

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

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# Part I:

## Executive summary

1. If Scotland were to become independent after the referendum planned for late 2014, it would be with the UK's agreement rather than by unilateral secession. In practice, its status in international law and that of the remainder of the UK (rUK) would depend on what arrangements the two governments made between themselves before and after the referendum, and on whether other states accepted their positions on such matters as continuity and succession. But there are a number of legal considerations.
2. First of all, the status of Scotland before the union of 1707 would be of little or no relevance. In particular, the *Treaty of Union*, considered with or without the *Acts of Union*, does not currently sound as a treaty in international law.
3. The three possible outcomes for the status of Scotland and the rUK in international law following Scottish independence are as follows, from most to least probable.
  - 3.1 Most likely, the rUK would be considered the continuator of the UK for all international purposes and Scotland a new state. This has been the most common outcome in the case of separation, as evidenced, for example, by the acceptance of Russia as the continuator of the Union of Soviet Socialist Republics (USSR) despite its political collapse. The fact that the rUK would retain most of the UK's territory and population and that its governmental institutions would continue uninterrupted would count in its favour. So, importantly, would the acquiescence of other states in any claim of continuity. Since the rUK would be the *same state* as the UK, questions of state succession would arise only for Scotland.
  - 3.2 Some states have dissolved entirely into new states, leaving no continuator. But the most recent instances of this are the result either of an agreement between the states involved, one of which might otherwise have been considered the continuator state (Czechoslovakia), or of prolonged resistance by other successor states and third states to a claim of continuity in circumstances of ethnic conflict (the Socialist Federal Republic of Yugoslavia). This outcome would be likely only if the UK were to agree to it.
  - 3.3 Reversion to a previous independent state such as the pre-1707 Scottish state may not be excluded. But it normally depends on conditions that are absent here, such as the unwilling subjugation of the former state. Some apparent exceptions are illusory or are political assertions with no legal consequences. In any event, the passage of such a long period of time would make it difficult for Scotland to assert identity with the pre-1707 Scottish state for legal purposes, and even if it did so that would not affect the status of the rUK as continuing the legal personality of the UK.

4. The rules of state succession to treaties generally do not apply to membership of international organisations; instead, membership depends on the particular rules and practices of the organisation. In the UN, for example, the rUK would continue the UK's membership – including its permanent seat on the Security Council – and Scotland would be expected to join as a new state.
5. Scotland would also be expected to join the Council of Europe as a new state, though the *European Convention on Human Rights* would probably continue to apply to Scotland uninterrupted without the need for Scotland to ratify it in its own right.
6. Within the EU, there is no precedent for what happens when a metropolitan part of a current Member State becomes independent, so it is necessary to speculate.
  - 6.1 Since the rUK would be the same state as the UK, its EU membership would continue. Indeed, the EU treaties impliedly preclude 'automatic' withdrawal by a state. There might have to be an adjustment to the UK's terms of membership to reflect its reduction in territory and population, but this could be done without the UK ceasing to be an EU Member State.
  - 6.2 On the face of it, Scotland would be required to accede to the EU as a new state, which would require negotiations on the terms of its membership, including on the subjects of the UK's current opt-outs. The EU treaties make no provision for succession to membership. Certain provisions of the EU treaties would require amendment. If Scotland were somehow to become an EU member in its own right automatically, it is not clear how adjustments to the relative positions of Member States could be willed into being without negotiations. Nor would it be clear on what terms it would be a member.
  - 6.3 Some have argued that the rights conferred on individuals by EU citizenship might influence the European Court of Justice (ECJ) to somehow resist this outcome. But this is a matter for speculation and does not have a clear precedent in EU law. It would also require the issue to somehow come before the ECJ, which may be unlikely.
7. In any event, Scotland's position within the EU is likely to be shaped more by any agreements between the parties than by pre-existing principles of EU law.

## Part II:

# The purpose and structure of this advice

8. On 5 May 2011, the Scottish National Party (SNP) won a majority of seats in the Scottish Parliament. The Scottish Government formed by the SNP wishes to hold a referendum on the independence of Scotland from the United Kingdom of Great Britain and Northern Ireland (UK). On 15 October 2012, the UK and Scottish governments signed an agreement ‘to work together to ensure that a referendum on Scottish independence can take place’ that states, among other things, that it should ‘have a clear legal base’, ‘be conducted so as to command the confidence of parliaments, governments and people’ and ‘deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect’. The agreement envisages that the Scottish Parliament will legislate for a referendum to take place by the end of 2014.<sup>1</sup>
9. Three departments of the UK Government – the Foreign and Commonwealth Office, the Cabinet Office and the Office of the Advocate General for Scotland – have jointly instructed us to advise in connection with the proposed referendum.
10. We are asked to advise on two questions:
  - 10.1 the status of Scotland and the rUK in international law after Scottish independence, in particular ‘(a) the strength of the position that the rUK would be treated as a continuation of the United Kingdom as a matter of international law and an independent Scotland would be a successor state’; and
  - 10.2 after Scottish independence ‘(b) the principles which would apply to determining the position of the rUK and an independent Scotland within international organisations, in particular the European Union’.
11. We are instructed that this advice has two principal purposes.
12. First, the UK Government has announced a programme of work to inform and support the debate on Scotland’s future in advance of the referendum. One strand of the programme will examine Scotland’s position in the wider world, including membership of the European Union and other international organisations. The matters in this advice may also affect other strands of the programme, including defence, currency, monetary policy, nationality and border control. The programme will result in the publication of detailed evidence and analysis to assess the benefits of Scotland remaining part of the UK.

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

13. Second, the Foreign Secretary is expected to give evidence to an inquiry by the Foreign Affairs Committee of the House of Commons into ‘whether Scottish separation would have an impact on the future foreign policy of the UK and that of an independent Scotland’. The Foreign and Commonwealth Office has already submitted a written memorandum arguing that Scotland and the UK both benefit from union.
14. This advice is premised on the assumption that if Scotland becomes independent then it will be with the UK’s agreement rather than by means of a unilateral secession.
15. This advice has three substantive parts. In Part III, we explain the general principles of state continuity and succession and define certain terms. In Part IV, we consider the status of Scotland and the rUK following independence. This involves an analysis both of the historical status of Scotland and the UK and of recent state practice. In Part V, we consider the principles that would apply following independence to determine the position of the rUK and Scotland in the EU and other international organisations.

## Part III:

# Principles of state continuity and succession

16. The first question concerns whether the rUK would be treated as the continuator state of the UK and Scotland as a successor state. The second question is one of state succession and depends on the answer to the first.
17. It will initially be helpful to explain the concepts of state continuity and state succession. In international law there is a fundamental distinction between the two.
18. The term 'state continuity' denotes cases where the same state continues to exist despite changes in its territory and population. The central case of continuity is where a state retains substantially the same territory and the same structure or system of government over a certain period. In other cases it can be harder to determine state continuity.
19. The notion of state continuity has been criticised as misleading, as overly general or as giving a false impression of objectivity. Because there are no well-defined criteria for the extinction of states, subjective factors such as a state's own claim to continuity may be pertinent or even determinative. But the notion is well established and arguably even logically required by the distinction between states and governments. This advice will assume the existence of the notion of state continuity but will consider below, in light of state practice, the relevance of subjective factors such as state claims and recognition.<sup>2</sup>
20. The term 'state succession' refers to the complex of legal issues that arise when there is a change of sovereignty over a territory. The *Vienna Convention on Succession of States in Respect of Treaties* and the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts* define 'succession of States' as 'the replacement of one State by another in the responsibility for the international relations of territory'.<sup>3</sup>
21. The law of state succession does not purport to regulate the process of the transfer of sovereignty or the creation of statehood. It is premised on the assumption that a change of sovereignty has occurred in accordance with international law, but otherwise applies regardless of how that change of sovereignty occurs. What it deals with are the *consequences* of a change of sovereignty in fields such as succession to treaties, state property, archives and debts and the nationality of natural or legal persons.

