



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 12 June 2014



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**EUROPEAN AND EXTERNAL RELATIONS COMMITTEE**  
**15<sup>th</sup> Meeting 2014, Session 4**

**CONVENER**

\*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

**DEPUTY CONVENER**

Hanzala Malik (Glasgow) (Lab)

**COMMITTEE MEMBERS**

\*Clare Adamson (Central Scotland) (SNP)

\*Roderick Campbell (North East Fife) (SNP)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

\*Jamie McGrigor (Highlands and Islands) (Con)

\*Alex Rowley (Cowdenbeath) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Bruce Adamson (Scottish Human Rights Commission)

John Ainslie (Scottish Campaign for Nuclear Disarmament)

Professor Alyson Bailes (University of Iceland)

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab) (Committee Substitute)

Dr Colin Fleming (University of Edinburgh)

Dr Juliet Kaarbo (University of Edinburgh)

Professor Adam Tomkins (University of Glasgow)

**CLERK TO THE COMMITTEE**

Katy Orr

**LOCATION**

The Robert Burns Room (CR1)



## Scottish Parliament

### European and External Relations Committee

*Thursday 12 June 2014*

[The Convener *opened the meeting at 09:16*]

#### “Brussels Bulletin”

**The Convener (Christina McKelvie):** Good morning and welcome to the 15th meeting in 2014 of the European and External Relations Committee. I make the usual request for mobile phones to be switched off. Some members are using iPads. I extend apologies from Hanzala Malik and welcome Patricia Ferguson to the committee as a substitute.

The first item on the agenda is quite a comprehensive “Brussels Bulletin”. Members have a copy in their packs, if they want to have a look at it. The clerks have put together a detailed analysis of the transatlantic trade and investment partnership, commonly known as the TTIP, because it was something that we wanted to look at. I am happy to take any questions, comments or queries about the “Brussels Bulletin”.

**Roderick Campbell (North East Fife) (SNP):** I wanted to ask whether we as a committee were going to engage and possibly put forward a response to the consultation on Europe 2020 or whether we were going to invite the Scottish Government to do so.

**The Convener:** I am just having a wee whisper in my ear. We have some scheduled work to do in August so we are discussing how we are going to focus on that and take that forward. The meeting that we have in August will probably be the place to do that.

**Jamie McGrigor (Highlands and Islands) (Con):** A few constituents have written to me about the TTIP. It could have a fairly large impact on businesses in Scotland if the trade barriers with the United States are removed. I am looking for answers, really. That is all I can say. I would like to know more about the implications of the TTIP.

**The Convener:** It is still at the consultation stage. We had agreed previously to go into a bit more detail on the TTIP for that very reason—people had been writing to members and to me, as convener, looking for information on how we would handle the issue.

You are absolutely right, Jamie. I attended a hustings with the National Farmers Union Scotland and a number of farmers raised serious concerns about the provenance and quality of beef and

other products from other parts of the world and the concern that such products might not maintain the standards that the European Union requires. There are real questions in there about what the TTIP means for farmers and others on the ground. If the committee is minded, we could write to the Scottish Government to ask it about its progress in any negotiations or conversations that are going on, how the TTIP will affect Scotland and its plans in that respect. That would give the committee locus to consider the issue.

**Jamie McGrigor:** Yes, and perhaps what the supposed implications might be. Could we ask that?

**The Convener:** Indeed. Are there any other comments?

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** Two items in the “Brussels Bulletin” struck me as worthy of mention. The first is access to finance for small businesses, which is discussed on page 9. Members will note that, under the EU capital requirements directive, which came into force in January this year, small businesses have a right to get feedback from their banks about loan applications. We might think that that is obvious, but it seems that it is not widespread in practice.

It also appears that, when small businesses make loan applications, the assessment is often done using large data pools, which are corporate-based assessment tools, rather than localised decision making. If the Commission can beef up the feedback, it might allow small businesses to interact with their banks more locally when they are discussing loan applications. That can only be a helpful step in understanding the situation and, perhaps, persuading banks to make more localised decisions for small businesses in Scotland and Europe.

The other point that is of interest to me is the digital skills agenda. Members will note that the bulletin reports that Europe tells us that there are expected to be about 700,000 unfilled information and communication technology-related jobs in the Union by about 2015. I imagine that most of them will be in software engineering and, as we know from discussions in the Scottish Parliament, there is quite a dearth of software engineers in Scotland. That seems to be reflected throughout Europe. In fact, the bulletin reports that 60 per cent of those vacancies are in the United Kingdom, Germany, Italy and France.

The recent initiatives in Scotland to try to address that dearth and encourage more youngsters, particularly women, to take up software engineering are to be welcomed. It is good to know that the European Union is concerned about that and is prepared to do something about it.

**Clare Adamson (Central Scotland) (SNP):** I will pick up on ICT, in which I have also taken a keen interest. With our backgrounds in information technology, Mr Coffey and I have a particular interest in such areas.

The bulletin says that the institute for prospective technological studies has produced a map of ICT activity. Could the clerks find us a link to that or could we get it lodged in the Scottish Parliament information centre so that members have the opportunity to look at it? That would be useful.

I echo everything that Willie Coffey said about the digital skills agenda, but I was also taken with the section on blue innovation, which is about the strategy for marine areas. That will be of particular interest to Scotland because of its waters, so perhaps we could come back to it at a future meeting to consider it in more detail.

**Roderick Campbell:** Could we ask for some kind of update, if there is any, on when the Court of Justice of the European Union is likely to hear the UK's legal challenge to the capital requirements legislation?

**The Convener:** If there is nothing else, are we happy to forward the "Brussels Bulletin" to the subject committees?

**Members** *indicated agreement.*

**The Convener:** Should we raise with the Economy, Energy and Tourism Committee and the Finance Committee the points that you raised about finance, Mr Coffey?

**Willie Coffey:** It would be helpful to alert them to that matter.

**The Convener:** Thank you very much. Before we move on to our second agenda item, I suspend the meeting briefly to allow our witnesses to get to their seats.

09:23

*Meeting suspended.*

09:24

*On resuming—*

## **Independence: International Policy**

**The Convener:** Welcome back. Agenda item 2, which is our main item, is on the Scottish Government's proposals for an independent Scotland in relation to international policy, including membership of international organisations. This is a one-off evidence session in a round-table format, as we can see.

Apologies have been received from David Pratt, who cannot be with us. He has another commitment.

People should catch my eye if they want to say something, comment on others' comments, or answer questions from members. They should speak one at a time through me. We will then perhaps make some sense of things.

Alyson Bailes is with us on the videoconferencing monitor from Iceland.

I want everyone around the table to introduce themselves and say where they are from. I am the convener of the committee.

**Clare Adamson:** I am a Central Scotland MSP.

**Dr Colin Fleming (University of Edinburgh):** I am from the Scottish centre on constitutional change at the University of Edinburgh. I say good morning to Alyson Bailes.

**Willie Coffey:** I am the member for Kilmarnock and Irvine Valley.

**John Ainslie (Scottish Campaign for Nuclear Disarmament):** I am co-ordinator of the Scottish Campaign for Nuclear Disarmament.

**Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab):** I am the MSP for Glasgow Maryhill and Springburn.

**Dr Juliet Kaarbo (University of Edinburgh):** I am senior lecturer in politics and international relations at the University of Edinburgh.

**Alex Rowley (Cowdenbeath) (Lab):** I am the constituency MSP for Cowdenbeath.

**Roderick Campbell:** I am the MSP for North East Fife.

**Bruce Adamson (Scottish Human Rights Commission):** I am the legal officer at the Scottish Human Rights Commission.

**Professor Adam Tomkins (University of Glasgow):** I teach constitutional law at the University of Glasgow.

**Jamie McGrigor:** I am an MSP for the Highlands and Islands.

**Professor Alyson Bailes (University of Iceland):** I teach at the University of Iceland in Reykjavík.

**The Convener:** I welcome everyone to the meeting.

We have quite a good topic to get stuck into. Will the witnesses give us a wee bit of insight into where they think Scotland's standing is in the world, how that has developed, and how we can take it forward? That is a gentle opener; we can then go to more specific questions.

**Bruce Adamson:** The Scottish Government has made commitments in the white paper and through "Scotland's National Action Plan for Human Rights 2013-2017", which set out very clearly Scotland's relationship and international obligations. The Scottish Government and previous Scottish Governments have committed to ensuring that human rights considerations are at the heart of the international framework to which Scotland connects through international development, bilateral engagement and engaging with intergovernmental organisations.

International human rights law lays out obligations that states are bound to respect. By becoming party to the international treaties, which Scotland has done through the UK, states assume obligations and duties to respect human rights by refraining from interfering with or curtailing them; to protect individuals and groups against human rights abuses; and to fulfil human rights by taking positive actions. Those obligations to respect, protect and fulfil flow through all international policy. That is a really good place to start when we consider Scotland's relationship with all intergovernmental organisations.

