Declaration.²

13. The Declaration on Principles of International Law concerning Friendly Relations [Declaration on Friendly Relations],³ which is referred to in the quotation above and is generally considered to set out the agreed clarifications of the international legal principles of the UN Charter, states that:

¹ Human Rights Committee, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 183, para 1.

² UK Permanent Representative to the UN (Sir Anthony Parsons), 25 May, 1982, S/PV.2366 pp.71-2, as quoted in Geoffrey Marston (ed), "United Kingdom Materials on International Law", 53 *British Yearbook of International Law* (1982) 371-2.

³ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to General Assembly Resolution 2625(XXV), 24 October 1970.

*By virtue of the principle of equal rights and self-determination of peoples enshrined in the [UN] Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*⁴

14. The Declaration on Friendly Relations makes clear that the principles of the UN Charter must now be understood as providing for the self-determination of peoples as a human right – not just as an international legal principle - which is binding under international law on all States. This was confirmed by the International Court of Justice [ICJ] in its *Advisory Opinion on the Chagos Archipelago* (2019) ICJ [*Chagos Opinion*].⁵

15. Who are a “people” for the purposes of the right to self-determination has not been fully determined, not least because “nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history”.⁶

16. The most widely quoted definition of “peoples” for the purposes of the right to self-determination is that set out by an international group of experts:⁷

A people for the [purposes of the] rights of people in international law, including the right to self-determination, has the following characteristics:

(a) A group of individual human beings who enjoy some or all of the following common features:

(i) A common historical tradition;

(ii) Racial or ethnic identity;

(iii) Cultural homogeneity;

(iv) Linguistic unity;

(v) Religious or ideological affinity;

(vi) Territorial connection;

⁴ Ibid, section titled ‘The principle of equal rights and self-determination of peoples’, opening paragraph.

⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (2019) ICJ, para 155.

⁶ Eugene Kamenka, ‘Human Rights, Peoples’ Rights’ in James Crawford (ed), *The Rights of Peoples* (OUP, 1988) 127 at 133.

⁷ Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Rights of People for UNESCO, SNS–89/CONF.602/7 (22 February 1990).

(vii) Common economic life.

(b) The group must be of a certain number who need not be large (e.g. the people of micro States) but must be more than a mere association of individuals within a State.

(c) The group as a whole must have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.

(d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.

17. What is acknowledged in this definition is that, while there can be some objective characteristics to defining a “people”, it is difficult to create an objective definition because identity is largely subjective. Thus part (c) in the document above refers to “the will to be identified as a people”.

18. In most instances the separate identity of a people, through its language, location, laws and other means, normally indicate clearly who is a people for the purposes of the right to self-determination.⁸

19. The exercise of the right to self-determination is usually considered to be of two types: external and internal. External self-determination is where the consequence of the exercise of the right is a change in the international relationships between the peoples exercising their right of self-determination and the original state/colonial power, as well as with other states and international actors. Internal self-determination is where there is a change in the internal relationships and administrations within a State as a consequence of the exercise of the right but there is no change in the external relationships.

20. The Declaration of Friendly Relations sets out the main ways in which the right to self-determination can be exercised externally:

⁸ Robert McCorquodale, ‘Group Rights’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (4th ed, OUP, 2022) 359, 362-364.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

21. It should be noted that independence is only one method of exercising external self-determination, and it is not the sole method.
22. Internal self-determination can occur in numerous ways, from federalism of a State and the autonomy of part of a State, to the control of cultural matters by a region. The process of devolution in the UK would be seen as an exercise of the internal right to self-determination (as is referred to in the next section).
23. The means of exercising the right to self-determination requires, as the ICJ held in the *Western Sahara Opinion* (1975) ICJ, “a free and genuine expression of the people concerned”.⁹ The means for establishing a free and genuine expression of the views of the people has normally been, outside the colonial context, by having a majority in favour of a clearly worded referenda.¹⁰ This is evidenced by the practices for the creation of the new States arising from the collapse of the Union of Soviet Socialist Republics [USSR] and Yugoslavia.¹¹
24. The right to self-determination is not an absolute right, as it is limited in its exercise, like almost all human rights, by the rights of others.¹² This would include, for example, the rights of Indigenous people to self-determination and the territorial integrity of the State in which the people reside (see para 26 below).
25. Where the people in part of an existing state seek to exercise their right to self-determination by becoming independent from that State, it is known as secession. Although international law does not provide for a human right to secession, it is not prohibited by international law (see para 70 below).

⁹ *Western Sahara Advisory Opinion* (1975) ICJ, para 55.

¹⁰ The Council of Europe’s Venice Commission on the Rule of Law has issued a Code of Practice on Referendums, 2022: [0900001680a8115a \(coe.int\)](https://www.coe.int/t/e/treaties/0900001680a8115a/coe.int).

¹¹ Jure Vidmar, *Democratic Statehood in International Law* (Hart, 2013), pp 169-201. He notes, at p.247, that “an overwhelming vote [in an election] for a political party advocating secession does not necessarily imply support for secession”.

¹² Robert McCorquodale, ‘Group Rights’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (4th ed, OUP, 2022) 359-381, 369-373.

26. In instances of secession, the Declaration on Friendly Relations does seek to balance the State's territorial integrity (which arises from its sovereignty) with the people's right to self-determination:

Nothing in the foregoing paragraph [recognizing the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

27. This has been understood to mean that it is difficult for a people to exercise their right to self-determination by means of secession where they are in a State which has a government where people are not discriminated against and have internal self-determination. However, there are generally thought to be three exceptions where it may be possible for a people who have internal self-determination to seek independence by secession.¹³ These three exceptions are:

- a. Where the people are, in effect, in a colonial territory, such as when Bangladesh seceded from Pakistan in 1971;
- b. Where a people are oppressed, such as by military actions, by the central government, as seen in South Sudan where the people of South Sudan voted in 2011 to secede from Sudan after civil war;¹⁴ and
- c. Where the people are blocked from meaningful access to government in the State, such as the people of Kosovo,¹⁵ or mistreated systematically by the central government.¹⁶

¹³ Jure Vidmar, *Democratic Statehood in International Law* (Hart, 2013), pp 244-247.