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

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

22. Several terms that are common in this area of law are used throughout this advice:
- 22.1 'Secession' is the process by which a group seeks to separate itself from the state to which it belongs and to create a new state on part of that state's territory. It is essentially a unilateral process.
- 22.2 A bilateral and consensual process by which a state confers independence on a territory and people by legislative or other means may be called 'negotiated independence'. It can also be called 'devolution', but since that term is used in a different sense to describe the relationship between the UK and its constituent parts, we will use the term 'negotiated independence' for this purpose.
- 22.3 Many instances of both secession and negotiated independence in state practice concern colonial territories: geographically separate territories that are dependent on and subordinate to another state. These fall under *UN Charter* Chapters XI (non-self-governing territories) and XII (trust territories). Article 74 uses the term 'metropolitan' in contradistinction to non-self-governing territories to refer to the administering state. Colonial peoples have a right to self-determination that is distinct from any right of the people of the metropolitan state. Partly for this reason, states have generally been less reluctant to recognise secession by colonial territories. Since Scotland is part of the metropolitan UK, state practice that depends on the colonial status of territories is of little or no relevance.
- 22.4 A state that has acquired a territory, or an entirely new state that comes into existence following a change of sovereignty, is called a 'successor state'.
- 22.5 A state that has lost territory is called a 'predecessor state'.
- 22.6 If the predecessor state retains its legal identity and existence despite a significant change in its circumstances such as a loss of territory or population, it may be called a 'continuator state'. This contrasts with 'successor state' in that a continuator state is regarded as legally identical with the predecessor state. The first question could thus be framed as whether the rUK would be the *same state* as the UK.
23. Under *UN Charter* Article 4, only 'States' can be admitted to UN membership. States do not have to seek UN membership, though all new states since 1945 have done so.<sup>4</sup> The practice of the General Assembly and Security Council in admitting new states to membership and acknowledging the continuing membership of established states has been influential in ascertaining their status and will be noted below in discussing state practice on state continuity and succession.
24. If the same state continues to exist, even if there are changes to its government, territory or people, the question of state succession to particular rights and obligations does not arise. That is to say: the question of continuity precedes that of succession.<sup>5</sup> So if the UK continues in existence, state succession will be irrelevant for it. A conclusion that Scotland would be a new state would, in contrast, give rise to a host of questions about state succession (mostly falling outside this advice).

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

<sup>5</sup> *Brownlie's Principles* (8th edn, 2012) 426–7.

## Part IV:

# The status of Scotland and the remainder of the UK in international law

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

### (1) The historical status of Scotland and the UK

26. From 1603, when the Stuart King James VI of Scotland inherited the English throne, Scotland and England (and its colony Ireland) shared the same monarch.
27. There is little reason to doubt that between that date and 1707, England and Scotland remained separate states. They had separate constitutional systems, despite sharing a monarch. For instance, Scotland affirmed its different rules of succession in the *Succession Act 1682* (Scotland). It also had international relations with England, even after 1603, and the English Parliament levied customs dues on Scottish exports.<sup>6</sup>
28. Devine suggests that ‘Scotland was far from being an independent state’ in that ‘Scottish foreign policy had moved with James [IV] to London in 1603 and there was a great grievance that thereafter foreign policy for both kingdoms was exclusively designed to suit English needs’. But the Darien Project in Panama – the failed Scottish investment launched in 1695 that partly precipitated the union – does evidence a separate Scottish foreign policy, at least to some extent.<sup>7</sup> And Queen Anne’s ministry in London was also ‘forced to accept’ the *Act anent Peace and War 1704* (Scotland),<sup>8</sup> despite, Devine notes, ‘the fact that its whole emphasis suggested a separate and autonomous foreign policy’.<sup>9</sup> It provided that ‘after Her Majesty’s Decease, and failing Heirs of her Body, no person being King or Queen of Scotland and England shall have the sole power of making War with any Prince, Potentate or State whatsoever without consent of [the Scottish] Parliament’.
29. It is also true that James VI proclaimed himself king of ‘Great Britain’ in 1604, but that was probably unconstitutional and was not followed by his Stuart successors. The English Parliament refused to alter the name of the kingdom on the ground, among others, that ‘the alteration of the name of the Kingdom doth inevitably and infallibly draw on the

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

<sup>7</sup> *Ibid* xxii, 5–6.

<sup>8</sup> ‘Anent’ means ‘about’.

<sup>9</sup> Devine, (1999) 7.

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

30. Later attempts to unite England and Scotland by both the Stuarts and Oliver Cromwell foundered. Only in 1707 was a lasting union between them effected.
31. On 22 July 1706, commissioners appointed by the English and Scottish parliaments agreed on 25 articles comprising the *Treaty of Union*. On 16 January 1707, the Scottish Parliament approved the articles, along with certain amendments made in the course of debate, in the *Union with England Act 1707* (Scotland). On 28 January 1707, having been presented with the *Treaty of Union* and the *Scottish Act*, the English Parliament passed the *Union with Scotland Act 1706* (England). It approved the terms of the *Scottish Act* without amendment (the two Acts together being the *Acts of Union*).<sup>12</sup> The Kingdom of Great Britain was constituted on 1 May 1707.
32. The significance of the union is debated. There are two questions relevant to this advice: whether it created a new state and whether the *Treaty of Union*, considered with or without the *Acts of Union*, still constitutes a treaty in international law.

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

33. There are two possible answers to this question. It is a question not of the position of Scotland within domestic law – under which Scotland clearly retained a distinct constitutional status, in particular a separate legal system – but of how the union of 1707 should be treated as a matter of *international law*.
34. One view is that the union created a new state, Great Britain, into which the international identities of Scotland and England merged and which was distinct from both. Lord McNair writes: 'England and Scotland ceased to exist as international persons and become the unitary State of Great Britain.'<sup>13</sup> This view has been relied on in UK courts: *MacCormick v Lord Advocate*.<sup>14</sup>
35. An alternative view is that as a matter of international law England continued, albeit under a new name and regardless of the position in domestic law, and was simply enlarged to incorporate Scotland. In support of this view, among other things:
  - 35.1 Scottish members joined Parliament at Westminster, but there was no new election of its *English* members. This was in accordance with the *Acts of Union* Article XXII.
  - 35.2 Treaties concluded by England appear to have survived to bind Great Britain. Parry and Hopkins cite the *Treaty of Alliance with Portugal*<sup>15</sup> as the oldest 'British' treaty, and it is generally accepted as being such, even though it was concluded by

<sup>10</sup> Cited by Dicey AV and Rait R, *Thoughts on the Union between England and Scotland* (1920) 121.

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

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

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

<sup>14</sup> [1953] SC 396, 411.

<sup>15</sup> 16 June 1373, 1 BSP 462.

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

- 35.3 England's diplomatic representation in the rest of Europe continued uninterrupted. The *Acts of Union* Article XXIV appears to acknowledge this in retaining the Great Seal of England for transitional purposes.
36. We note that the incorporation of Wales under laws culminating in the *Laws in Wales Act 1536* (England) and of Ireland, previously a colony, under the *Union with Ireland Act 1801* (GB) and the *Act of Union 1800* (Ireland) did not affect state continuity. Despite its similarity to the union of 1707, Scottish and English writers unite in seeing the incorporation of Ireland not as the creation of a new state but as an accretion without any consequences in international law.
37. For the purpose of this advice, it is not necessary to decide between these two views of the union of 1707. Whether or not England was also extinguished by the union, Scotland certainly was extinguished as a matter of international law, by merger either into an enlarged and renamed England or into an entirely new state.
38. It is therefore misleading to speak of Scotland (or similarly of England, Wales, Northern Ireland or the isle of Great Britain) as if it were an entity already possessing international personality in its own right or some other relevant international status, regardless of what status it may have as a matter of UK domestic law.
39. It may also be misleading to speak of dissolving the 'union' effected by the incorporation of those territories: whatever the position historically or politically or in domestic law, in international law the position of the UK does not necessarily differ from that of a state formed in some way other than by a 'union'. (This point is pursued below in discussing whether Scotland could revert to the pre-1707 Scottish state.)