The Scottish Human Rights Commission, as the national human rights institution for Scotland, does not take a view on the outcome of the independence referendum—that is a matter for the people of Scotland—but now is a really good time to reflect on Scotland's place in the world and where we want to be in the future.

Although foreign affairs is currently reserved, observing and implementing international obligations is not, and we have made some really good progress on that over recent years. Members of the Scottish Parliament share that obligation and play a key role as part of the state architecture in implementing and observing human rights. I would like to develop the role that the Scottish Parliament can play in the future with intergovernmental organisations.

There are some areas, such as business and human rights and climate justice, in which

Scotland is already leading the way and playing a key role in developing international standards. Our approach to the Commonwealth games is particularly relevant at the moment. For the first time, there will be a human rights policy in relation to the Commonwealth games.

There is also the national action plan, which I mentioned at the start. We have received international praise for the approach that we have taken on that, but we need to do a lot more, because there are some real gaps. For example, there is the reticence here to incorporate international obligations. Our engagement with the international community has raised some serious concerns about things such as the age of criminal responsibility and the lack of equal protection for children from violence. The international framework provides us with a really good starting point for further discussions.

What I want to say, and what the commission wants to flow through this, is that the obligations to respect, protect and fulfil flow through all our international obligations.

09:30

**The Convener:** Thank you. I have a follow-up question. I do not know whether you are aware of the House of Commons European Scrutiny Committee's report "The application of the EU Charter of Fundamental Rights in the UK: a state of confusion". When I read the report, I was not very confused but I was worried by references to the disapplication of human rights responsibilities. I do not know whether recommendations will go in that direction but, if they did, I am a bit worried about how that would impact on our human rights charter and how we would take that forward.

**Bruce Adamson:** The key point is that our international obligations flow through everything that we do, whether they come from the United Nations, the Council of Europe, the European Union or the European charter of fundamental rights. There are political decisions to be made in terms of where Scotland fits in the world, but those decisions do not include our commitment to the international standards of human rights.

The committee has spent a significant amount of time in taking evidence on the EU, including on the charter of fundamental rights, and to an extent that has been dealt with separately. However, the SHRC's approach is to say that the starting point is the human rights principles, which flow through everything. The charter of fundamental rights reflects international standards that are reflected in a range of international treaties that the UK and Scotland are already party to. The way in which we engage with the EU, the Council of Europe and other international bodies needs to flow from those

obligations and how they apply in Scotland. It is much more about how human rights are brought home and apply in the day-to-day lives of people than the political decisions that we need to take about how we fit into some of the structures.

**The Convener:** Thank you.

**Professor Tomkins:** I have not read the European Scrutiny Committee report to which you referred, convener, but I will do so very shortly now that you have made me aware of it. The anxiety that is shared across both of the main Westminster parties in British politics about human rights is not about anything that Bruce Adamson has just been talking about. I agree with everything that he said just now, but that will soon stop in order to make this interesting.

The anxiety is not about the UK's or Scotland's commitments to international human rights standards; the anxiety is about the role of the European courts, particularly the extent to which the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg seem able to dictate to the United Kingdom on aspects of domestic law in a way that goes considerably further than the human rights standards that the United Kingdom signed up to when it ratified the relevant treaties: the European convention on human rights, which dates from 1950, and the treaty of Rome and the Lisbon treaty on the EU side.

That anxiety is felt equally strongly north of the border. We find that Scottish judges are privately concerned about the issue in the same way as English judges are. For example, there was a huge political storm a few years ago about certain European rulings concerning aspects of Scottish criminal justice procedure. We also see elements of that in the on-going political arguments here about corroboration and the reform of criminal justice.

I would make a distinction between, on one hand, the commitment of the United Kingdom and Scotland to human rights standards and, on the other, an anxiety that is felt strongly in British and Scottish politics about how far the role of European courts and European judges in the two European courts has extended to limit the room for manoeuvre—the margin of appreciation, as it is sometimes called—that elected politicians ought to be able to have in legislating for the distinction between the necessary protection of fundamental individual rights and the public interest.

In crude terms, courts in the UK, north and south of the border, are more deferential to political judgments that are made in the Scottish Parliament and the United Kingdom Parliament than European courts have been. That is where the cause for concern is. I do not know whether

the report of the European Scrutiny Committee in Westminster that you referred to talks about that, but that seems to be an important distinction to bear in mind.

**The Convener:** Did you want to come back on that, Mr Adamson?

**Bruce Adamson:** Only briefly, to agree with Adam Tomkins that we are going to disagree on the importance of the justiciability of human rights.

The starting point is to realise that the human rights treaties are not aspirational documents that were dreamed up; they are carefully negotiated treaties with effect in international law. I disagree with Adam with regard to the issue of how the courts have extended rights. We have a framework of international human rights obligations that have been very clearly negotiated. They are universal. We cannot separate rights or put a priority on certain rights.

One issue of conflict seems to concern situations in which there is a difference of opinion on how far the courts should go. However, courts very much set the floor or the minimum standards. The application of human rights really concerns the application of economic and social rights and the process of the realisation of those rights, and the courts' role is to ensure that we do not fall below that minimum standard. There is a real danger in seeing human rights as a sort of ceiling. That can get us into a very confused position.

**The Convener:** I am happy to widen out the discussion to wider topics, if colleagues are raring to go.

**Jamie McGrigor:** I want to ask about the difference between individual human rights and what is deemed to be the public interest. When the European courts come up with rulings on individual human rights, do they not take account of the public interest? Obviously, such issues will cause difficulties for some Governments when they arise. I want to know how all that comes into being.

**Professor Tomkins:** The answer is that national courts in Scotland and south of the border and the European courts—the European Court of Justice and the European Court of Human Rights—certainly take into account questions of the public interest when determining disputes on human rights and convention rights grounds. However, the argument in British politics at the moment seems to concern, in simple terms, a disagreement between the extent to which courts should privilege public interest considerations over individual rights considerations.

A classic example of that concerns what happened when this Parliament legislated to ban the hunting of foxes with hounds in Scotland. That



legislation was challenged on human rights grounds by people who said that their right to property, their right to privacy or their right to a livelihood was disproportionately interfered with by that legislation. The courts considered those arguments and said that some of the individual rights claims and some of the public interest considerations were material. They then looked at the record and saw that the Scottish Parliament had deliberated on those considerations in some detail—I think that it is fair to say that they were impressed by the quality of the debate here—and they ruled that the legislation was not a disproportionate interference with the rights in question.

That is absolutely typical of human rights litigation. There is a challenge to legislation by individuals who claim that the public interest in the name of which the legislation has been passed disproportionately interferes with their rights under the convention or with their human rights. It is then the job of the court to assess whether the legislature has achieved an appropriate balance.

In that very delicate exercise—which, it seems to me, is not an exercise purely of law or of politics but an exercise that involves both legal and political considerations—UK courts tend to be slightly more deferential to legislative judgments that have been reached by elected policy makers than European courts are, although, of course, there are exceptions. That is one of the causes of the current tension both north and south of the border in relation to what we might call human rights politics or arguments about the reform of the Human Rights Act 1998.

If I can bring the independence question into this, I do not think that Scottish independence, were it to arise, would make very much difference to any of those considerations—other than that they would be more visible in Scotland. There would probably be more concern in Scotland about how this Parliament was being constrained in its freedom of manoeuvre by international human rights lawyers and by European courts using aspects of international human rights law aggressively.

Why would those considerations become more visible? Because the range of powers that are available to this Parliament would obviously grow after independence and a number of human rights considerations would come into play in Scottish legislation here that are currently reserved to Westminster. It is not a reason for or against independence; it is not a reason for or against a yes or a no vote. However, Scottish public and political concern about international and European human rights law would be likely to grow rather than diminish in the event of independence.

**Roderick Campbell:** Mr Adamson's written submission refers to the way in which Scottish "law, policy and practice" is currently represented by the UK. There is reference in the footnote to a report to the UN Committee on Economic, Social and Cultural Rights, which I think makes particular reference to drawbacks in the UK member state submission in relation to housing and health, particularly in Scotland. However, that report dates back to April 2009.

Does Mr Adamson have any more updated thoughts on how separate Scottish law and practice is represented by the UK member state? How does he perceive independence might change that?

**Bruce Adamson:** I have a brief point on our concept of human rights. As lawyers, we often focus very much on the justiciability of human rights. We look at the Human Rights Act 1998 and the Scotland Act 1998 and how they have brought domestic incorporation of some civil and political rights within Scotland, but there is a real danger of getting too focused on that, because I think that it ignores the wider obligations that we have. Even the rights contained within the Human Rights Act 1998 are not all absolute.