¹⁴ [South Sudan becomes an independent nation - BBC News](#), 9 July, 2011.

¹⁵ This is discussed in para 66ff below.

¹⁶ James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed) *Peoples' Rights* (OUP, 2001) 7, 64: "there remains the possibility [for secession] that a particular people may be treated systematically by central government in such a way as to become, in effect, non-self-governing with respect to the rest of the state".

28. It is, though, clear that the type of government – whether it is democratic with multi-party elections or not - is not relevant to whether it may be possible for a people who have internal self-determination to seek independence by secession. This is because international law does not generally require any form of governance in a State.¹⁷

The Right to Self-Determination in Scotland

29. A full discussion of whether the right to self-determination applies to Scotland is outside the scope of this Opinion, though a very brief summary may be useful.

30. There is little dispute that the people of Scotland are a distinct people within the UK. The reasoning for this is summarised by the Scottish National Party in its Intervention [SNP Intervention] before the Supreme Court in the *Scottish Devolution Reference* case.¹⁸ The people of Scotland also fit the criteria for a “people” set out in para 16 above, with, for example, a distinct territory, history, culture, laws and institutions. There is also, as the courts in the UK have acknowledged, a distinct constitutional legal tradition in Scotland.¹⁹

31. The structure of devolution in the UK, which is a form of internal self-determination, confirms that the people of Scotland are distinct within the UK and have a right to self-determination.²⁰ This is confirmed by the UK government in its periodic reports to the UN Human Rights Committee, where it reports on its implementation of the ICCPR, in which it refers to devolution in Scotland (and Wales and Northern Ireland) under its Article 1 (right to self-determination) obligations.²¹

32. As the people of Scotland are a people for the purposes of the right to self-determination, they can exercise it. The choice of the means to exercise is for the

¹⁷ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America) ICJ (1986), para 261.

¹⁸ [The SNP's Supreme Court submission on the independence referendum — Scottish National Party](#), para 5.1-5.6.

¹⁹ For example, *MacCormick v. Lord Advocate*, 1953 SC 39, per Lord President Cooper and *Cherry v Advocate General* 2020 SC 37, per Lord President Carloway.

²⁰ James Mitchell, "The 1992 Election in Scotland in Context", (1992) 45 *Parliamentary Affairs* 612 at p. 613: "the claim of Scottish [and Welsh] distinctiveness...is aided by the State having conceded that Scotland [and Wales] is a political entity through its establishment of central institutions and some measure of policy distinctiveness".

²¹ For example, the UK's 7th Periodic Report to the Human Rights Committee in December 2012: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en, paragraphs 221-243.

people to decide and not for the State,²² though there may be limitations on the exercise of the right, as noted in para 27 above, including the means under domestic law.

Scottish Referendum Reference Case

33. This case arose from a reference to the Supreme Court by the Lord Advocate of Scotland under the Scotland Act 1998 [Scotland Act], which sets out the legislative and other powers which are held by the devolved Scottish Government and Parliament. The powers which remain in the UK Government are known as “reserved powers”.
34. The core issue before the Supreme Court was, as the Court succinctly stated[1]: *‘Does the Scottish Parliament have power to legislate for the holding of a referendum on Scottish independence?’*.
35. The reason this issue arose was because the UK Government was not willing to make the relevant Order in Council to allow a referendum on Scottish independence at this time, as it had done in 2013 to enable the referendum in 2014. The Scottish Government had drafted a Scottish Independence Referendum Bill seeking to enable such a referendum.
36. The Lord Advocate brought a reference to the Court in the following terms [12]:
Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be ‘Should Scotland be an independent country?’ relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (paragraph 1(b) of Schedule 5 [of the Scotland Act]); and/or (ii) the Parliament of the United Kingdom (paragraph 1(c) of Schedule 5 [of the Scotland Act])?
37. The Supreme Court answered this question (and two related ones) unanimously. They held that [92]: *“the Scottish Independence Referendum Bill does relate to reserved matters, and, in particular, it relates to the Union of the Kingdoms of Scotland and England, and the Parliament of the United Kingdom”*.

²² Judge Dillard, Separate Opinion, *Western Sahara Opinion*, [122]: “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”.

38. Accordingly, the Scottish Government was not able to proceed with its Scottish Independence Referendum Bill.

Scottish Referendum Reference Case and International Law

39. In terms of international law, the key aspect of the decision was the consideration by the Supreme Court in relation to the right to self-determination, as set out in [84-90] of the decision.

40. The right to self-determination was raised in the SNP Intervention. Two of their main arguments are summarised by the Court [85]:

The intervener submits that the right to self-determination is a fundamental and inalienable right in international law and that there is a strong presumption in favour of the interpretation of domestic legislation in a manner which is compatible with international law.

41. The Supreme Court noted that [86] *“The Advocate General does not dispute that the United Kingdom recognises and respects the right of self-determination in international law”*. The Court also stated [87] *“The strong presumption in favour of interpreting our domestic law in a way which does not place the United Kingdom in breach of its obligations in international law is well established”*.

42. The Court went on to hold [88-89] that the right to self-determination (which they incorrectly, call the “principle” of self-determination) does not apply here. They reach this decision based on two grounds:

- a. A decision of the Supreme Court of Canada; and
- b. A submission by the UK Government to a case before the ICJ.