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

40. Despite its name, it is not obvious that the *Treaty of Union* did and does sound as a treaty in international law. Certainly there was a negotiation between England and Scotland, and it was subsequently referred to as a 'treaty' in both *Acts of Union*. But the Scottish Parliament, in enacting the *Scottish Act of Union*, then unilaterally amended its provisions. It is therefore unlikely that it constituted a treaty in itself.
41. Smith has argued that although the *Treaty of Union* itself is just a 'record of negotiations' between the commissioners that the Scottish Parliament later debated and amended, the subsequent 'complex of exchanged Acts of the two Parliaments' does constitute a treaty, albeit one concluded in an unorthodox way. On this view, the *Scottish Act of Union*, in providing that none of its articles would be binding until approved by Queen Anne with the English Parliament's authority, was in effect 'the offer of Treaty terms by the Scottish Queen in Parliament to the English Queen in Parliament', and the registration of Queen Anne's command of the English Exemplification under the Great Seal of England without objection in the books of the Scottish Parliament then brought the treaty into force.<sup>17</sup>
42. But there is no need to express a concluded view on whether the *Treaty* or *Acts of Union* ever constituted a treaty in the international law sense. Smith's view was that '[t]wo international persons disappeared in 1707 – the obligants under the treaty – and a new

<sup>16</sup> Parry C and Hopkins C, *An Index of British Treaties, 1101–1968* (1970) 18.

<sup>17</sup> Smith, 'The Union of 1707 as fundamental law' (1957) *Public Law* 99.

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

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

43. The same result follows from the alternative possibility, discussed above, that Great Britain was the continuator of England rather than a new state. The *Vienna Convention on the Law of Treaties* Article 2 (though anachronous here) defines 'treaty' as an agreement 'concluded between States'.<sup>20</sup> If one of the two parties to the treaty ceased to exist as a state in May 1707, it can no longer sound in international law. The situation is perhaps comparable to the *Treaty of Waitangi* between the UK and certain Māori chiefs, which on one view (by no means uncontested but still useful by way of analogy) was an international treaty under which an independent state ceded its sovereignty.<sup>21</sup> This view relies on the assumption that there could have been a treaty and yet the resulting constitutional system could still be identified with only one of the two parties, England, at the expense of the other – which is certainly possible.
44. Consistently with the view that the *Treaty* and *Acts of Union* no longer sound as a treaty, even if they ever were one, Parliament soon afterwards enacted legislation amending it: the *Union with Scotland (Amendment) Act 1707* (GB), which abolished the separate English and Scottish privy councils and created a new Privy Council of Great Britain. The *Acts of Union* Article IX had provided that the Queen 'may Continue a Privy Council in Scotland ... until the Parliament of Great Britain shall think fit to alter it'.
45. The UK Parliament has since amended or repealed multiple other provisions of the Acts of Union, such as those providing for Scottish representation in Parliament or concerning religion.
46. Indeed, in 1999 the UK Government suggested to the Committee for Privileges that the UK Parliament had 'complete sovereignty' to amend even those articles of the *Acts of Union* that 'are expressed to be entrenched for all time (such as the creation of the United Kingdom, the succession of the Monarchy, the Scottish Courts and the Church of Scotland)'.<sup>22</sup> The existence of such 'entrenched' provisions is a matter for domestic constitutional law and need not be dealt with here. The fact that at least some provisions are open to amendment by the UK Parliament is enough to reinforce the conclusion that neither the *Treaty* nor the *Acts of Union* currently operate as a treaty in international law.<sup>23</sup>

<sup>18</sup> Ibid 106.

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

<sup>20</sup> 22 May 1969, 1155 UNTS 331.

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

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

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

## (2) Possible outcomes of Scottish independence

47. The assumption that if Scotland becomes independent then it will be with the UK's agreement is not determinative of Scotland's or the rUK's status following independence. Negotiations between the UK and Scotland and the views of other states might well shape that status.
48. This is also true of matters of succession more generally. The multilateral peace treaties that constituted new states in 1815, 1919–23 and 1947 all dealt with succession problems. For example, the *Treaty of Saint-Germain-en-Laye*<sup>24</sup> provided for the responsibility of the successor states of Austria-Hungary for its public debts. Unilateral declarations can also be significant. Thus when Egypt and Syria formed the United Arab Republic, its Foreign Minister informed the UN Secretary-General that 'all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law'.<sup>25</sup> Although such a unilateral declaration could not bind other states, other states acquiesced in that position.<sup>26</sup> The continuation of UN membership, though certainly not determinative, is a useful indicator of whether other states accept a state's claim of continuity or require it to rejoin as a new state (as they did with the Federal Republic of Yugoslavia).
49. There are three possible outcomes of negotiated Scottish independence in international law: (a) one state that is the continuator of the UK and one new state; (b) two new states (neither of which is the continuator of the UK, which would be extinct); and (c) one state that is the continuator of the UK and one state which reverts to the status of the pre-1707 Scottish state. We will discuss each possibility in turn.<sup>27</sup>

### (a) One continuator state and one new state

50. Logically there are two possibilities: either Scotland or the rUK could be considered the continuator state of the UK and the other considered a new state. But the former possibility cannot be seriously entertained. It will be evident, without further elucidation, that none of the factors relevant to state continuity discussed below counts in favour of it. We will therefore focus on the possibility that the rUK – comprised of England, Wales and Northern Ireland – would be the continuator state of the UK and an independent Scotland a new state. This is the position of the UK Government and the position on which we have been particularly asked to advise.
51. Situations where one of the states existing after secession or negotiated independence is considered the continuator state are the most common in state practice. We will consider them chronologically and then draw some preliminary conclusions about the likelihood of the same outcome occurring if Scotland becomes independent.
52. In general, state practice shows that continuity depends on the criteria for statehood: a state is the same if it involves what may be regarded as the same independent territorial and governmental unit at the relevant times, despite changes in its population, territory or system of government.<sup>28</sup>

<sup>24</sup> 10 September 1919, 226 CTS 8, Art 203.

<sup>25</sup> International Law Commission *Ybk* 1958/II, 77.

<sup>26</sup> See *Brownlie's Principles* (8th edn, 2012) 424–5.

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

<sup>28</sup> See further Crawford (2nd edn, 2006) 667–72.