The courts are very good at balancing the concepts that Jamie McGrigor was talking about to find the proportionality. The courts have developed their approach very well, but there is a real danger in focusing too much on the rights that are justiciable and forgetting that there is a wide framework of international obligations that we need to meet.

We can meet those obligations in a whole bunch of very positive ways, and a lot is contained within the national action plan about doing that. We need to be very clear that we should ensure the protection that is contained within the Human Rights Act 1998 and the Scotland Act 1998 in terms of the way in which legislation is framed, but that is not the whole story.

Roderick Campbell asked specifically about how Scotland in particular is represented through the UK at the international level—through the reporting against our international obligations. One concern that the commission has raised on a number of occasions is that, when the member state or the high contracting party to a treaty is engaging with the international mechanisms that review those obligations, there is a risk that Scotland, and some of the progress that we have made, might not be as well represented as it could be. Although the commission does not take a view on independence, there is huge value in ensuring that public and civil servants and other professionals are fully trained and aware of human rights standards, so that they can feed into that reporting process.

09:45

We are talking about the reporting process to the supervisory bodies. I spent most of last year at the UN office in Geneva, representing national human rights institutions from more than 100 countries, and I engaged closely with diplomatic missions and treaty bodies from across the world. I found that what works well is not just having highly trained civil servants in New York, Geneva, Strasbourg and Brussels, but having well-educated and engaged domestic civil servants who can feed in and be brought in to that process.

The world programme for education on human rights is key. What we can do—and what I hope we will do through the national action plan—is to improve the level of education and understanding of everyone in Scotland, particularly civil servants, so that we can engage better with that reporting process.

**Clare Adamson:** Before we move on from that topic, could you expand on what you say in your submission about the white paper and what it says about the opportunities that might be created to embed human rights in a written constitution in an independent Scotland?

**Bruce Adamson:** Adam Tomkins and I will probably disagree quite strongly about the place of economic, social and cultural rights in the framework of a constitution. The UK is one of the few countries that do not have a written constitution. Israel and my home country of New Zealand are the only other two countries in the world that do not have a written constitution in a single document. The same discussion and conversation about the value of having a written constitution is taking place in New Zealand at the moment, and Adam Tomkins tells me that that discussion is also being had in Israel, so it is an extremely interesting time.

The commission's strong view is that, independent of the result of the referendum in September, we should be looking at how we can better incorporate human rights in the constitutional framework. Whether that is done through legislation at devolved or national level or constitutionally, that is a discussion that we should have. A decision can be made about that.

What a decision cannot be made about is the international standards. We have really good evidence from across the world that the best way to protect human rights and to fulfil our international obligations is to incorporate all those rights, including economic and social rights. The vast majority of the countries in the world now incorporate economic and social rights to some extent within some kind of constitutional framework, so that is where we should be headed. That reflects the fact that all human rights are

universal, indivisible, interdependent and interrelated, but the commission does not take a view on whether independence would provide additional impetus. What we are clear about is that we need to have the debate and to explore ways of doing it, no matter what the result is in September.

**Patricia Ferguson:** I must admit that I have always been intrigued by how people in Scotland would be better served by having human rights obligations enshrined in a constitution, because they are already enshrined in everything that we do. This Parliament cannot pass legislation that is not compliant. I would like to tease out what you think would be additional in the scenario in which we had a written constitution that enshrined human rights.

**Bruce Adamson:** The human rights in the Scotland Act 1998 incorporate within Scotland, in a quasi-constitutional way, a number of rights—the civil and political rights—in the European convention on human rights, as set out in the Human Rights Act 1998. However, a wider discussion is necessary about the whole range of international obligations that are not currently entrenched in any way in domestic law. The discussion that we want to have is about rights that are wider than the rights that are contained in the Human Rights Act 1998 and referenced in the Scotland Act 1998.

**Patricia Ferguson:** What rights and obligations do you have in mind?

**Bruce Adamson:** A broad range of economic and social rights. There have recently been discussions in the Parliament about the UN Convention on the Rights of the Child, which is not incorporated, and whether it could be incorporated in some way. I am talking about a broad range of economic and social rights—the rights that cut to the very heart of people's daily lives—rather than the civil and political rights that have traditionally been protected. Such rights include rights in relation to housing and education—in other words, the basic things that cut to the heart of people's daily lives.

**Professor Tomkins:** I have two concerns about what Bruce Adamson has said. My first is about the tendency to say, "You know that thing over there that we like—that is a human right." There are lots of things over there that we like. We like a clean environment, good air to breathe and clean water to drink—I thank the committee for supplying it. We also like good education for our children and good healthcare. The more you say that all those good things, which are public policy imperatives—the reason why we elect you is to get those things right for us—are human rights, the more you risk diluting that concept.

Like Bruce Adamson, I believe passionately in human rights. I think that some rights are so important that they ought to be absolute rules—lines that can never be crossed. The absolute right to be free of torture anywhere in the world is one that I would say is an absolute right that should not be subject to proportionality analysis or deference; it should be an absolute right. There are probably others, but that is one example.

I worry that the extremely good and well-intentioned work of the Scottish Human Rights Commission and other like-minded organisations across Europe and the world risks diluting the core of the concept. For that reason, I am nervous about constantly adding to the list of human rights. A human right is something that we cannot be a human without. If we are denied a human right, we are denied something that is the essence of our humanity.

My second concern is that, if you put these economic, social and cultural rights, such as the right to food, the right to development, the right to healthcare and the right to social security—those are the rights that we are talking about when we talk about economic and cultural rights—in a written constitution, an act of Parliament or any kind of legal instrument, regardless of whether you call it a written constitution, do they become justiciable? Do they become enforceable in a court of law? Would it be the case that, in an independent Scotland with a written constitution that included all the rights that Bruce Adamson wants to put in it, this Parliament would not be responsible for determining how water was supplied to Scots, how to tackle questions of the environment or how stretched resources could be used appropriately to provide healthcare, because Parliament would not decide any of those things? Instead, it would make pitches to the Court of Session, which would decide those things, because once those rights become enshrined—which is the word that Bruce Adamson used—or embedded in a written constitution, an act of Parliament or some kind of legal instrument, they become, as it were, the domain of lawyers.

I am a lawyer and I quite like lawyers, but I like politicians more. The reason I like politicians more is that we elect them to make decisions for us, and if we do not like the decisions that they make, we can de-elect them. You cannot do that with judges.

There is a real democratic deficit problem with the prospect of enshrining all these rights in a written constitution or an act of Parliament, which is why the UK has never done it. The UK, as a polity, is absolutely committed to doing the best that it can on healthcare and a clean environment. You may disagree politically with what the UK is doing, but that is exactly the point: it is a political disagreement. Why would you want to hand all

that over to the unelected old, white men of the Court of Session to enforce on Scotland's behalf? I just do not understand the democratic logic of that position.

**The Convener:** After hearing from Alex Rowley and Bruce Adamson, I think that we will have to move on to another topic.

**Alex Rowley:** It is a really interesting discussion, regardless of the outcome of the referendum, and perhaps we should return to it. I have always believed that every individual has the right to a roof over their head and I have striven to bring that about. I am sure that politicians and Governments of all persuasions—or most of them, certainly—would strive to do that. The question is whether enshrining that in some kind of written constitution would mean anything to people if the local authority, the Scottish Government or the UK Government did not make available the financial resources to prioritise giving everyone in the country a roof over their head. That is the interesting thing: what would be the point of that if it did not mean much?

Bruce Adamson said that there is evidence that the best way to protect human rights is to have a written constitution. It would be interesting to get that evidence, although not necessarily today. Are you saying that in all those countries that have a written constitution, human rights are better protected? Where people have rights to housing and healthcare in written constitutions, do they get those things more than we do, with our unwritten constitution? It would be interesting to hear about that. As I said, that is not necessarily something for this debate, but we should certainly return to it after the referendum.

**Bruce Adamson:** That cuts very much to the heart of what we are looking to do through the national action plan. As I said, most countries incorporate economic and social rights on things such as housing, health and education in some kind of legal or constitutional framework, which provides a high level of protection.

I strongly disagree with Adam Tomkins on defining human rights simply as absolute rights. That is not what human rights are. This is not something that is made up by courts; it is something that is made up by politicians. The international treaty obligations are carefully negotiated at an international level. The Universal Declaration of Human Rights in 1948 did not distinguish between the rights; it said that they were all indivisible, including economic and social rights. Following the treaties in the 1960s, with the international covenants on economic, social and cultural rights, we have had a strong history of political negotiation on defining what the rights are.