43. The Court also held [90] that devolution legislation is not interpreted in accordance with the presumption in favour of compatibility with international law.

44. The decision by the Supreme Court of Canada to which the UK Supreme Court referred was *Reference re Secession of Québec* [1998] 2 SCR 217. That decision was quoted by the Court [88]:

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign

military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. (at para 138)

45. The submission by the UK Government to the ICJ to which the Supreme Court also relied was in regard to the ICJ's Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, [2010] ICJ Rep [Kosovo Opinion]. In that instance, the UK Government submitted, as quoted by the Supreme Court [89] "*international law favours the territorial integrity of States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'*".²³

46. As a consequence of referring to these two documents (both argued by the Intervenor), the Court held [89]:

[T]he relevant point, in relation to the intervener's submission based on a right of self-determination under international law, is the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada, none of which applies to Scotland.

47. On these two bases, the Court considered that international law in relation to the right to self-determination was not relevant to the *Scottish Devolution Reference* case.

48. It needs to be seen whether these documents were accurately considered by the Court and if they reflect current international law.

²³ Written Statement of the United Kingdom in response to the Request for an Advisory Opinion of the International Court of Justice on the Question, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?', (17 April 2009), para 5.33.

Reference re Secession of Québec

49. In regard to the *Reference re Secession of Québec*, the Supreme Court only quoted parts of the decision by the Supreme Court of Canada and did not consider the context of, or the full reasoning in, the case.
50. The context was that a referendum had been held by the people of the Province of Québec. The referendum question was '*Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Québec and of the agreement signed on 12 June 1995?*'. The referendum was lost by a narrow majority of 50.58%. Only after the referendum was lost was a reference brought to the Supreme Court of Canada in which three questions were asked.
51. The first question in *Reference re Secession of Québec* was whether Québec could lawfully secede unilaterally from Canada as a matter of Canadian constitutional law. The second question was whether international law gave the right to effect unilateral secession of Québec from Canada. The third question was whether Canadian law or international law took precedence in the event of conflict between them.
52. On the first question, the Supreme Court of Canada noted that, while there was no right to secession in the Canadian constitution (both in the written documents and broader constitutional principles), nevertheless [88]:
- The clear repudiation by the people of Quebec of the existing constitutional order [through a referendum where the votes were in favour of secession] would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.*
53. The Court then looked at what this requirement of entering into negotiations would require. They held [91] that the Province of Québec could not dictate the terms of the proposed secession and [92] that the federal government and the other provinces must respect that referendum. Therefore [93]:

The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other.

54. Accordingly, under the Canadian constitutional principles, which included democracy, the rule of law, protection of minorities and federalism, the Canadian Supreme Court held that, if a referendum showed a clear majority of the people of Québec wanted to secede from Canada, there must be a negotiation by the federal government and other provinces with the Province of Québec. The other governments in Canada could not ignore the referendum.

55. On the issue of the application of international law, the Supreme Court of Canada reviewed international law at the time and determined that [112]:

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people.

56. After reviewing the possible exercises of the right to self-determination which enabled secession – see para 44 above – which were being a colonial people, being oppressed by the relevant State or being [134], “*blocked from the meaningful exercise of its right to self-determination internally*”, the Court concluded that none of them applied to give the people of Québec a right to secede. The basis for this was, relying on the Declaration on Friendly Relations (see para 26 above) [154]:

A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be

suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

57. However, the Court did note that [155]:

The ultimate success of such a secession [should it occur] would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

58. Overall, on this question, the Supreme Court of Canada held that there was no right of the people of Québec to secede under international law.

59. Accordingly, the third question, about conflict between Canadian law and international law, did not arise to be decided.

60. What is evident from this review of the decision in *Reference re Secession of Québec* is that the Supreme Court in the *Scottish Referendum Reference* misunderstood a few matters:

- a. The referendum had **already** occurred in the *Reference re Secession of Québec* case. The issue before the Supreme Court of Canada was whether the people of Quebec had a right to secession. It was **not** whether they could have a referendum on that matter and so there was no decision by the Supreme Court of Canada that a referendum of this type was unlawful under Canadian constitutional principles or international law.
- b. The decision in the *Reference re Secession of Québec* case was based on a specific question as to whether the relevant institutions of Québec had “the right to effect secession of Québec from Canada unilaterally”. The decision given was specific to the particular **federal structure** of Canada and so could be seen as not being of automatic application to the different structures of the UK.
- c. Where a referendum was held which showed that a clear majority of the people of a part of a democratic State wanted to secede, there had to be a

negotiation by the central government (and other governments in that State) with that part of the State. Refusing to negotiate was contrary to key constitutional principles - - democracy, the rule of law, protection of minorities and federalism – in a democratic state.

- d. International **recognition** of a secession is very important and, in making a decision on recognition, other States will consider the conduct of both the entity seeking secession and the central government.

61. Accordingly, in my view, the Supreme Court was mistaken in law in relying on the decision in *Reference re Secession of Québec* as it did. It was mistaken in its lack of appreciation of the context of the Canadian case, where a referendum had already occurred and was not found to be unlawful, the relevant constitutional principles requiring a government to negotiate with a part of its State that was seeking to exercise its right to self-determination by secession, and whether the case was applicable at all to the structure of the UK. Each of these factors were of relevance to the *Scottish Devolution Reference* case.

62. Further, as the decision by the Canadian Supreme Court in *Reference re Secession of Québec* was made 25 years ago, there have been some developments are relevant.

63. For example, as noted in para 27 above and subsequent to the decision by the Canadian Supreme Court, the people of South Sudan exercised their right to self-determination by secession, after a referendum, from the State of Sudan and declared themselves independent from Sudan in July 2011. This was despite the people of South Sudan having some form of internal self-determination.