**(i) State practice**

53. The presumption of continuity despite even drastic territorial change is illustrated by imperial powers that have lost territory – including the UK itself, whose continuity is not questioned despite its loss of not one but two global empires. Likewise, Turkey was regarded as the continuator of the Ottoman Empire after 1918.<sup>29</sup> France's continuity was not questioned despite the loss of Algeria, which unlike other more definitively colonial territories had been assimilated into metropolitan France, at least according to French law. For the most part, however, colonial or quasi-colonial cases are of little relevance here, since Scotland (as opposed to Australia, Canada, India or other former British territories) is part of the metropolitan UK rather than a colony.
54. After the partition of British India in 1947, the Dominion of India was treated as the same entity and Pakistan as a new state, though there is some uncertainty about whether British India had already become an independent state before partition rather than a colonial territory still subordinate to the UK.
- 54.1 After partition, the Dominion of India retained most of British India's territory and population and continued its founding membership of the UN. But Pakistan (having initially claimed that its membership should also be automatic) applied for membership in its own right on 15 August 1947.<sup>30</sup>
- 54.2 The British Indian government, though constitutionally distinct from the UK, was subordinate to the UK Cabinet and Parliament, at least until the exchange of ambassadors that took place a few months before ostensible independence (and partition) in 1947, and its founding membership of the UN was an anomalous status.<sup>31</sup> Against this: in *Murarka v Buckrack Bros*, a US Circuit Court of Appeal held that the exchange of ambassadors had 'amounted at least to de facto recognition, if not more. To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away'.<sup>32</sup>
55. Singapore's separation from Malaysia in 1965 is a clearer case. Malaysia retained its international identity and UN membership and Singapore was admitted as a new state.<sup>33</sup> This occurred pursuant to a separation agreement that referred to Singapore as 'an independent and sovereign state and nation separate from and independent of Malaysia and so recognized by the Government of Malaysia'.<sup>34</sup> The separation agreement assumed the continuity of Malaysia.
56. After the separation of Bangladesh from Pakistan, the remaining territory, which comprised the former West Pakistan, was also considered the continuator state.
- 56.1 In March 1971, the Pakistani government suspended the National Assembly – in which an East Pakistani political party, the Awami League, had won an absolute majority – and instigated martial rule in East Pakistan. The following month the Awami League proclaimed the independence of Bangladesh on the territory

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<sup>29</sup> *Ottoman Debt Arbitration* (1925) 3 ILR 42; *Roselius & Co v Karsten & Turkish Republic* (1926) 3 ILR 35.

<sup>30</sup> (1947–48) UNYB 39–40. It was admitted on 30 September 1947: SC Res 29 (1947); GA Res 108 (1947).

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

<sup>32</sup> *Murarka v Buckrack Bros* (1953) 20 ILR 53.

<sup>33</sup> SC Res 213 (1965); GA Res 2010 (1965).

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

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

- 56.2 This was a definite case of secession – forcible and unilateral – rather than negotiated independence. That may have contributed to the acceptance of the rest of Pakistan as the continuator state: its institutions were substantially unchanged, and it retained the majority of the predecessor state’s territory. These factors may have been especially important in this case given that, unusually, Pakistan was the smaller unit by population, though only slightly: in 1975 its population was 68,483,000, whereas Bangladesh’s was 70,582,000.<sup>35</sup>
- 56.3 Pakistan’s UN membership continued, whereas Bangladesh was eventually admitted to the UN separately, on 17 September 1974.<sup>36</sup>
57. A particularly pertinent example of state practice is the dissolution of the USSR in 1990–91. Several of its former constituent republics, comprising a significant part – though not a majority – of Soviet territory, became newly independent states. The largest unit, the Russian Federation, was after initial uncertainty regarded as continuing the legal personality of the USSR. This example illustrates several considerations.<sup>37</sup>
- 57.1 In a political sense, it was uncontroversial that the USSR had come to an end: the *Minsk Protocol* between Russia, Belarus and Ukraine stated that ‘the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists’;<sup>38</sup> the *Alma Ata Protocol* between Russia and ten other former Soviet republics, that ‘with the establishment of the Commonwealth of Independent States, the [USSR] ceases to exist’.<sup>39</sup> Although some authors at the time regarded this as determinative,<sup>40</sup> hindsight has made clear that it is not: the political extinction of a state does not necessarily extend to the legal realm. Thus as Shaw notes, ‘it is clear from all the circumstances’ that the position expressed in these instruments amounted to ‘an essentially political statement not taken by either the parties themselves or by third states as constituting a proclamation of dissolution preventing claims by Russia of continuity’.<sup>41</sup>
- 57.2 On 24 December 1991, Russia wrote to the UN Secretary-General, illustrating the significance, in practice, of the position taken by a state itself on whether it constitutes the continuator state to an apparently dissolved union:

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

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

<sup>36</sup> SC Res 351 (1974); GA Res 3203 (1974).

<sup>37</sup> Crawford (2nd edn, 2006) 676–8.

<sup>38</sup> *Minsk Protocol*, 13 December 1991, 31 ILM 143, 3.

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

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

<sup>41</sup> Shaw, ‘State succession revisited’ (1994) 5 *Finnish YBIL* 34, 49–50.

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

- 57.3 The newly independent former Soviet republics all accepted this position, and no other state objected to it. The UK's position, for example, was that 'it was not necessary to reaccredit [the UK ambassador to the USSR], he just became the continuous representative to the continuum State, namely, Russia'.<sup>43</sup>
- 57.4 The European Communities (EC) declared that 'the international rights and obligations of the former USSR, including those under the United Nations Charter, will continue to be exercised by Russia' and 'welcome[d] the Russian Government's acceptance of these commitments and responsibilities'.<sup>44</sup> This is arguably consistent with two possibilities: that Russia was the continuator state of the USSR or that it was a new state that nonetheless succeeded to all the extinct USSR's rights and obligations. But in general it is accepted that Russia was indeed the continuator state. The acquiescence of other states in its claim to that effect was rapid and unquestioning.
- 57.5 The result was that Russia continued the USSR's membership of the UN, including its permanent membership of the Security Council.
- 57.6 The other former Soviet republics joined the UN separately in 1991 or 1992, except Belarus and Ukraine. Anomalously, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic (like British India) had already become original members in 1945, despite being constituent republics of the USSR. After independence they simply notified the UN of changes of name. But any ostensible continuity of those states with former entities has not been consistently observed: since 1991 they have both acceded to treaties to which they were apparently already parties. For instance, the *New York Convention* included them as parties in 1958.<sup>45</sup>
58. A case of unilateral secession that was later accepted by the predecessor state is Eritrea. In 1962, Ethiopia had abolished a federal arrangement with the former Italian colony of Eritrea, entered into under UN auspices in 1962. Following a military campaign for independence sustained for many years, the Eritrean People's Liberation Front assisted in overthrowing the military regime in Addis Ababa. The subsequent Transitional Government of Ethiopia accepted Eritrea's right of self-determination. In a plebiscite in 1993, 99.8% voted in favour of Eritrean independence. The new state of Eritrea was admitted to the UN that same year with the support of the Transitional Government of Ethiopia.<sup>46</sup> Ethiopia continued its UN membership.<sup>47</sup>
59. Another recent case is the dissolution of the State Union of Serbia and Montenegro (Serbia-Montenegro) in 2006. It was governed by a *Constitutional Charter* adopted in 2002. Article 2 stated that it was 'based on the equality of the two member states'. Article 60 dealt expressly with 'Breaking Away from the State Union'. It set out certain requirements for breaking away, including a referendum, and then stated:

<sup>42</sup> UN Doc 1991/RUSSIA, Appendix, 24 December 1991, 31 ILM 138.

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

<sup>44</sup> Declaration of the European Communities, 23 December 1991, *EC Bull* 12, 121 (1991).

<sup>45</sup> *New York Convention*, 10 June 1958, 330 UNTS 3.

<sup>46</sup> SC Res 828 (1993); GA Res 47/230 (1993).

<sup>47</sup> See Crawford (2nd edn, 2006) 402–3.

Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244 [on the international presence in Kosovo], would concern and apply in their entirety to Serbia as the successor.

A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state.

Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia.<sup>48</sup>

60. The term 'successor state' may be misleading. Its juxtaposition with 'newly independent state' and the statement that the state breaking away from Serbia-Montenegro 'shall not inherit the right to international personality' suggest that the 'successor state' was expected to continue the legal personality of Serbia-Montenegro. That is to say: the intention of the *Constitutional Charter* appears to have been that the unit not breaking away from Serbia-Montenegro would be the continuator state.
61. Whether, had Serbia invoked the procedure, the much smaller Montenegro would have been the continuator state might be doubted. But in the event it was Montenegro that invoked the referendum procedure and broke away. The position adopted by all states involved was that Serbia was the continuator state. On 5 June 2006, two days after Montenegro declared independence, the Serbian Assembly adopted a declaration 'On Obligations of public authorities of the Republic of Serbia as State which continues the State and legal identity of the State Union of Serbia and Montenegro'.<sup>49</sup> Its membership of the UN continued, and Montenegro was admitted in its own right.<sup>50</sup>
62. The most recent instance of state continuity despite secession is Sudan following South Sudan's independence. As in the case of Eritrea, after years of war a referendum was held in 2011 that resulted in independence. The new state was then admitted separately to the UN while Sudan continued its membership.<sup>51</sup> Like Eritrea, the new state comprised a minority of the predecessor state's territory and population.
63. Cases such as Korea – superficially comparable in that on one view the Democratic People's Republic of Korea (North Korea) is a separate state formed by secession from the Republic of Korea (South Korea) – are complicated by competing claims over the same territory and so have little relevance here as state practice.<sup>52</sup>
64. Other recent state practice in which it is harder to discern a continuator state, such as the dissolution of Czechoslovakia, is discussed below.

<sup>48</sup> *Constitutional Charter of the State Union of Serbia and Montenegro*. An English version is available on the website of the Serbian Ministry of Foreign Affairs: [www.mfa.gov.rs/Facts/const\\_scg.pdf](http://www.mfa.gov.rs/Facts/const_scg.pdf).

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

<sup>50</sup> SC Res 1691 (2006); GA Res 60/264 (2006).

<sup>51</sup> SC Res 1999 (2011); GA Res 65/308 (2011).

<sup>52</sup> See Crawford (2nd edn, 2006) 466–72.

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

65. There is one further example of state practice of direct relevance to the UK: the separation of 26 Irish counties in 1922 to form the Irish Free State, which was treated just as a change in territory rather than a break in the UK's continuity. There is no indication in the *Articles of Agreement for a Treaty between Great Britain and Ireland* of 6 December 1921<sup>53</sup> that either party questioned the UK's continuity; on the contrary, it appears to have been premised on the personality of the UK continuing uninterrupted.
66. In that case the state eventually changed its name – from the United Kingdom of Great Britain and Ireland to the United Kingdom of Great Britain and Northern Ireland – though not until five years later, under the *Royal and Parliamentary Titles Act 1927* (UK).<sup>54</sup>
67. There are countless other examples to suggest that no weight can be put on such changes of name.<sup>55</sup> Of the above cases, Russia and Serbia were treated as continuator states despite their different names, each having been the largest unit in a federal arrangement. The example of 1922 suggests that no consequences for state continuity would likewise follow from Scottish independence whether or not the rUK chose to retain the words 'Great Britain and Northern Ireland' in its name rather than changing them to, say, 'England, Wales and Northern Ireland'.
68. The state practice just recounted also indicates that Scotland's independence would have the same outcome for the UK as the Irish Free State's did in 1922. We can draw several conclusions from it about which factors influence state continuity:
- 68.1 In almost all the above cases, the continuator state was the unit retaining the majority of the predecessor state's population and territory. This is true of the Dominion of India, Malaysia, Russia, Ethiopia, Serbia and Sudan. The exception is the former West Pakistan, whose territory was larger but whose population was smaller than that of Bangladesh at the date of secession. But the difference in population size was relatively minor, and the central government was based in and dominated by West Pakistan.
- 68.2 In all the above cases, the continuator state retained substantially the same governmental institutions as the predecessor state. Arguably, Russia and Serbia are again partial exceptions in that the constitutions of the USSR and Serbia-Montenegro did not continue. But it is not suggested that *all* the institutions of government must continue – on the contrary, even the revolutionary overthrow of a governmental system does not affect state continuity.<sup>56</sup> The continuity of governmental institutions is merely one indicator. But it gives rise to a particularly strong presumption of state continuity. Indeed, it probably explains the continuity the Federal Republic of Germany (FRG) after German unification 1990: the FRG and the German Democratic Republic (GDR) did not merge into a single new state but instead the *Länder* that previously constituted the GDR (plus Berlin) became part of the FRG under its existing constitution.<sup>57</sup> The same view is usually taken of

<sup>53</sup> Available at: [multitext.ucc.ie/d/Articles\\_of\\_Agreement\\_as\\_signed\\_6\\_December\\_1921](http://multitext.ucc.ie/d/Articles_of_Agreement_as_signed_6_December_1921).

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

<sup>55</sup> See Crawford (2nd edn, 2006) 680 n 54.

<sup>56</sup> See *ibid* 678–80.

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

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

- 68.3 In cases of peacefully negotiated independence (Singapore's from Malaysia and Montenegro's from Serbia-Montenegro), the parties negotiated terms of state succession that expressly or impliedly identified a continuator state.
- 68.4 In the other cases, the positions of Pakistan, Russia, Ethiopia and Sudan in continuing the identity of their predecessor states were not questioned by the seceding states, by other states or by organs of the UN. Even in the case of the Dominion of India, although Pakistan initially claimed that it could automatically continue British India's UN membership, it did not pursue that claim and applied for membership in its own right.
- 68.5 In all the above cases, the continuator state was able to continue the UN membership of the predecessor state, whereas the new state submitted a new application for UN membership.
69. All of these factors count in favour of the rUK being the continuator state of the UK: if Scotland became independent, the rUK would retain about 92% of the UK's population, more than two-thirds of its territory, and its principal governmental institutions, since the UK Parliament, the UK Supreme Court and its government departments are located in London. The precedent of the separation of most of Ireland also indicates that the UK would survive another, comparable loss of territory, regardless of whether it changed its name (or flag) to acknowledge the loss of Scotland.
70. In our view, it can be expected that the weight of international opinion would favour recognising the rUK as the continuator. The Foreign and Commonwealth Office has already written in its memorandum to the Foreign Affairs Committee that the 'overwhelming weight of international precedent suggests that [the rUK] would continue to exercise the existing UK's international rights and obligations, and that an independent Scotland would be a new state' and that the UK Government 'judges that this situation would be recognized by the international community'.<sup>59</sup> We agree with that judgement.

#### (b) Two new states

71. Nonetheless, the alternatives should be briefly considered. In one scenario, the predecessor state would become extinct and two entirely new states would be created. Neither Scotland nor the rUK would be the continuator state of the UK; the law of state succession, subject to negotiations, would determine which of the former UK's rights and obligations each of the two new states succeeded to.
72. It is not always clear whether situations fall into this category. There was no consensus in judicial or treaty practice, for example, on the status of the two former constituent parts of the Dual Monarchy of Austria and Hungary (Austria-Hungary) when they separated after the First World War. The *Treaty of Saint-Germain-en-Laye* with Austria and the *Treaty of Trianon* with Hungary<sup>60</sup> assumed the continuity of Austria and Hungary with the respective

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

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

<sup>60</sup> 4 June 1920, 6 LNTS 188.

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

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

**(i) State practice: Czechoslovakia**

74. The Czech and Slovak Federal Republic (Czechoslovakia) ceased to exist at midnight on 31 December 1992 on the basis not of a plebiscite or referendum but solely of legislation. The Czechoslovak Foreign Ministry had announced that ‘the Czech and Slovak Federal Republic as well as [Czechoslovak] membership of the United Nations will cease to exist on December 31, 1992’.<sup>62</sup> Two new states were created on its former territory, the Czech Republic and Slovakia, both of which promptly applied for membership of international organisations and were admitted to the UN in January 1993.<sup>63</sup>
75. A substantial body of treaty obligations survived Czechoslovakia’s extinction. The prime ministers of both new states wrote to the UK Prime Minister that they regarded ‘Treaties and Agreements in force to which the United Kingdom and [Czechoslovakia] were parties as remaining in force’ between the UK and their respective states.<sup>64</sup>
76. Notable about this situation is that the extinction of Czechoslovakia was effected by the consent of both new states; neither claimed to continue its identity. Nor does any other state appear to have doubted its extinction. This illustrates again the importance of any claims of state continuity and their acceptance by other states.
77. This is especially so when we consider that there might have been a different result in the absence of agreement. The Czech Republic retained 66% of Czechoslovakia’s population, 62% of its territory and 71% of its economic resources.<sup>65</sup> Malenovsky suggests that it was only the agreement between the two former constituent republics that established the dissolution of Czechoslovakia and that the situation might have been characterised as a secession by Slovakia,<sup>66</sup> which would have been consistent with the factors indicating state continuity discussed above.
78. So Czechoslovakia should not be taken as detracting from the general presumption in favour of state continuity despite changes in territory. The outcome of its dissolution depended on agreement. This serves to reinforce the importance of negotiations in predetermining the consequences of independence.