We are not talking about new concepts; these are things that have been negotiated at a political level. Some rights, such as the right to be free from torture, are absolute, but others need to be realised progressively, taking into account the economic situation in a country. Courts in other places are very good at balancing these rights. We have seen some very strong jurisprudence in South Africa, particularly on issues such as healthcare. There were cases in which people asked for a particular type of treatment for their condition, but the court said, "No—the right to health does not say that you get the treatment that you want."

However, the standards say that the state must consider everything and must make a decision based on the available resources to the best attainable standard. Therefore, although the case of an individual who asks for a particular level of care might not necessarily succeed, in a case on providing antiretroviral drugs to prevent the transfer of HIV between mums and babies, the Constitutional Court of South Africa said that there must be a standard, which must be considered—it cannot apply in some areas but not others. The international standards and the incorporation of economic and social rights in particular provide a framework for decision making in which not necessarily the outcome but the decision-making process can be challenged. That provides for the best possible decision within available resources.

10:00

**The Convener:** We could probably talk for a few hours about the issues that have been raised. If the witnesses want to provide additional written evidence on both sides of the argument, we would be keen to have that, which would allow us to consider the issues further.

Clare Adamson will ask about a new topic.

**Clare Adamson:** My initial question is to Alyson Bailes. In an article for the Carnegie Endowment for International Peace, you wrote:

"Scotland would be joining a set of nations that have often flourished in modern Europe, so long as they grasp the implications of their status and the careful choices required."

I will ask a general question to open up the debate a little. What opportunities would a yes vote open for Scotland to flourish on the global stage?

**Professor Bailes:** Thank you for the question. I stressed that point in my article because small states are extremely diverse. Some of them cannily make good use of their position—to be frank, it gives them the chance to be a free-rider, because they escape a lot of the most difficult burdens and decisions from powerful status in the world, and they gain the chance to be a respected

mediator, for example, and a taker of high-minded initiatives.

A small state has a relatively small and limited economy, in which it can bring out its best qualities for international competition. It may have a better chance of popular cohesion behind its policies, although I stress that that does not come automatically and that a small state needs just as sophisticated a mechanism for forming policy as a large state does, because differences can easily become sharper if they are personalised in a small community.

Deciding to become a small state—in Scotland's case, it would be independent for the first time—is only the first step. The state must then say what kind of small state it wants to be and what actions it will take internally—I stress that—as well as externally to follow that through.

In explaining what kind of small state it would want Scotland to be, the Scottish Government has given fairly clear answers. Scotland would be a robust small state with proportionately sized armed forces, so it would be ready to defend itself. It would want to be in NATO, through which it would have to defend its allies—an interesting point is that an independent Scotland in NATO would be pledged to defend the remaining UK. However, Scotland would also be a peaceful small state with a particular attachment to disarmament, including nuclear disarmament. It would have a global conscience and would engage in peace missions to provide humanitarian aid and so on.

That is often presented as a Nordic profile. Objectively speaking, such characteristics are typical of the Nordic states, although individual Nordic profiles vary a lot. It is not unrealistic for Scotland to try to assimilate itself to that profile, given not just its size, traditions and skills but its geographical position, which makes it a peripheral and maritime power. Small and peripheral maritime powers have chances for overseas intervention and for wide global engagement, which landlocked small states that are hedged in by big neighbours might find more difficult.

I will not go on for too long on the question, but I add that Scotland would be in an unusual position as a small state breaking out of a large one because the carriers of Scottish policy in that new situation—the diplomats, soldiers and international businesspeople—would have a big-country background but be acting out their role as representatives of a small state.

That is an interesting situation and it might have negative and positive connotations for Scotland's prospects compared with those of other small states. The large-country experience would be helpful in tackling some tough international problems; I think that, internationally, people would

expect Scotland to understand terrorism, given its background, in a way that rather few other states of 5 million people would. On the other hand, would Scotland be able to shake off those aspects of the big-country heritage and image that it would want to shake off? There is no automatic answer to that. It would need careful thinking about in the event of independence.

**Clare Adamson:** That is interesting.

The white paper also has a number of proposals for how Scotland would do its international engagement—proposals about embassies and what their core functions would be. Do you have any comments to make on the five core functions of embassies as stated in the white paper?

**Professor Bailes:** As a former diplomat, I regard them as straightforward and natural. The problem, which one of my colleagues has already raised in evidence today, is how the resources would be found to maintain that representation at suitable numbers and quality in so many different locations when it is legally correct, I think, that existing British embassies would remain the property of the United Kingdom.

I will throw in a point that may not have come up in the discussion yet, although the Scottish Government might have been considering it. For a small state, there are some options for diplomatic representation on the cheap, as it were, and they are quite normal in diplomatic life. One is that the state can share an embassy building with someone else. Here in Reykjavík, the UK shares with Germany, which saves a lot of costs. Scotland could, of course, share with the remaining UK, a Nordic country or another country.

Secondly, if the state does not want to have full embassy representation, it can set up what is called an interests section in the embassy of another country. It can have a few of its own staff embedded there to carry out whichever functions it wishes—consular, political, commercial or whatever.

Thirdly, the state can ask another country to look after its citizens from the consular point of view. EU members are more or less committed to offer one another that kind of help if they are asked and particularly in an emergency.

Another point that may not have been discussed is that any country can appoint honorary consuls in a country in which it does not have an embassy. I recently read a study of how Liechtenstein, which is really tiny, had persuaded some of its citizens abroad or friendly foreigners to act as honorary consuls and, through them, had been effective in pursuing its commercial and cultural interests and its image building. However, you could not really

expect to use honorary consuls for tougher purposes such as military policy.

**Dr Kaarbo:** I will add a few things to what Alyson Bailes said about what small states can do. I agree with the different approaches that she outlined, but I will add a few.

One is that small states can prioritise what they do. Often, they decide that they cannot cover everything globally but they will focus on a few things. They can also develop economic niches and priorities. Small states often also choose to show themselves as good allies for security and protection. That comes with some commitments to the stronger ally but gets the benefits of protection.

Some small states are innovative in their internal organisation. Several have not only a foreign ministry and a defence ministry but a trade ministry and a development ministry. Sometimes, they will have more external ministries than a big state because they know that they have to do more on whatever priorities they have.

Collective action and belonging to international organisations is a key strategy for small states. One thing that small states have that big states often do not have is credibility to serve as honest brokers, lead international organisations or mediate in international conflicts. In some ways, they have that credibility because they are small and they are not seen as a threat. They are often seen as not coming to the table with another agenda, although they sometimes do that. That soft power, honest broker credibility or other credibility is built up over a long time; it does not happen on day 1 simply because a state is small.

Small states can do all those things, but let me throw out something else. They cannot choose those strategies in isolation; they are part of an international community, and from day 1 there are all kinds of external expectations of the roles that they can and should play.

To go back to the convener's broad opening question about Scotland's standing in the world, I note that that standing depends partly on what Scotland makes of it and partly on what others outside want Scotland to do.

**John Ainslie:** I want to follow up on nuclear disarmament and what has happened internationally. There are various examples of small states that have played a key role in nuclear disarmament, such as New Zealand and Ireland. They have been involved in creating and sustaining groupings at nuclear non-proliferation treaty preparatory committees, working with other states.

The other key point about how an independent Scotland could flourish on a global stage concerns the impact of an independent Scotland carrying

out the nuclear disarmament initiatives that are being proposed. My view is that Scotland's not having nuclear weapons is likely to result in London deciding to scrap its Trident programme. That has major international implications.

The current position is that there is a log jam in nuclear disarmament, and there is a great deal of resentment about that around the world. The United Nations General Assembly's first resolution called for the complete elimination of nuclear weapons, and resolutions that have said that have been passed every year.

The P5 nuclear weapon states—Russia, America, China, France and Britain—work together to effectively try to block progress on nuclear disarmament. Frustration with that has resulted in a series of conferences, the first of which was hosted last year by Norway, which is a NATO member. That was followed up by a conference in Mexico this year; there will be a third in Austria later on. The Mexico conference was attended by 146 nations and boycotted by the P5 nuclear weapon states. Those countries come together and say, "We want to see progress on nuclear disarmament" under a heading of looking at the humanitarian impact of nuclear weapons.

If Scotland were independent and it pursued its nuclear disarmament policy, there would be resentment of that in some quarters, but many other states would welcome it. When South Africa got rid of its nuclear weapons, that was followed by its playing a key international role in nuclear disarmament initiatives. That is an example of how a small state can play a disproportionate role.

**Dr Fleming:** My remarks are not on nuclear weapons and the nuclear deterrent, which we will probably come back to later; they are on a point that Alyson Bailes made on whether Scotland as an independent state would be caught between having some of the baggage of a larger state and trying to find its way as a smaller state. I will reflect on that in light of the defence section of the white paper and speeches and declarations by the First Minister and Angus Robertson. Much in them highlights that, militarily, Scotland would be very different from the UK, and that would be very important for Scotland.