64. Further, there have also been decisions of the ICJ since *Reference re Secession of Québec* which are relevant to these issues. These are discussed in the next section.

Kosovo Advisory Opinion

65. As noted above, the Supreme Court directly referred to the *Kosovo Opinion* in the *Scottish Referendum Reference* decision. It did so by referring to a submission by the UK Government to the ICJ in that case. However, it did not consider what the ICJ actually determined in that case.

66. The *Kosovo Opinion* arose out of a unilateral declaration of independence by 'provisional institutions of self-government' of the region of Kosovo, which was part of the State of Serbia. The ICJ was asked whether this unilateral declaration of independence was 'in accordance with international law'.²⁴

67. The ICJ specifically referred to the Supreme Court of Canada's decision in *Reference re Secession of Québec* and made clear that it was not relevant [56]:

The question put to the Supreme Court of Canada inquired whether there was a right to "effect secession", and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked [the ICJ] whether the declaration of independence was "in accordance with" international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence.

68. The ICJ determined [81] that the fact that the declaration was unilateral (and not with the consent of the State of Serbia) was not relevant in international law. In addition, the fact that the declaration of independence was not made by a formal representative body of the people of Kosovo was also not crucial [119]. It concluded [122]:

[T]he adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework [of Serbia]. Consequently the adoption of that declaration did not violate any applicable rule of international law.

69. In reaching this position, the ICJ reviewed the relevant international law [79]:

During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points

²⁴ UN General Assembly Resolution 63/3 of 8 October 2008.

clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.... A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

70. This passage, on which the ICJ based its final view, is important in that it clarifies two matters of relevance:

- a. A unilateral declaration of independence is **not prohibited** by international law, including outside the colonial context; and
- b. Many unilateral declarations of independence are opposed, often strenuously, by the existing State, and this does **not** make the declaration of independence unlawful.

71. These conclusions do not mean that an entity within a State has an entitlement to exercise their right to self-determination by secession; only that it is not prohibited from attempting to do so.

72. The ICJ made no reference at all to the UK government's argument – quoted by the Supreme Court [89] - that *"international law favours the territorial integrity of States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'"*.

73. Accordingly, the Supreme Court relied on a statement by the UK government which was not supported by the ICJ in the *Kosovo Opinion*. The Supreme Court also failed to take into account the reasoning or conclusions of that Opinion. As a consequence, it can be argued that the Supreme Court was mistaken in law in not correctly applying the relevant international law.

74. Further, relying solely on a submission by the UK government to the ICJ might be considered unreliable as evidence in relation to the right to self-determination in international law. Not only was that particular submission not adopted by the ICJ but

the UK itself recognised Kosovo as an independent State.²⁵ This was done even though Kosovo clearly did not meet the criteria that the UK's submission set out.

75. In addition, other submissions by the UK government in relation to the right to self-determination, albeit in a different context, have been expressly rejected by the ICJ. In its *Chagos Opinion*, the ICJ rejected almost all the UK government's submissions.²⁶

76. That case arose from a request by the UN General Assembly to the ICJ for an Advisory Opinion in relation to the actions by the UK government in its continued colonial administration of the Chagos Islands and its process of decolonisation of Mauritius.

77. The ICJ determined, by a 13-1 majority²⁷ [183]:

- a. The process of decolonisation of Mauritius has not been lawfully completed;
- b. The UK's administration of the Chagos Islands is a continuing unlawful act under international law;
- c. The UK has an obligation under international law to bring to an end its administration of the Chagos Islands "*as rapidly as possible*"; and
- d. All member States must cooperate with the UN to complete the decolonisation of Mauritius.

78. In reaching this decision, the ICJ stated [177-178] (emphasis added):

*The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the **United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.... It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.***

Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.

²⁵ <http://www.pm.gov.uk/output/Page14594.asp>.

²⁶ For example, *Chagos Opinion*, paras 86 and 172.

²⁷ Judge Donoghue, the dissenting judge, dissented only on the ICJ's jurisdiction to make its decision. She made no comment on the law or the application of the law to the facts of the case.

79. On 22 May 2019, the UN General Assembly passed Resolution 73/295 endorsing the ICJ's *Chagos Opinion* by an overwhelming majority.²⁸ The Resolution “demand[ed]” that the UK cease its administration of the Chagos Archipelago within six months.²⁹
80. The UK government repeatedly rejected the *Chagos Opinion*. This was primarily on the basis that the government considered that the Opinion is based on a lack of consideration of relevant facts and that it is not legally binding (see next section).³⁰ However, after two and a half years, the UK government finally began discussions with Mauritius about sovereignty over the Chagos Islands, prompted by the *Chagos Opinion*.³¹
81. The relevant issue here is that the submissions of the UK government to the ICJ cannot be considered automatically as being representative of what is international law in regard to the right to self-determination.
82. Therefore, in my view, the Supreme Court in the *Scottish Referendum Reference* case was mistaken to rely on a UK government submission alone without further investigation of the position in international law.

ICJ Advisory Opinions

83. An Advisory Opinion of the ICJ is not legally binding of itself, because it is an advice by the ICJ to the UN General Assembly (or whichever body sought it) and it is not a decision of the ICJ in a contentious case between two or more States.³²
84. However, this does not mean that the views of the ICJ on international law within an Advisory Opinion have no legal effect on States. If a ICJ Advisory Opinion makes clear what is an international legal obligation, then that obligation is binding on all relevant

²⁸ There were 116 votes in favour, and 6 against (Australia, Hungary, Israel, the Maldives, the UK, the US), with 56 abstentions. UN Meetings Coverage, General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization, 24 May 2019, at 1: www.un.org/press/en/2019/ga12146.doc.htm.