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

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

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

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

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

<sup>64</sup> (1994) *BYIL* 587.

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

<sup>66</sup> Malenovsky J, ‘Problèmes juridiques liés à la partition de la Tchécoslovaquie’ (1993) 39 *AFDI* 305, 317–18.

- 3 March 1992.<sup>67</sup> The two remaining republics, Serbia and Montenegro, adopted a new constitution under the name Federal Republic of Yugoslavia (FRY) and declared on 27 April 1992 that the FRY ‘continu[ed] the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia’.<sup>68</sup>
80. Whether the FRY was indeed the continuator state of the SFRY remained controversial until 2000.<sup>69</sup>
  81. The FRY relied on several factors to support its position:
    - 81.1 Serbia and Montenegro had constituted the largest part of the SFRY’s population and territory (though not a majority) and its historical and geographical core.
    - 81.2 The independence of the four other republics did not take place simultaneously but through a series of separations from the predecessor state, leaving Serbia and Montenegro as its only remaining constituent parts.
    - 81.3 The FRY controlled all but one of the former SFRY’s missions abroad.
    - 81.4 The former SFRY’s UN membership (which the FRY claimed to continue) was not regarded as having been terminated, the SFRY’s flag continued to fly outside UN offices, and the FRY continued to pay financial contributions to the UN, though it was excluded from participation in the UN’s principal organs.
  82. On the other hand, the FRY did not conclude any separation agreements with the other former Yugoslav republics, and other states took exception to its claim. The UK stated that it was ‘one of the successor states of the [SFRY]’.<sup>70</sup> The federal government organs that represented the SFRY had also ceased to function.<sup>71</sup>
  83. UN organs took slightly different positions. The Security Council considered ‘that the state formerly known as the [SFRY had] ceased to exist’ and that ‘the claim by the [FRY] to continue automatically the membership of the former [SFRY] in the United Nations has not been generally accepted’.<sup>72</sup> The General Assembly declined to state this in such plain terms but nonetheless did not allow the FRY to automatically take over the SFRY’s seat. The Secretariat took a nuanced position: that ‘the only practical consequence’ of the General Assembly’s resolution that the FRY should apply for UN membership was that it could not ‘participate in the work of the General Assembly’.<sup>73</sup>
  84. The Arbitration Commission on the Former Yugoslavia stated on 29 November 1991 that ‘the [SFRY] is in the process of dissolution’<sup>74</sup> and on 4 July 1992 that it ‘no longer exists’.<sup>75</sup>

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

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

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

<sup>70</sup> FCO telegram, 11 April 1996, reprinted at (1996) 67 *BYIL* 719.

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

<sup>72</sup> SC Res 757 (1992).

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

<sup>74</sup> *Opinion 1*, 29 November 1991, 92 ILR 162, 162–3.

<sup>75</sup> *Opinion 8*, 4 July 1992, 92 ILR 199, 202. See also *Opinion 9*, 4 July 1992, 92 ILR 203; *Opinion 10*, 4 July 1992, 92 ILR 206.

85. The International Court, after initially referring to the FRY's status within the UN as '*sui generis*' and declining to state outright whether it was the continuator state of the SFRY, held in 2000 that that '*sui generis* position could not have amounted to its membership',<sup>76</sup> implying that – at least viewed in hindsight – the FRY did not succeed to the SFRY's membership of the UN. The result was that between 1992 and 2000 the FRY's status in the UN remained unclear and could shed little light on its claim to continuity, except insofar as it illustrated other states' resistance to that claim.
86. What clarified the situation was partly the positions of other states and international institutions and partly the FRY's own eventual acquiescence. In November 2000 it was admitted to UN membership. An *Agreement on Succession Issues* which it entered into on 29 June 2001 posited, consistently with its abandonment of its claim to continuity, 'the sovereign equality of the five successor States to the former [SFRY]'.<sup>77</sup>
87. In other words: in a case as unclear as the break-up of the SFRY, the distinction between the dissolution of the predecessor state and a series of secessions that leaves its core intact may be in the eye of the beholder. Ultimately, since a position must be taken one way or the other, the perception of other parties may be crucial.
88. The contrast with the break-up of the USSR is stark. In both cases it was the constituent units of a federation that declared independence, leaving the remaining constituent unit or units intact and in partial control of former federal government organs. But Russia, unlike the FRY, accounted for the great majority of the predecessor state's territory and population, and the other former Soviet republics and other states and international organisations acquiesced in its claim of continuity.
89. One factor that influenced perceptions in this case was that the FRY was engaged in a war with the other successor states. To have recognised it as the continuator of the state from which the other belligerent parties had declared independence might have allowed it to characterise the conflict as a *civil* war. That might have given it a moral and legal advantage in pursuing what others might instead have seen as an *irredentist* war, fought in the guise of the former federal state both through its ostensibly national army and through surrogates such as the Serbs of Bosnia-Herzegovina.
90. These considerations are irrelevant to situations of negotiated independence such as that envisaged for Scotland to which, we firmly expect, other states would not object.
91. It cannot be concluded from the dissolution of the SFRY, given the complex and lengthy series of events that occurred before the position became clear, that it represents some general category of cases in which a predecessor state will dissolve entirely and leave no continuator state.
92. In fact it illustrates this even more forcefully than Czechoslovakia: in that case the parties agreed that the predecessor state would dissolve, whereas here even a claim of continuity as strong in some respects as the FRY's was not sustainable in the face of opposition both by other successor states and by other states and international organisations.

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

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

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<sup>76</sup> *Legality of the Use of Force (Serbia and Montenegro v Belgium)*, ICJ Rep 2004 279, 310.

<sup>77</sup> (2002) 41 ILM 3.

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

**(c) Reversion to the Scottish state existing before 1707**

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

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

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

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

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

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

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

<sup>78</sup> Scott P, *Scotland in Europe: Dialogue with a Sceptical Friend* (1992) 41–2.

<sup>79</sup> See Crawford (2nd edn, 2006) 695–9.

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

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

### (i) State practice

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

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

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

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

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

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

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

<sup>80</sup> See *ibid* 691–2.

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

<sup>82</sup> See Crawford (2nd edn, 2006) 489.

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

<sup>84</sup> Declaration at the Brussels EC Extraordinary Ministerial Meeting, 27 August 1991, (1991) 62 *BYIL* 558.