10:15

It would not be easy to transition forces but Scotland, like a lot of states—I include the United Kingdom in this—would be in a position where it had a blank canvas to decide what the best military instrument is for the 21st century and build that accordingly. Given that, Scotland has a chance to find a niche in its military affairs. Alyson Bailes talked about the Nordic region. It is quite clear that the Scottish Government sees its

strategic gambit as lying in that approach, and it could carve out a niche there, as well as being prepared to be involved in other overseas missions.

Whether the Scottish Government could get rid of the baggage depends on lots of things, including negotiation. The blueprint in the white paper gives a clear indication of what it would do, but it would be interesting to see that being thought out further during negotiations. The white paper states that there will be a strategic defence review in 2016. That would be the point at which to think about what Scotland wants to do and how it would do it and, in negotiation and co-operation with London, to find its role in the world.

**The Convener:** Alyson, do you want to come back on any of those points?

**Professor Bailes:** I have some comments on the nuclear issue but, as was mentioned, you might want to consider that issue later in the context of Scottish defence policy.

**The Convener:** No—just make your comments; we would be happy to hear them.

**Professor Bailes:** I am personally very much engaged on the nuclear disarmament side; nevertheless, I need to make the point that a small state works first for its own preservation. That is an immutable law. In Scotland's case, I assume that that is what led the Government to say that it would have to be in NATO, although we know that for many in Scotland that was not an easy decision. Scotland would need the protection of NATO; specifically, it would need the protection of the United States, given our geographical strategic position in the Atlantic, and it would need intimate defence co-operation with the remainder of the UK.

It would be interesting to see where the day-by-day development of Scottish nuclear policy would come between, on the one hand, the strong impulse to be a non-nuclear, anti-nuclear state for reasons of belief, using the possibility that a small state has to take such ideal positions and, on the other hand, the political deals and compromises that would be necessary to stay in NATO.

Having raised that point, I add that that is not an impossible conundrum to resolve. Norway, Denmark and Iceland have resolved the issue by being non-nuclear states, saying that they will not accept any nuclear presence on their territory and supporting the strategic concept of NATO, which includes nuclear deterrence but, at the same time, stressing that NATO has committed itself to a nuclear-free world.

Going on from that, which is what I mean by the day-to-day choices, aside from having the large banner of a nuclear-free world, they have used

their expertise as technologically developed small states that have a lot of insight into nuclear technology because they have civil nuclear power systems, for example, to take technical initiatives that are important for nuclear disarmament, arms control, the monitoring of reductions, the technical aspects of non-proliferation and so forth.

There has not been time to investigate this yet, but an independent Scotland, with its big-country heritage, would have the opportunity either to invent or to join some extremely important technical initiatives related to proliferation and disarmament not only in the nuclear field but in other fields of weapons of mass destruction policy or arms policy in general.

**Jamie McGrigor:** I think that my question comes under theme three. I hope that I am not mixing up the themes.

In the event of a yes vote, who would decide whether the rest of the UK alone was the continuing state? If it was the continuing state, Scotland would be considered to be a new state. Alternatively, would both the rest of the UK and Scotland be continuing states? The implication appears to be that, if only the rest of the UK was deemed to be the continuing state, all the assets that belonged to the UK would be transferred to the rest of the UK, while Scotland would have to start from scratch.

**The Convener:** I call Adam Tomkins.

**Professor Tomkins:** I thought that you might do that, convener, although the question is for everyone.

The answer to the question of who would decide is a matter of international law and is not up for negotiation. Professor James Crawford, a professor of international law at the University of Cambridge, and Professor Alan Boyle, a professor of international law at the University of Edinburgh, have provided a full analysis of the question, which the United Kingdom Government commissioned and published in full as part of the first of its Scotland analysis papers. I commend that analysis to everyone who is on the committee.

The analysis of public international law in that legal opinion has never seriously been questioned by anybody. That analysis is that, in the event of a yes vote in September, under international law Scotland would become a new state and the rest of the United Kingdom would become the continuator state. Why is that the case? There is a range of reasons.

That is what happened in 1922, when the Irish Free State was created. It was a new state in international law, while the United Kingdom of Great Britain and Ireland became the United Kingdom of Great Britain and Northern Ireland. It

is also what happened when the Soviet Union collapsed—Russia was the continuator state.

That is not what happened in Czechoslovakia; the Czech Republic and Slovak Republic were both new states and Czechoslovakia was dissolved. Why would that not happen in the UK? It would not happen for a range of reasons, the most important of which is that the vote will take place only in Scotland. It is a decision in Scotland about whether Scotland should stay in or leave the UK. It is not a decision of the UK about whether the UK should be dissolved and reconvened into fresh states. If this was a UK-wide referendum about the future of the union, the legal implications might be very different, but it is not a UK-wide referendum. As we all know, the referendum is taking place in and made in Scotland—I think that that is the phrase that has been used.

The decision in the referendum is on whether Scotland should stay in or leave the UK. The UK's international legal status will be unaffected by the referendum result. If there is a no vote, the UK will subsist. If there is a yes vote, the UK will subsist, albeit—tragically, in my mind—without Scotland, which plays a massive role in British life.

That is the position in international law. I understand that the Scottish ministers have said that they do not accept that position, but they have not explained in international legal terms the grounds on which they do not accept it. I think that that is because there are no grounds on which the position can credibly be challenged as a matter of law.

What follows is not quite what Mr McGrigor said. The UK's public institutions would automatically become the public institutions of the rest of the UK—for example, the UK Parliament would become the Parliament of the rest of the UK and the UK Supreme Court would become the Supreme Court of the rest of the UK. A point that is material to our conversation this morning is that, as Alyson Bailes said in her first contribution, the UK's diplomatic corps, embassies and international relations—and the machinery that delivers all that—would become the diplomatic corps, embassies and international relations of the rest of the UK.

The public institutions of the UK would become the public institutions of the rest of the UK. It is important for people to understand that that would not be a question for political negotiation in the event of a yes vote; it is a matter of law.

What would have to be negotiated in the event of a yes vote is the equitable apportionment of the assets and liabilities. A distinction must be borne in mind between institutions on the one hand and assets and liabilities on the other.

The assets and liabilities of the UK would fall to be apportioned equitably between the rest of the UK on the one hand and an independent Scotland on the other. How that equitable apportionment would be calculated is a matter of politics, not of law. There would be a complex, difficult and tense political negotiation, and there would inevitably be trade-offs between particular assets and liabilities.

There has been a lot of confusion about that, but the principles of international law are actually fairly basic. It is clearly and authoritatively set out in the legal opinion of Professors Crawford and Boyle, but I am afraid that the independence white paper gets it wrong, as I say in paragraph 2 of my written evidence. Page 211 of the white paper states:

“Scotland will be entitled to a fair share of the UK’s extensive overseas properties ... allowing us to use existing premises for some overseas posts.”

That assertion has no basis in law. In the event of independence, the United Kingdom’s diplomatic network, and its 267 embassies, high commissions and consulates in 154 countries around the world, would become the diplomatic mission of the rest of the UK, as the United Kingdom has correctly stated in its Scotland analysis paper on EU and international issues, published in January 2014.

That is not a negotiating position or a matter of politics or of opinion; it is a matter of law. It is unfortunate that the independence white paper—the most important document published in the lifetime of the Scottish Government—proceeds on an inaccurate footing as a matter of international law. Either legal advice was not taken or it was not understood.

**The Convener:** How do you answer Dr Andrew Blick, who is a senior research fellow at the centre for political and constitutional studies at King’s College London? At an appearance before the Foreign Affairs Committee of the House of Commons on 16 October 2012, he said:

“In my view, there is a legal case for saying that the UK is dissolved, and that there are two successor states.”

Is that a case of putting two lawyers in the same room and getting three opinions?

**Professor Tomkins:** I am not sure whether Andrew Blick is a lawyer or not. I have met him before and he is a frequent witness to various committees of the UK Parliament, including the one that I work for. I am afraid that I think that, in this instance, Dr Blick is profoundly wrong. He is mistaken. There are no credible legal grounds for believing that, in the event of a yes vote, the UK is dissolved. It is as simple and as straightforward as that. There are no credible legal grounds for believing that, in the event of a vote for

independence in September, the United Kingdom is dissolved.

**The Convener:** What about Professor David Scheffer of Northwestern University school of law in Chicago, who is a former United States ambassador for war crimes and senior counsel to the US representative to the United Nations? He has said:

“the fundamental premise of Scottish independence is to regain the sovereignty of pre-1707. Thus the break-up should be viewed as two successor States of equal legitimacy—not size, wealth, or power, but legitimacy”.