²⁹ General Assembly Resolution 73/L.83/Rev.1, 17 May 2019.

³⁰ For example, [Westminster Hall Debates in the Commons on 3rd July 2019 \(parallelparliament.co.uk\)](http://WestminsterHallDebatesintheCommonson3rdJuly2019(parallelparliament.co.uk)), Minister for Europe and the America, Sir Alan Duncan, at 16.17.

³¹ [Mauritius and UK launch sovereignty talks over Chagos Islands | Africanews](http://MauritiusandUKlaunchsovereigntytalksoverChagosIslands|Africanews); [UK agrees to negotiate with Mauritius over handover of Chagos Islands | Chagos Islands | The Guardian](http://UKagrees tonegotiatewithMauritiusoverhandoverofChagosIslands|ChagosIslands|TheGuardian).

³² Statute of the ICJ, Chapter IV.

States. The ICJ noted its role in this regard in its *Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons* (1996) ICJ [18]:

[The ICJ] states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

85. In the *Chagos Opinion*, the ICJ made clear that there are legal obligations on all States arising from their clarification of the customary international law right to self-determination [180]:

Since respect for the right to self-determination is an obligation erga omnes [applying to all States] all States have a legal interest in protecting that right.

86. These clarifications by the ICJ of the international legal obligations in relation to the right to self-determination do legally bind all States. This applies irrespective as to whether, for example, the *Chagos Opinion* or the *Kosovo Opinion* themselves are legally binding.

87. It is noted, though it is outside the scope of this Opinion, that the courts in the UK have directly applied ICJ Advisory Opinions as evidence of the relevant international law. For example, in *Serdar Mohammed v Ministry of Defence* [2017] AC 821, Lord Sumption in the Supreme Court stated [23]:

In Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion [1971] ICJ Rep 16, paras 115-116, the International Court of Justice confirmed that these provisions [of the UN Charter] are binding not only by treaty on members of the United Nations but as a matter of customary international law on the small number of States which are not members.

Lord Sumption also referred [43, 48] to two other ICJ Advisory Opinions in his decision.

88. Therefore, Advisory Opinions of the ICJ can express matters of international law binding on States and these can be applied in domestic law.

International Legal Routes

89. As the Supreme Court did not accurately set out the international law regarding the right to self-determination of the people of Scotland, it is necessary to consider what international legal routes there may be through which representatives of the people of Scotland can seek to bring a claim to exercise their right to self-determination by secession.
90. It should be noted that the decisions of the UK Supreme Court in the *Scottish Referendum Reference* case and the Supreme Court of Canada in *Reference re Secession of Québec*, in denying the exercise of peoples in their State to exercise their right to self-determination by secession, are consistent with the practice of most national courts when faced with this issue.³³ For example, the Spanish Constitutional Court has held that the Basque Parliament and the Catalan Parliament had each acted unconstitutionally in seeking to have a referendum on secession.³⁴ Similarly, the Supreme Court of Alaska in the United States held that a referendum on independence in Alaska was contrary to the US Constitution.³⁵ Therefore, it was, perhaps, unsurprising that decision to bring a reference to the UK Supreme Court on such a Scottish referendum bill, was unlikely to lead to the outcome sought. It is, as a consequence, necessary to look beyond the domestic legal system for redress.
91. Access to most international courts and tribunals in matters of human rights are generally restricted to States, or subject to the consent of States, including contentious cases before the ICJ.³⁶
92. In relation to seeking redress for a breach of the right to self-determination, there are two international human rights treaties and one regional human rights treaty which provide for possible redress, as the European Convention on Human Rights does not include the right to self-determination. Both the ICCPR and the ICESCR provide a

³³ Matt Qvortrup, *Referendums and Ethnic Conflict* (University of Penn Press, 2nd ed, 2022) Chapter 4.

³⁴ Judgment 103/2008, Case No. 6761-2003. STC, Apr. 20, 2004, and Decrees 123 and 124/2017, of 19 and 20 September 2017, which each relied on the 1978 Spanish Constitution of 1978, Article 2: "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and solidarity amongst them all".

³⁵ *Kohlhaas v Alaska* (2006) 147 P.3d 714.

³⁶ Statute of the ICJ, Chapter III.

means to bring a complaint in relation to the right to self-determination, as does the African Charter of Human and People's Rights [ACHPR].

93. The UK is a party to the ICCPR and the ICESCR. However, it has not accepted the relevant additional treaties – the First Optional Protocol to the ICCPR and the Optional Protocol to the ICESCR respectively - which enable a complaint to be brought under those treaties. The UK is not a party to the ACHPR. Therefore, there are no means to bring a complaint against the UK under any of these treaties.

94. There are two other possibilities: an Advisory Opinion before the ICJ; and a case before the Permanent Court of Arbitration.

Advisory Opinion of the ICJ

95. Article 96 of the UN Charter provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

96. In practice, almost all the Advisory Opinions of the ICJ have arisen from a request by the UN General Assembly or UN Security Council.³⁷ These can concern a State and non-State (such as the *Kosovo Opinion*) and even a matter which seems to be a bilateral dispute (such as the *Chagos Opinion*). While the ICJ has a discretion under Article 65 of the ICJ Statute to choose whether or not to give an advisory opinion, it has always done so to date, as “only ‘compelling reasons’ should lead it to refuse to give a requested advisory opinion”.³⁸

97. The route to requesting an Advisory Opinion requires a resolution (being a vote on a proposal) being passed by the UN General Assembly or the UN Security Council. With the UK being a Permanent Member of the Security Council, with a veto, the only

³⁷ The World Health Organisation [WHO] did request an Advisory Opinion, which the ICJ determined was not within the powers of the WHO: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, WHO Advisory Opinion, (1996) ICJ.