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

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

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

103. But even if this is indeed what happened, the consequences of the reappearance of the Baltic states were few. All or almost all the manifestations of the pre-1940 Baltic states disappeared after their effective submergence into the USSR. A few diplomatic and consular remnants continued to be treated as having some official status, though their governments did not continue in exile.<sup>87</sup> Lehto posits that the 'doctrine of *desuetude*' led to the termination of most or all of their pre-1940 treaties.<sup>88</sup> The result was that whether the post-1991 Baltic states continued the identity of the pre-1940 Baltic states had almost no practical effect. For example, the UN not having existed in 1940, they joined it as new members on 17 September 1991.<sup>89</sup>
104. Finally, there is a category of assertions of state continuity made in the 20th century despite even longer intermissions. These have an even more fictional air.
105. The constitutions adopted by Croatia and Macedonia after their independence asserted continuity with entities long predating the SFRY.<sup>90</sup> The FRY accepted these assertions and, in exchange, Croatia and Macedonia stated that the FRY was related to the Serbian state recognised by the Congress of Berlin (which reorganised the Balkans after the Russo-Turkish War). The Croatian–FRY exchange, for example, stated:

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

<sup>85</sup> Statement of Parliamentary Under-Secretary of State, FCO, 581 *HL Deb* col 1187, 21 July 1997.

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

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

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

<sup>89</sup> SC Res 709, 710 and 711 (1991); GA Res 46/4, 46/5 and 46/6 (1991).

<sup>90</sup> See Crawford (2nd edn, 2006) 690.

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

106. Sahović notes that these exchanges were crafted so as to produce few legal consequences. In particular, they segregated issues of state succession from the statements about 'continuity'.<sup>92</sup> This suggests that the continuity they purported to recognise was a matter of national or historical identity rather than international law.
107. Poland effectively ceased to exist from its partition in 1795 until 1918. Thereafter Polish courts made claims of identity, but they were not recognised by other states.<sup>93</sup>
108. On the identity of the Kingdom of Bohemia and Moravia with Czechoslovakia, despite a gap from 1620 to 1918, Malenovsky writes: '*l'affirmation de sa continuité au bout de trois siècles de rupture ne dépassait pas les limites d'une fiction juridique*'.<sup>94</sup>

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

109. Once we leave aside plainly inapplicable categories of reversion, there is little or nothing to suggest that Scotland could identify itself with the pre-1707 Scottish state in a manner which would have any specific legal consequence for the issue on which we are asked to advise.
110. Even if the case of the UAR is treated as a genuine example of reversion, it differs from that of the UK in that the union was rather nominal and existed for less than four years. It seems unlikely that the principle could encompass situations of voluntary incorporation into a metropolitan state for a much longer period.
111. Cases of annexation that other states have treated as being illegal are even less apposite to Scotland. The Baltic states may seem atypical in that they apparently reappeared after a period – forty years – that lasted much longer than, say, Iraq's more fleeting occupation of Kuwait. But if that is indeed what happened, the principle nonetheless rests on the preservation of their identity throughout a period of illegal annexation. It is not applicable to a voluntary union. Given the few legal consequences that followed from the Baltic states' claims, they might also be seen as having been primarily political rather than legal assertions.
112. The pre-1707 Scottish state is comparable to the Kingdom of Bohemia and Moravia in that a claim of continuity would have to overcome a gap of more than three centuries. Claims of continuity over such longer periods that do not depend on an annexation being illegal under the international law of the day have an even more plainly non-legal character. In the case of the exchanges of recognition between Croatia, Macedonia and the FRY, these states even took steps to segregate them from any legal consequences for state succession.

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

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

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

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

113. More practically, it seems that Scotland would have little to gain from asserting a *legal* claim of continuity with the pre-1707 Scottish state, as distinct from claiming it as a matter of national or historical identity. Scott suggests that after reverting, Scotland and England 'would both inherit the other treaty rights and obligations of the United Kingdom and that includes membership of the European Community'.<sup>95</sup> But that does not follow as a matter of law. Like the pre-1940 Baltic states, the pre-1707 Scottish state was not a member of the EU – or of the UN. Whether Scotland would succeed to the UK's membership of the EU is a separate question from whether it can revert to a former state: see Part V below.
114. Any assertion of reversion by Scotland (even if generally accepted) would have no consequences for the rUK's status. For the reasons discussed above, the UK may already be the continuator of the pre-1707 English state, and its territory has since also expanded to include Northern Ireland. But in any event, the state practice discussed above does not condition the claim to continuity of the 'rump state' upon the reversion to sovereignty of the separating entity. These are quite separate questions, as shown by the case of Russia and the Baltic states.
115. We conclude that Scottish reversion would not be legally relevant to the questions we are asked to advise on, and in particular that it would be inconsequential for the rUK.

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<sup>95</sup> Scott (1992) 41–2.

## Part V:

# Scotland and the remainder of the UK in international organisations

116. This Part will begin by considering the position of Scotland and the rUK in international organisations generally. It will then consider the special cases of the *European Convention on Human Rights* and the European Union.
117. These are matters of state succession and are conceptually separate from and subsequent to the determination of the status of the rUK and Scotland as continuator or new states.
118. The discussion below is premised on the conclusion drawn in Part IV: that the rUK would be the continuator state of the UK and Scotland would be a new state.

### (1) International organisations generally

119. Insofar as any claim by the SNP or Scottish Government that Scotland would remain a member of international organisations is based on the *Vienna Convention on Succession of States in Respect of Treaties* of 1978, it can be dismissed as, at best, inconclusive.
120. Articles 34 and 35 of the 1978 Convention provide as follows:

*Article 34*  
*Succession of States in cases of separation*  
*of parts of a State*

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

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

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

- (a) the States concerned otherwise agree;
- (b) it is established that the treaty related only to the territory which has separated from the predecessor State; or
- (c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

121. The exceptions in Article 34(2)(b) and Article 35(c) might well apply to a treaty constituting an international organisation. Automatic accession might, for example, be incompatible with the objects and purposes set out in the *Treaty on European Union (TEU)*<sup>96</sup> Articles 2 and 3 and elsewhere. Automatic accession might also 'radically change' the conditions for the operation of the EU treaties insofar as those conditions include the existence of particular Member States or the relative size of their territory or population.
122. But it is not necessary to consider whether those exceptions cover Scotland's or the rUK's membership of that or any other international organisation, because the *Vienna Convention on Succession of States in Respect of Treaties* Article 4 expressly states:

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

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

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

123. This makes it clear that the effect of state succession on membership of an international organisation depends on the relevant rules of that organisation.
124. It is doubtful whether the *Vienna Convention on Succession of States in Respect of Treaties* would be relevant to Scotland and the rUK in any event, since the UK is not a party. Few EU members are: only Cyprus, the Czech Republic, Estonia, Poland, Slovakia and Slovenia (plus acceding EU member Croatia).<sup>97</sup> Shaw comments that whether Article 34 'constitutes a rule of customary law is ... unclear, but in the vast majority of situations

<sup>96</sup> Original version: 7 February 1992, (1992) 31 ILM 253. Consolidated version: (2010) OJ C83/01.

<sup>97</sup> See [treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-2&chapter=23&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en).

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

125. In contrast, Article 4 accords with the prevailing view that principles of state succession to treaties have no application to membership of international organisations. Instead it depends on the particular constitution or rules of the organisation.<sup>101</sup>
126. This is illustrated by the state practice recounted in Part IV on the UN. The *UN Charter* makes no provision for succession to membership. Article 4(2) simply states:
1. Membership of the United Nations is open to all other peace-loving states [‘other’ meaning other than original members] which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
  2. The admission of any such state to membership of the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.
127. In other words: it falls to the Security Council and General Assembly to apply the conditions for membership in Article 4(1). In practice political considerations often intrude into admission decisions.<sup>102</sup> But in 1947, following the debate about whether Pakistan could succeed to British India's membership, the Sixth Committee of the General Assembly adopted the following principles as embodying its views on the legal rules ‘to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject’:
1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
  2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or no they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
  3. Beyond that, each case must be judged according to its merits.<sup>103</sup>
128. Thus if a state is a continuator state then its UN membership will continue, whereas a new state must be formally admitted to membership.

<sup>98</sup> Shaw M, *International Law* (6th edn, 2008) 980–1.

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

<sup>100</sup> See Crawford (2nd edn, 2006) 678 n 45; Shaw (6th edn, 2008) 976–7.