**Professor Tomkins:** I have read that, and it is a quotation that I have seen used on numerous occasions. Again, I am afraid that, if you look at the analysis provided by Professors Crawford and Boyle, you will see that they take pains to look carefully at that particular argument, which is that the legal effect of a yes vote would be that Scotland would be recreated and that it would revert to the position that it enjoyed pre-1707 as an independent sovereign nation state. They provide pages of analysis as to why that is erroneous in law. I will not go through that with you now, but that is my answer.

Professor Scheffer is mistaken in international law. There are no credible legal grounds for believing that, in the event of a yes vote in September, the United Kingdom would be dissolved. The rest of the United Kingdom would be the continuator state as a matter of international law.

**The Convener:** Paragraph 1 of Professor Crawford and Professor Boyle’s opinion states that, in practice, Scotland’s

“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”.

It is a political decision.

**Professor Tomkins:** Convener, it is a question of international law. What international law says on the question of state succession is partly based on established principles of international law—which Professor Crawford knows more about than anybody else on the planet, frankly—and it is also based on state practice.

There is no doubt that the United Kingdom’s allies will see an independence vote in Scotland as a wholly legitimate creation of a new Scottish state; nobody who is in favour of independence need have any fear on that score. At the same time, those allies will say that the rest of the UK is the continuator state of the United Kingdom. That is fairly clear from the recent interventions of, for example, Sweden’s Prime Minister and the President of the United States.



10:30

**Dr Fleming:** I will not be drawn into legal discussions, as I am not an international lawyer.

I do not think that the President of the United States' intervention changed anything and I do not think that it was that surprising. States generally want the status quo to continue, unless it is them that want to change the status quo. I do not think that that intervention has too much of a bearing.

I will not get into the discussion of whether it is right in international law or not, but in this situation we have to remember that international law and international politics can become very murky. Politics trumps international law most of the time, and we should not take that out of the equation.

I am not disagreeing with Professor Tomkins—I do not know what will happen—but we cannot say that politics will not be part of it. Politics will be part of any negotiations.

**Professor Tomkins:** I have never said that politics will not be part of it, but I hope that we—those of us who are neutral in this debate, those of us who are in favour of independence and those of us who are opposed to it—would all accept that whatever political negotiations follow a yes vote in September should take place in a framework of established principles of law.

The idea that international power politics should trump the rule of law is one that I feel very uncomfortable with. I hope that we all agree that whatever happens to Scotland's constitutional future with a yes vote or a no vote takes place within, according to and subject to a framework of principles of international and constitutional law.

**Professor Bailes:** Convener, I want to comment on the last quotation that you read out, from Professor Crawford, about how the international community would be influenced by what Scotland and the remaining UK negotiate between themselves.

It is an important point, and I draw your attention to a precedent, in which the continuator state and the new state, or several new states, negotiated among themselves arrangements for their international obligations—politically, of course—which were more or less accepted as a legal fait accompli by the rest of the world. That was the case of the dissolution of the Soviet Union. Negotiations took place among the remaining republics and the Russian Federation, which was clearly the continuator state, on how to divide their military assets, which at that time included nuclear weapons, and they negotiated the treaty of Tashkent, which left a proportion of military assets, including nuclear weapons, in the other republics.

Interestingly, the former Soviet Union's international disarmament obligations and arms

control transparency obligations were apportioned among the other republics. Once the republics had worked out the deal among themselves, the rest of the world was only too glad to accept it, bearing in mind that disarmament obligations had been properly taken care of.

My point is that it seems that, even if you start from the position that there is one continuator state, should that continuator state and the new state work out between themselves legal and institutional fixes that are designed to protect both sets of interests and achieve continuity, the precedent is all in favour of the rest of the international community accepting that. To me, in terms of the national interest of both sides, that may be the more encouraging point for us to focus on.

**Roderick Campbell:** I want to come back on the point about international law. In 2012, Patrick Layden QC gave the Westminster Parliament a view on two successor states. He changed that view subsequently. In his written submission to this committee's inquiry, he gives two reasons for changing that view. The first is

"general acceptance that RUK will continue as a Member State, and, in international law, general acceptance by other states carries a great deal of weight".

Secondly, he expects

"the internal UK legislation which recognised Scottish independence to make clear that the United Kingdom was continuing, and that Scotland was the separated entity."

However, he also refers to paragraph 57.2 of the Crawford-Boyle opinion, which says that

"the attitude of the state concerned has a significant effect on how other states will regard the matter."

It is a circular argument and, although I do not necessarily want to cross swords with Professor Tomkins, there are at least some arguments to be made on the point.

**Alex Rowley:** I would not dare to get into a debate with all these experts on international law. I would simply say that if a new state of 5 million and a continuing state of 50-odd million people could not reach agreement—even if we accept the argument that it would be politically possible for them to reach agreement and other states would then sign up to that—common sense tells me that they would probably have to fall back on international law. That is my only point.

**The Convener:** And it is an excellent point, well made, because we are about to hear from Willie Coffey, who is going talk about relationships with the rest of the UK.

**Willie Coffey:** I will continue with this theme. I am a wee bit disappointed with the tone of some of Professor Tomkins's contributions. It is almost as if there is going to be a great big bun fight, with

a battle, arguments, disagreements and aggression after independence. That is completely at odds with the spirit that is enshrined in the Edinburgh agreement, through which a yes vote for independence for Scotland will lead to a respectful and understanding negotiating position on the part of both Governments.

Professor Tomkins, you talked about international law saying that the UK will keep everything and we will start from scratch, as my colleague Jamie McGrigor suggested. I suggest to you that that is not how it will play out between two states that will respect each other because of our mutual and shared history. If we do not, what have the past 300 years of union been about? Has Scotland always been some sort of second-fiddle, subservient partner in this union? I thought that it was an equal partnership.

Rather than the notion that one party keeps everything after a divorce, which is not the case, I think that both parties will respect each other and, as you said, there will be an equitable appointment of all assets and liabilities. That will ultimately be a political decision between the two countries that emerge. That is the respectful outcome that can and must happen.

**Alex Rowley:** I must say that Willie Coffey should be careful not to talk Scotland down. We have not played a subservient part. Scotland has led the United Kingdom and others right across the world. There is a danger of this meeting turning into a debate rather than an evidence-gathering session.

**Willie Coffey:** When we are hearing points like those that Professor Tomkins made, we have to respond to them and defend Scotland. If we have played an equal role in the union as Alex Rowley and his colleagues suggest we have done—

**Alex Rowley:** We have led.

**Willie Coffey:** Well, I am not going to claim that. To be respectful to everyone here at the table, I claim only that we have had an equal role. We are entitled to expect equanimity in consideration for the equal distribution of assets and liabilities after a yes vote. That is the right and proper way to approach the situation and that is the approach that would respect both partners.

**The Convener:** We should also be careful to respect one another around the table. I call Jamie McGrigor and then Professor Tomkins.

**Jamie McGrigor:** The point of these evidence sessions is to seek clarification and to take evidence from experts. It is not about saying what should happen.

**Professor Tomkins:** First, the Edinburgh agreement commits both sides to respecting the outcome of the referendum. If there is a yes vote,

Scotland will become an independent state. If there is no vote, Scotland will not become an independent state. That is all that the Edinburgh agreement says about respecting the outcome of the referendum. It says absolutely nothing whatsoever about how the very difficult process of unpicking a 307-year-old union should proceed thereafter.

I have absolutely not said what you have accused me of saying. I have not said that, in the event of a yes vote, the rest of the United Kingdom keeps everything. I have made, carefully and clearly, a distinction that is not of my own invention but which I find in international law—of which neither of us is the author—between institutions, on one hand, and assets and liabilities, on the other.

I am afraid that, inconvenient as it might be to some people, in the event of a yes vote the public institutions of the United Kingdom automatically become the public institutions of the rest of the United Kingdom. There is nothing that any of us can do about that. I have not said that that means that the UK takes everything. On the contrary—

**Willie Coffey:** What does “starting from scratch” mean?

**Professor Tomkins:** In terms of building public institutions. [*Interruption.*] In terms of building—

**The Convener:** Excuse me, I do not want to have an argument across the table. I want to try to investigate as much as possible—

**Alex Rowley:** With respect—

**The Convener:** Sorry, Alex—

**Alex Rowley:** On a point of order, the witness is giving evidence and I think that he should continue to do so.

**The Convener:** Can you let me finish, please? For the committee’s purposes, I want us to investigate how these things would work. We are speaking to experts today. I want to go to Juliet Kaarbo to give us some of the—

**Alex Rowley:** I want to make my point of order—

**The Convener:** You do not have a point of order, Alex.

**Alex Rowley:** I do. You might not like the evidence, but you cannot just cut off the evidence.

**The Convener:** I can if it is becoming contentious. I am sorry, Alex, but I am the convener and I can decide.

**Jamie McGrigor:** It is not becoming contentious.

**The Convener:** It is becoming contentious, and I am not having a member of Parliament and a witness argue in this situation. I am sorry.