³⁸ *Kosovo Opinion*, para 30.

possible route in this instance is through the General Assembly, where every State has one vote and there are no vetoes.

98. The starting point is that a State must be prepared to take action on behalf of Scotland at the international level, as Scotland is not able to vote or take actions at the UN itself. This will require the representatives of the people of Scotland to find a State willing to do this.

99. If such a State is found, the obstacles to obtain an Advisory Opinion are still considerable, as is summarised by Philippe Sands in relation to the actions of Mauritius leading to obtaining the Advisory Opinion, which became the *Chagos Opinion*:

We would need to formulate legal questions which fell within the competence of the General Assembly.

We would have to put Chagos on the agenda of the General Assembly, something which had not occurred since 1968.

We would need to persuade a majority of UN members that Chagos is not a bilateral territorial dispute between Britain and Mauritius, on which the General Assembly has no authority, but rather a matter of multilateral concern about decolonisation, on which the Assembly did have a role

We would have to persuade a majority of UN members to vote to send our questions to The Hague [where the ICJ is located], in the face of British and American objections.

*If each of these obstacles could be overcome, we would then have to persuade a majority of judges that the Court has jurisdiction, should exercise it and give an opinion.*³⁹

100. Many of the obstacles faced by Mauritius in obtaining the *Chagos Opinion* are the same as for an Advisory Opinion on Scottish self-determination. There is also the analogy of it being a bilateral dispute with the UK, though it would be more directly internal to the UK than in regard to the Chagos Islands. However, an internal matter for a State did not prevent the ICJ giving the *Kosovo Opinion*, though in that instance Serbia did wish to have the Advisory Opinion given.

³⁹ Philippe Sands, *The Last Colony* (Weidenfeld & Nicolson, 2022) p.100.

101. A major obstacle in this instance would be to find a State willing to lead on the case and to act on behalf of the people of Scotland. Mauritius was willing to do so on behalf of the people of the Chagos Islands as they had a territorial interest in the Chagos Islands returning to be a part of the territory of Mauritius. The issue for Scotland would be whether a State would feel as willing to act on behalf of the Scottish people without any similar self-interest.
102. Of relevance is that many neighbouring States to Scotland are part of the European Union [EU], in which there are a number of States, such as Spain, which could appear to be very resistant to any action by another EU State to support Scottish secession because of their own situations where there are people seeking secession in their territory.⁴⁰ Even if there was a State willing to take all this action on behalf of Scotland, they would need to obtain the votes of enough States in the General Assembly for a resolution to pass. This would probably include persuading some States which have people who might wish to seek secession in their territory, which could be very difficult.
103. In my view, this option requires a close engagement by leaders in Scotland with a State which would be likely to support bringing an resolution for an Advisory Opinion to the General Assembly on behalf of the people of Scotland. This State would then need to develop a coalition of other States so that there was a General Assembly resolution for an Advisory Opinion by the ICJ. The current practice shows that, if this occurs, the ICJ is likely to give an Advisory Opinion.
104. If such an Advisory Opinion is given, and that Advisory Opinion states that the people of Scotland can exercise their right to self-determination by secession, and so become an independent State, that does not mean that the UK will comply with the Advisory Opinion. As noted above with regard to the *Chagos Opinion*, the UK initially resisted compliance with it, though it now seems to be moving towards compliance. Therefore, there is a potential hope that an Advisory Opinion could lead to the acceptance by the UK government of the independence of Scotland in due course.

⁴⁰ [Scottish independence and EU membership: process and implications | Herbert Smith Freehills | Global law firm.](#)

Permanent Court of Arbitration

105. The Permanent Court of Arbitration (PCA) is an international mechanism established by the 1899 Convention for the Pacific Settlement of International Disputes (revised in 1907) to facilitate arbitration and other forms of dispute resolution between States.⁴¹ It is based in The Hague and shares the same building as the ICJ.
106. The UK is a party to the Convention and has been involved in some inter-State cases.⁴²
107. While a majority of the PCA cases were historically between States, the PCA is not limited to hearing disputes between States, and may also arbitrate disputes between States, State entities, intergovernmental organisations and non-State actors. In 2022, the PCA acted as the registry for 4 inter-state cases, 105 investor-State arbitrations and 65 cases under contract involving a State or other public entity.⁴³
108. An example of a part of a State bringing a claim against its State before the PCA is that of the Abyei Arbitration between Sudan and the Sudan People's Liberation Movement/Army.⁴⁴ This dispute arose in the context of a long civil war within Sudan. The Abyei area, which has substantial oil resources, sits between the boundaries of what became Sudan and South Sudan, with the 2005 Comprehensive Peace Agreement [CPA] between the parties to the civil war providing that the people of Abyei would have a referendum to choose to become part of South Sudan or remain with Sudan.⁴⁵ After unsuccessful attempts at a military solution and a negotiated settlement, in July 2008 the parties to the conflict signed an Arbitration Agreement to determine the boundaries of the Abyei area, amongst other matters.
109. The reasons the parties chose arbitration before the PCA were probably because this type of arbitration is usually quicker than other forms of litigation, with the parties in control of the proceedings and appointments, and the arbitration

⁴¹ [Home | PCA-CPA](#).

⁴² For example, *Ireland/United Kingdom (MOX Plant Case)*, 25 October 2001.

⁴³ <https://pca-cpa.org/en/cases>.

⁴⁴ *The Government of Sudan v. The Sudan People's Liberation Movement/Army*, Final Award, 22 July 2009 (Abyei Final Award).

⁴⁵ CPA, Ch. IV, 'Resolution of the Abyei Conflict', Art. 8(1) provides for 'an Abyei Referendum Commission to conduct the Abyei referendum simultaneously with the referendum of Southern Sudan'

tribunal reaches a binding decision. It also enables a dispute between a State and part of a State to be taken before a panel of arbitrators made up of respected judges.⁴⁶ In this instance, the parties agreed that the arbitration tribunal would be composed of five arbitrators, with each party to appoint two and the four appointed arbitrators would choose a neutral fifth arbitrator, who would act as the president of the tribunal. In the event of there being no agreement on the fifth arbitrator, the Secretary-General of the PCA would make the appointment, which was not an uncommon procedure.

110. The arbitration tribunal did reach a decision on the boundary, which was respected by the parties to the dispute. However, while there has been a referendum in South Sudan, which became independent in 2011, the referendum in Abyei has been repeatedly delayed, primarily because of issues over who is a “resident of Abyei” and so entitled to vote.⁴⁷

111. While the outcome of that PCA arbitration has not been fully applied, it does show that such an international legal route is possible for an entity seeking to secede from a State.

112. However, for this to be a route for the people of Scotland it would require an agreement between representatives of Scotland with the UK government to take the right to self-determination of Scotland to the PCA. Without a civil war and international pressure that existed in Sudan, this is probably unlikely.

113. In my view, the chances of the UK government agreeing to take this matter to the PCA will depend on whether representatives of the people of Scotland could persuade the UK government to do so. However, as the UK government did not agree to Scotland having a referendum within UK law, it would probably be reluctant to have an international body make that decision for them.

Other Routes

114. As shown above, it is very difficult to bring to an international court or tribunal a claim by the people to Scotland to exercise its right to self-determination by

⁴⁶ Brooks Daly, ‘The Abyei Arbitration: Procedural Aspects of an Intra-state Border Arbitration’, (2010) 23 *Leiden Journal of International Law*, 801–823.

⁴⁷ [The referendum in Abyei is an ongoing challenge for the African Union - ISS Africa](#); [How aborted Abyei referendum escalated crisis - The City Review South Sudan \(cityreviewss.com\)](#).

secession, due to the nature of the international legal system in relation to human rights matters being dominated by States or requiring State consent. The only possible international legal route available for the people of Scotland to bring their claim for the right to self-determination by secession is through the support of States for an Advisory Opinion to the ICJ.

115. However, a unilateral declaration of independence by the people of Scotland, which then relies on international recognition by States, could be a way forward. This was done by the people of Kosovo, which has since obtained recognition by about 52% of the States members of the UN.⁴⁸ Kosovo is not yet a member of the UN as there is insufficient international recognition of it, and two Permanent Members of the UN, China and Russia, oppose recognition. Nevertheless, for those States which do recognise Kosovo as a State, it has diplomatic relations as an independent State.

116. In the case of Kosovo, the authors of the declaration of independence were considered by the ICJ not to be members of the then Kosovo governance institutions [105, 109]:

[T]he Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that [Serbian/Kosovo/UN] legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

117. This conclusion by the ICJ was important in that context as the overall governance of Kosovo was, at that time, partly through the UN (under Security Council Resolution 1244 (1999)), and partly under the sovereignty of Serbia. Therefore, in deciding that the authors were not part of the existing Kosovo legal institutions, the ICJ could find that they did not act contrary to the constitutional arrangements in operation in that region.

118. The manner of passing the declaration of independence of Kosovo is also relevant, as is summarised by the ICJ [76]:

The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who

⁴⁸ [Countries that Recognize Kosovo 2023 \(worldpopulationreview.com\)](https://worldpopulationreview.com/countries-that-recognize-kosovo/).

was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present.

119. It should be noted that, in September 1991, over 99% of voters in Kosovo voted in favour of independence, with a turnout of 87% (though the referendum was boycotted by Serbians living in the region, who comprised around 10% of the population). While this occurred after the declaration of independence, it has been argued that the overwhelming will of the people of Kosovo was very obvious at the time of the declaration of independence.⁴⁹
120. Accordingly, if a unilateral declaration of independence is to be undertaken in Scotland, it would seem to require that it not be done by an official Scottish institution, such as the Scottish Parliament, as this would raise similar issues to those in the *Scottish Referendum Reference* case, about constitutional principles. While an election for the Scottish Parliament by itself would appear to be insufficient to provide a basis for a unilateral declaration of independence,⁵⁰ it might be possible, after an election for it to establish, for example, a body of elected and diverse representatives from Scotland – perhaps through a modified version of the Scottish Constitutional Convention of 1989 – and it would require a clear majority in favour of a unilateral declaration of independence.
121. In addition, a referendum supporting the unilateral declaration of independence by Scotland, with a clear question and a clear majority supporting it, would be necessary, as the people's views in Scotland are not yet as obvious as was the situation in Kosovo. If this referendum was not based on legislation by the Scottish Parliament, then that might be a means to avoid the Scotland Act and UK constitutional principles, though those issues are outside the scope of this Opinion.

⁴⁹ Jure Vidmar, *Democratic Statehood in International Law* (Hart, 2013), pp 196-197. He quotes the Kosovo Special Representative of the UN Secretary-General to support this view.

⁵⁰ *Ibid*, p.247: "an overwhelming vote [in an election] for a political party advocating secession does not necessarily imply support for secession".

122. If the unilateral declaration of independence of Scotland is made, with a referendum, then it will require recognition of States to enable Scotland to be an independent State in international law.

123. It should be noted that there were 51 founding members of the United Nations in 1945, and that today there are 193 members.⁵¹ The vast majority of those new members (all of whom must be States) were entities which became independent from another State. It is, therefore, completely possible, despite the difficulties, for new States to occur, including through secession from an existing State as, for example, did the many former constituent parts of both the Union of Soviet Socialist Republics (USSR) and Yugoslavia, as well as Bangladesh and South Sudan.