Juliet, can you give us your interpretation of how states would work when they are negotiating?

**Alex Rowley:** I have a point of order.

**The Convener:** You cannot have a point of order. I am sorry. We are moving on.

**Alex Rowley:** You cannot just cut somebody off because you do not like the evidence that they are giving, for goodness' sake.

**The Convener:** I am not cutting somebody off because I do not like the evidence.

**Alex Rowley:** That is exactly what you have just done.

**The Convener:** The evidence was becoming contentious, and I am sticking to the themes of the inquiry. Juliet, could you give us your input?

**Patricia Ferguson:** Convener, I have always understood—correctly, I believe—that the purpose of our committees is to scrutinise what the Government is proposing, whether it be in legislation or elsewhere. I thought that that was the purpose of today's session—to take from experts their views and their considered opinions.

I have no problem with any of the evidence that has been given by any of the witnesses this morning but, even if I did, I think that I would hear it respectfully and consider it when I come to make my deliberations when the committee wants to produce its report. I am worried that we are in danger of not doing that today, and I really think that we need to hear what Professor Tomkins was saying before we move on to the next issue.

**The Convener:** What I did not want was Professor Tomkins and Willie Coffey arguing across the table. That is what I was stopping. I was not stopping the evidence being heard. Both were arguing across the table, which is not appropriate.

**Patricia Ferguson:** I think that interrupting a witness is not appropriate either, frankly.

**The Convener:** I interrupted both of them, Patricia.

**Alex Rowley:** With the greatest respect, Willie Coffey was interrupting the witness who was giving evidence. That is what you should have stopped, not the evidence.

**The Convener:** I interrupted both of them to calm it down.

I am going to move on. We need to move on and hear from the other witnesses. I hope that

everyone agrees with that and that we can move on.

Juliet, could you give us your interpretation of the relationship that nations have in a situation in which they are negotiating separation? I will ask Alyson Bailes to do the same after you.

**Dr Kaarbo:** To do that, I have to reference the debate a bit.

Scotland should plan for a range of outcomes with regard to independence. Whether it is a legally new state or not, there will be lots to be negotiated. I would also say that even if it is judged to be a new state—I realise that that has implications for the resources that it would get—there are lots of historical precedents for new states coming from successor states and building up foreign policies and roles in the world.

We have mentioned some of the ways in which states can do that. Joining international organisations is a key way in which states can—in Alyson Bailes's terms—seek shelter. In a rational world, it is a way in which they can seek to gain diplomatic influence and representation. That is what I would expect the first foreign policy steps of the new state or the successor state—whatever the legal term is—to be.

10:45

**The Convener:** Thank you.

I wonder whether we can draw on Alyson Bailes's considerable experience of diplomatic service to explore how she would envisage the negotiations going. I have a lot of faith that both sides of the argument—both the RUK and the Scottish Government—will take things forward in a decent and respectful way. Like Professor Tomkins, I do not expect the negotiations to be easy, but I expect them to be conducted respectfully. Professor Bailes, you have a lot of experience of these matters from your diplomatic service, and we would like to draw on it to help us.

**Professor Bailes:** Thank you for the question, to which I will respond with due regard to the sensitivity of the topic.

Like any citizen of the present UK, I hope that the negotiations will be carried out in a respectful and sensible way. It would set an excellent example to the rest of Europe and, indeed, the rest of the world, where certain issues with regard to the potential break-up of national states are being handled in a much less constitutional, peaceful and legitimate way.

Given that we are trying to clarify the issue, I want to turn the discussion in a slightly different direction and suggest that we look at the interests of those concerned. At the moment, people have

an interest in achieving either a yes or a no vote. On the day after a yes vote—were that to happen—everybody's interest would be in adjusting to that new world, which they might love, hate, find scary or find confusing. It is typical that a small state cannot think only of its own interests, which in this case are clearly defined in the ambitions set out by the Scottish Government; it has to try to get inside the heads of other powers and think about their interests, too.

It is interesting to consider the RUK's interests in the moment after a yes vote, what with all the feelings and emotions that would be in play. First, there would be an interest in exhibiting grown-up, sensible, peaceful behaviour, but there would also be an interest in maintaining what we might call the strategic unity of the British isles. I cannot see how it would be in the interests of the remainder of the UK to have a weak state on its northern frontier that was an international outcast and which was not bound by international obligations on serious issues such as fighting terrorism, proliferation, human rights and respect for contracts. Although the emotional side might be very difficult, I assume that negotiations would take place in an atmosphere that reflected the interests of the RUK.

Just as, on the RUK side, there would be an interest in not letting Scotland become a black hole or a wandering beggar of the international community, there would be corresponding interests among other members of NATO and the EU. One can, for example, underestimate NATO's interest in keeping up the unity of its operational space and deterrence cover through the period of the break-up of the British isles and maintaining the potential to operate across the space that would include Scotland and its waters.

I realise that that is a very general point, but I hope that it might turn our inquiry in an interesting direction that might not have been explored sufficiently so far.

**The Convener:** Thank you. Are there any comments or questions on that?

**Dr Fleming:** I will briefly echo some of Alyson Bailes's comments. The defence section of the white paper certainly takes account of some of the issues that might pertain to the rest of the United Kingdom in the event of a yes vote. It is very important for Scotland that, if it becomes independent, it respects the interests of the rest of the United Kingdom. That is certainly important in my own area of defence, because Scotland will require a close relationship with the rest of the United Kingdom to phase the transition to its defence forces.

Scotland does not want the two states to be at loggerheads. Having talked about the issue in

discussions and talks in London, I think that the debate that is happening in Scotland is not reflected there and there is less understanding of the issue. There is a need to be careful about and to respect the interests of both states. I have no doubt that, in the event of a yes vote, both states would act responsibly, but in some cases the onus would be on Scotland to demonstrate respect for the interests of the United Kingdom. It does not necessarily have to agree with those interests or be bound by them, but a collegial approach is the best way forward.

**The Convener:** We are bordering on time up—we have about 10 minutes left. Do our visitors wish to add anything on an issue that we have not covered or to clarify or expand on any points?

**John Ainslie:** I will say a wee bit about NATO membership and nuclear weapons, which has been made into quite a big issue.

To put it in context, I point out that Scottish CND's position is that we support a yes vote and independence, but that we are opposed to membership of NATO. Having said that, I think that the problems with nuclear weapons and NATO—and the extent to which Washington and London would be absolutely determined that nuclear weapons stay here—have been exaggerated. History highlights a slightly different lesson. John F Kennedy was not at all keen on giving Britain Polaris, and Carter was not keen on giving Britain Trident. The recent upgrade deal was made between Bush and Blair in the aftermath of the Iraq war. Even in London, General Nick Houghton, the chief of defence staff, gave a speech in December that was critical of the way in which defence expenditure is going. He did not say that we should not spend money on Trident—I am not sure that he would say that—but that is the logical extension of the position that he adopted.

The starting position would be that Washington and London would say that we have to keep nuclear weapons at Faslane, but I am not at all sure how robustly held those views would be if they were challenged and Scotland held its position. There is a range of views in NATO. I would need more time to expand on that, but other countries certainly have other views. Spain is an interesting example. It had similar arrangements to those in Holy Loch until 1979, when the American submarines left Rota. In 1981, the Spanish Parliament had a debate on joining NATO, and a condition of winning that vote was that no nuclear weapons would be deployed. If that provision had not been there, the Spanish Parliament probably would not have agreed to join NATO, and Spain joined the following year on the basis that nuclear weapons would not be deployed.

Basically, the starting point would probably be that Washington and others would want to keep the status quo of having nuclear weapons deployed in Scotland. If Scotland held its ground and said, "We're not having nuclear weapons here"—as I have said, that would probably lead to British nuclear disarmament—and Washington's choice was between a non-nuclear Scotland that was in NATO and a non-nuclear Scotland that was not, Washington would probably prefer that we were in it. That would be the starting point.

Other witnesses might want to come in on that.

**Dr Fleming:** I will come to the nuclear question in a minute. I do not think that membership of NATO will be terribly problematic for Scotland, although I understand that other people have different views. My argument is that, with regard to NATO membership, there is an open-door policy for European states if they meet the criteria, and Scotland already meets most of those criteria. Nor would Scotland go to the back of the queue to join. There are some barriers to membership, including the one that John Ainslie has just referred to of whether Scotland can be a non-nuclear state that has enshrined the illegality of nuclear weapons in a written constitution and still be part of NATO. I believe that it can, and it has said that it will sign the strategic concept, which is the key to being part of the organisation. If the Scottish Government had said that it would not sign, Scotland would not be a member of NATO, but it has said that it would.

The main debate is the nuclear one. The question is not whether Scotland has nuclear weapons. There will be a lot of pressure on the rest of the United Kingdom and the US not to be seen to be bullying Scotland. As Alyson Bailes pointed out, it is important for Scotland to respect the interests of the rest of the United Kingdom on the nuclear issue, because that will have an impact on all the negotiations.

Scotland should not be forced to keep nuclear weapons against its will, and the United Kingdom will not want to keep nuclear weapons indefinitely in what would be a foreign country. However, although I am not a supporter of nuclear weapons, I believe that, as the white paper notes, it is not the place of the Scottish Government or the Scottish Parliament to force the disarmament of the rest of the United Kingdom.

There will be discussions about NATO membership, but it would be important for Scotland to give the rest of the United Kingdom the time to decide whether it wants to continue with a nuclear deterrent, or the time to move that deterrent.

The Scottish Government has set out a seven-year timeline, while the Secretary of State for

Defence, Philip Hammond, has talked about 10 years. I think that a seven to 10-year timescale is possible. That issue needs to be addressed quite quickly, but if it is dealt with properly, I do not see many other problems arising with regard to Scotland's membership of NATO.

**Professor Bailes:** I agree with the general line of those statements, and I will throw in a couple of facts that might be interesting.

It is important to realise that, if Scotland accepted a long transitional period before the removal of UK nuclear weapons, it could still, from the first day, apply to join the non-proliferation treaty as a non-nuclear state. A country is not debarred from non-nuclear status simply because another country has stationed nuclear weapons on its territory; the decisive factor is the ownership of the weapons. For example, Germany has always been a non-nuclear state under the NPT despite there having been, at various times, a lot of nuclear weapons stationed in the country.

I want to state firmly that there is no connection between a country being a member of NATO and its having or accepting nuclear weapons on its territory. The majority of current NATO members have never had such weapons on their territory. In 1997, after the cold war, NATO assured Russia that none of its new members, which included the eastern half of Germany, would have any nuclear objects on its soil. It was a limitation that NATO imposed on itself rather than a matter of countries trying to wriggle out of their nuclear obligations. In NATO terms, Scotland's position would not be so peculiar, and it would be able to declare itself a non-nuclear state even with UK nuclear weapons still on its territory.

**Bruce Adamson:** Reflecting on the earlier discussions, I think that the statutes and frameworks that set up intergovernmental organisations do not generally deal with state succession. That is, as has been discussed, a matter of international custom and law.

However, when we discuss defence, the starting point must be the UN charter, which in the first line of its preamble clearly states:

"We the people of the United Nations determined to save succeeding generations from the scourge of war".

The purpose of the international community is to keep peace. The UN charter provides very limited exception in relation to defence under article 51, which is the provision under which NATO was set up. Scotland's engagement with NATO, whether as part of the UK or independently, must take into account its human rights obligations, including the need to ensure that any defence personnel are fully trained in international humanitarian law and the laws of armed conflict.

The same obligation resides here in Scotland. There can be discussions about how Scotland constructs its defence, but that obligation on any defence personnel acting at the Scottish level has to be the starting point.

11:00

**The Convener:** Thank you. We are just about out of time, but I want to give people around the table the chance to make any final points if they want to do so. Professor Tomkins, do you have any final points?

**Professor Tomkins:** Thank you, convener. I have enjoyed this morning's conversation—thank you for inviting me and for allowing me to participate, for the most part—but one issue that has not been discussed is costs.

You did not allow me to finish my explanation of this point in my earlier response, in which I attempted to correct the record after my previous evidence had been misrepresented by a member, but the reason why the distinction between institutions and assets and liabilities matters is not because it is an arcane point of international jurisprudence. If the white paper is, as I believe, wrong to say that an independent Scotland would automatically be entitled to its "fair share" of the UK's overseas properties, Scotland is obviously going to have to develop those networks and properties, find diplomatic staff, train them and pay them from its own resources. Those will be among the inevitable start-up costs of an independent Scottish state that the independence white paper famously says nothing about. If I may say so respectfully, it would be remiss of a committee such as this, which is charged with the responsibility of safeguarding the public purse, not to consider the cost implications of the issues that we have been discussing.

**The Convener:** I wanted to give people the chance to make final comments so that we can pick up certain matters.

**Clare Adamson:** The other side of the issue of costs that Professor Tomkins has referred to is that Scotland already pays for its share of the international embassies. The white paper says that it is expected that the international costs for Scotland, as laid out with the priority areas that are listed, will be less than Scotland's current contribution to the UK's embassies. If those embassies are no longer responsible for the great work that they currently do on behalf of Scotland, their relationship will, in some ways, also change. Will they be able to sustain the current level of representation, the number of staff and all the rest of it? Would it not be in the best interests of both areas to negotiate and share those assets to

ensure that they were able to continue after the establishment of an independent Scotland?

**Professor Tomkins:** Would it be in the best interests of an independent Scotland and the rest of the UK to co-operate fully in the event of Scottish independence? Of course it would. Would that happen? Yes, but not on the basis of one party's unilaterally declared assertions. That is not how negotiations work. I am sure that agreements could be arrived at between Edinburgh and London and between Edinburgh and a range of other foreign capital cities on the sharing of diplomatic premises, but those things do not come free. There would be a fee attached, as there is in the EU with regard to consular sharing arrangements—

**Clare Adamson:** —and as there is for Scotland in the union because we contribute to the current system.

**Professor Tomkins:** I got told off for speaking across a member. Is the discussion back with me?

**Clare Adamson:** I am sorry.

**Professor Tomkins:** I have no doubt that those things could be accommodated. I do not know what the costs are. I have to say that, as a citizen, I am disappointed that the Scottish Government has not furnished us with them. Its responsibility is to do so, and this Parliament's responsibility is to keep pressing the Government on that question.

**Clare Adamson:** I sincerely apologise for interrupting—I did not mean to do it. I was simply making the point that under the current system we already pay for embassies. Again, I apologise for interrupting.

**The Convener:** Rod Campbell, did you want to come in?

**Roderick Campbell:** I am content to leave things there, convener. I will reflect on what has been said.

**Patricia Ferguson:** Professor Tomkins makes a good point about the costs. The committee might wish to write to the Scottish Government and ask for an analysis and a breakdown of what the estimated costs might be. It would be useful and help to illuminate the debate around the issues.

**The Convener:** That is a useful suggestion. Does anyone else have a final comment?

**Willie Coffey:** My view is that we are entitled to respond to comments that are made around the table. The particular comment that I responded to was Jamie McGrigor's point about starting from scratch, which led to a discussion about what that might mean. Ultimately we are talking about a break-up of assets and liabilities in which if one party, by law, keeps all the assets, presumably that party, by law, also keeps all the liabilities and

the rest of it. I wonder whether members agree with that standpoint; it is certainly not a position that I would support. I would support a sensible joint agreement and carve-up of all assets and liabilities after independence.

That said, we cannot have it both ways. If the rest of the UK is going to keep everything and make Scotland start from scratch, I am afraid that it will have to think about keeping all the liabilities and debts that have been accrued on our behalf.

**The Convener:** Patricia Ferguson made a very good—*[Interruption.]* I have lost the word.

**Willie Coffey:** Suggestion.

**The Convener:** Indeed. We will write to the Scottish Government as there are obviously grounds for looking at assets and liabilities as well as costs. Are members happy to do that?

**Willie Coffey:** Sure.

**Jamie McGrigor:** I just want to say that, in my view, I asked a perfectly legitimate and important question. With respect to Mr Coffey, he has every right to give his opinion on it. However, it is also my view that witnesses have the right to complete their evidence, convener, and my protest is that on this occasion you stopped a witness in mid-stream and prevented him from doing so. I am glad that this is in the public domain today.

**The Convener:** Absolutely, Jamie. This committee has nothing to hide. What I did was stop a dual exchange across the table. When we came to the end of the evidence session, I invited Professor Tomkins to come back in and finish what he had to say, because I, too, was very keen to hear it. Earlier on, however, I felt that I needed to calm down a bit of a spat so that we could move on. Is that okay?

I thank everyone who has given evidence. The current debate, which covers many topics, is obviously an emotional and sparky one for those on both sides of the argument. As I have said, I invite anyone who might have additional information to submit it to the committee. Like, I think, the rest of the committee, I am interested in hearing both sides of the human rights argument. If anybody can add anything to the other arguments that have been made around the table today, it will help our deliberations. Finally, I thank Alyson Bailes for joining us from Iceland. We look forward to hearing from you again.

Our next committee meeting is on 26 June 2014, when we will hear from the Minister for External Affairs and International Development, Humza Yousaf, on all the topics that we have discussed in our three one-off evidence-taking sessions.

*Meeting closed at 11:07.*





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