Treaties and the Right to Self-Determination

124. The separate Kingdom of Scotland and Kingdom of England, as independent States, formed the United Kingdom of Great Britain through a treaty, called the Articles of Union 1707.⁵² There are no provisions in that treaty for a means to withdraw from it by either State or to allow for a vote by the people of those territories in the future.

125. In comparison, more recent treaties, such as the Treaty on the Functioning of the European Union, expressly provides for withdrawal from it by a State party (Article 50(3)). In addition, the Good Friday Agreement of 1998,⁵³ which is a treaty between the UK and Ireland, expressly provides for a vote by the people of Northern Ireland (Annex A, Article 1 1), as part of their “right of self-determination” (Annex, Article 1(ii)).

126. An issue arises as to whether a treaty in 1707 can be interpreted in light of contemporary international legal rules. The ICJ in its *Advisory Opinion on Namibia*⁵⁴ clarified this issue [53]:

⁵¹ [Member States | United Nations](#).

⁵² [articlesofunion.pdf \(parliament.uk\)](#).

⁵³ [The Belfast Agreement An Agreement Reached at the Multi-Party Talks on Northern Ireland.pdf \(publishing.service.gov.uk\)](#)

⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970) ICJ (1971).

[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years... have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.

127. This Advisory Opinion was directly on the matter of the contemporary interpretation of an international document ("instrument") in relation the right to self-determination. It made clear that an international document - which includes a treaty - should be interpreted and applied within the framework of the current international rules on the right to self-determination.
128. This is consistent with my view, see paras 29-32 above, that the people of Scotland, irrespective of the exact terms of the Articles of Union treaty, have the right to self-determination.
129. The issue, therefore, is not whether they have the right to self-determination under this treaty but whether they can exercise it by seeking independence. This has been discussed in para 27 above.
130. There is, though, one possible additional value of the Articles of Union treaty in relation to this matter. If the claim by the people of Scotland reaches an international legal body, then an argument based on this interpretation of the treaty could be made, in addition to the arguments set out above. This would be bolstered by a comparison being made with the Good Friday Agreement, where a vote was expressly provided for the people of Northern Ireland. It could then be argued that, by not allowing this vote for the people of Scotland, it could be a form of systemic mistreatment of the people of Scotland within the UK, which, as discussed in para 27, is a basis for seeking to exercise the right to self-determination by secession/independence.

Conclusions

131. I have set out the main parameters of the right to self-determination in international law. I consider that these apply to the people of Scotland.

132. I have indicated that the right to self-determination can be exercised by secession, though only in limited circumstances. Nevertheless, secession is not prohibited by international law.

133. In my opinion, the Supreme Court was mistaken in law in its approach to the right to self-determination of the people of Scotland in the *Scottish Referendum Reference* case. This is for two main reasons:

a. The Supreme Court relied on the decision by the Supreme Court of Canada in *Reference re Secession of Québec* as being directly applicable to the situation in the case before the UK Supreme Court. In so relying, the Supreme Court made the following mistakes:

- i. It did not appreciate that a referendum on secession had already occurred prior to the Canadian case, so the case did not consider whether or not a referendum could be held;
- ii. The decision was made in the context of a Canadian federal system with its particular constitutional principles applying;
- iii. The decision by the Canadian Supreme Court in *Reference re Secession of Québec* was made 25 years ago and there have been some developments which cast doubt on some aspects of its approach to secession.

b. The Supreme Court relied on a submission by the UK government to an ICJ case, being the *Kosovo Opinion*. In so relying, the Supreme Court made the following mistakes:

- i. The particular submission by the UK government was not supported by the ICJ in its *Kosovo Opinion*;
- ii. It failed to take into account the reasoning or conclusions of the ICJ, in which it determined that unilateral declaration of independence by an entity seeking secession from a State is not prohibited by international law, including outside the colonial context; and that opposition to this

declaration by the existing State does not make the declaration of independence unlawful;

- iii. The approach by the UK government set out in its submission was not actually taken by the UK government in its actions, as the UK government did recognise the secession of Kosovo from Serbia; and
- iv. The submissions by the UK government to the ICJ on the right to self-determination, albeit in a different context, were comprehensively rejected by the ICJ in the *Chagos Opinion*.

134. The international legal routes for the people of Scotland to bring a claim to exercise their right to self-determination by secession are very limited. These limitations are primarily due to the UK government not ratifying two international human rights treaties – the Optional Protocols to the ICCPR and the ICESCR - enabling complaints by those in its territory and jurisdiction to bring a claim based on the right to self-determination. Other routes, such as to the PCA, are probably not available as they would require an agreement with the UK government.

135. There are two possible international legal routes available:

- a. Seeking an Advisory Opinion from the ICJ. This requires a majority vote by States in the UN General Assembly to refer a legal question to the ICJ, and for the ICJ to determine the matter. It also requires a State to take this forward on behalf of the people of Scotland, which may prove difficult.
- b. Make a unilateral declaration of independence. This requires a clear majority of people representing Scotland to indicate their approval but it should not be done by the Scottish Parliament, as the latter is within UK domestic law. This could be done, for example, through a convention of elected and diverse representatives from across Scotland with a clear majority in favour. This approach relies for its effectiveness on the recognition by States of the Statehood of Scotland.

136. There are no easy routes to find a remedy in international law for the people of Scotland to exercise their right to self-determination by secession and so seek their independence from the UK. However, as seen in the history of other peoples with the right to self-determination seeking to become States, while this is challenging, it is by no means impossible.

Professor Robert McCorquodale

Brick Court Chambers

9 June 2023