<sup>101</sup> See *Brownlie's Principles* (8th edn, 2012) 442–3.

<sup>102</sup> See Crawford (2nd edn, 2006) 179–90.

<sup>103</sup> (1947–48) *UNYB* 39–40.

129. Practice has been mostly consistent in requiring new states to join the UN in their own right, at least once a consensus has emerged on disputed questions of continuity: Pakistan (in 1947); Singapore; Bangladesh; the former Soviet republics other than Russia (and Belarus and Ukraine, which were, anomalously, already members in their own right); Eritrea; the Czech Republic and Slovakia; the former constituent parts of the SFRY (including eventually the FRY: in 2000); Montenegro; and South Sudan. Conversely, the continuator states in those cases did not have to rejoin.
130. The only apparent exception – Syria after leaving the UAR – has already been noted as a special case with little weight as state practice. If that exception sheds any further light on the likelihood that Scotland or the rUK would be required to join the UN, it is on the significance of acquiescence by other states to a state's continuing membership.
131. That acquiescence is particularly relevant to the UK insofar as a precedent was set when Russia continued to occupy the USSR's permanent seat on the Security Council, even though *UN Charter* Article 23 allocates it to 'the Union of Soviet Socialist Republics'. In our view, if other states accepted the rUK as the continuator state they would accept its retention of the UK's permanent seat.
132. So there may be no general rule in international law governing succession to membership of international organisations. But at least in the case of the UN, Scotland would be required to join as a new state whereas the rUK would retain the UK's membership – including its permanent seat on the Security Council.
133. Although it would depend on the relevant organisation's rules, *prima facie* Scotland would also be required to join other international organisations as a new state.

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

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

<sup>104</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, ETS 5 (as amended).

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

<sup>106</sup> Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994).

135. The relevant provisions of the *Statute of the Council of Europe* state:<sup>107</sup>

*Article 2*

The members of the Council of Europe are the Parties to this Statute.

*Article 3*

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

*Article 4*

Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.

*Article 16*

The Committee of Ministers shall, subject to the provisions of Articles 24, 28, 30, 32, 33 and 35, relating to the powers of the Consultative Assembly, decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. For this purpose the Committee of Ministers shall adopt such financial and administrative arrangements as may be necessary.

136. There is an express provision for withdrawal (Article 7) but none for state succession. There are, however, two precedents: the dissolution of Czechoslovakia (alluded to below) and, more recently and more relevantly, the independence of Montenegro.
137. Serbia-Montenegro was a member of the Council of Europe and a state party to the *ECHR*. On 16 June 2006, the Committee of Ministers of the Council of Europe, referring to a letter from Serbia stating that it would continue its membership in accordance with the *Constitutional Charter* of Serbia-Montenegro (quoted at paragraph 59 above), 'noted that the Republic of Serbia is continuing the membership of Serbia and Montenegro in the Council of Europe with effect from 3 June 2006'.<sup>108</sup> In contrast, Montenegro submitted a request for accession to the Council of Europe, the request was accepted, and on 11 May 2007, it ratified the *Statute of the Council of Europe*.<sup>109</sup> That is to say: Serbia's membership continued and Montenegro joined the Council of Europe as a new state in accordance with *Statute of the Council of Europe* Article 4.
138. As for Montenegro's position under the *ECHR*, the Committee of Ministers decided:<sup>110</sup>
- having regard to their decision to invite the Republic of Montenegro to become a member of the Council of Europe and to the declaration by that state of its intention to succeed to those conventions to which the State Union of Serbia and Montenegro had been a Party or Signatory and to consider itself bound, as from 6 June 2006, to the European Convention for the Protection of Human Rights and Fundamental

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<sup>107</sup> *Statute of the Council of Europe*, 5 May 1949, ETS 1.

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

<sup>109</sup> See [conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG).

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

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

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

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

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

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

- (i) the only reasonable interpretation of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro ... , the wording of Article 44 of the Montenegrin Right to a Trial within a Reasonable Time Act ... and indeed the Montenegrin Government’s own observations, would all suggest that Montenegro should be considered bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro;
- (ii) the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention;
- (iii) although the circumstances of the creation of the Czech and Slovak Republics as separate States were clearly not identical to the present case, the Court’s response to this situation is relevant: namely, notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court’s practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993 ... .

<sup>111</sup> App 11890/05, 28 April 2009, ECtHR.

<sup>112</sup> *Ibid* §§ 67–9.

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

140. The consequences of Scottish independence are likely to be the same: the rUK will simply continue the UK's membership of the Council of Europe and continue to be a state party to the *ECHR*. Scotland will probably have to accede to the Council of Europe as a new member, but the application of the *ECHR* to Scotland will continue uninterrupted. As the reference to the earlier precedent of Czechoslovakia indicates, even if both the rUK and Scotland were considered new states, the *ECHR* would similarly still continue to apply uninterrupted.
141. Given that the Committee of Ministers and the Court both had regard to Montenegro's own legislation and declarations, it is possible that the result might be different if Scotland were to express a contrary intention. Even then, the Court's comment that fundamental rights 'belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession' suggests that if that situation arose the Court might well still resist the conclusion that the *ECHR* would cease to apply.

### (3) The European Union

142. In principle the comments made above about the *Vienna Convention on Succession of States in Respect of Treaties* and admission to international organisations apply equally to the EU: Scotland would not automatically join on independence unless the EU's rules had that result. It is true that the EU is a 'new legal order of international law'<sup>113</sup> and that internally the relations of the Member States and their peoples in matters covered by the European treaties are governed by European law, as determined ultimately by the ECJ, and not by general international law. Nonetheless, such treatment derives from treaties which are concluded by Member States on a basis of unanimity, in the same manner as other treaties. The question of whether a state is a member of the EU has hitherto been treated as a matter of international law,<sup>114</sup> just as the question of the territorial extent of a state has been.<sup>115</sup>
143. There is no clear precedent for a metropolitan part of an EU Member State becoming independent and then either claiming automatic membership or seeking in its own right to join the EU (or its predecessor organisations: we will refer to all its incarnations taken together as the 'EU'). Nor has a state ever withdrawn from the EU. Only the idiosyncratic cases of Algeria and Greenland can provide even approximate guidance.
144. In practice, to an even greater extent than questions of state continuity or membership of the UN, the consequences of Scottish independence within the EU will depend on the attitude of other EU Member States and organs, and on negotiations. This means that the following discussion must necessarily be somewhat speculative.

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

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

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

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

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

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

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

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

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

*Article 50*

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

<sup>116</sup> *EEC–Algeria Cooperation Agreement*, 26 April 1976, (1978) OJ L263/2.

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

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

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

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

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.
148. Although this anticipates that the EU treaties might cease to apply to a state even without a withdrawal agreement, it still requires notification to the European Council and the passage of two years. The word 'shall' implies that this is mandatory.
  149. For the UK to continue as a state after Scottish independence yet somehow to withdraw automatically from the EU would seemingly conflict with this provision, which is the only express one in the EU treaties on withdrawal from membership. This adds to the likelihood that the rUK would continue to be a member of the EU.
  150. It does not follow that the rUK's position in the EU would be unaffected by Scottish independence. The consequent reduction in its territory and population could affect any of the UK's terms of membership that depend on those factors. Some might be matters for negotiation, though presumably the UK would have little scope to resist proportionate reductions.
  151. The unification of Germany in 1990 should also be mentioned. At the time Member States agreed to avoid specifically amending the EC treaties to reflect the enlargement of the FRG's territory and population. For the FRG, this expedited enlargement; for the other Member States, it implied the FRG's acceptance of the existing apportionment of voting weight and other matters.<sup>119</sup> Since the question was effectively avoided, it is of little use as a precedent.

## **(b) Scotland's position in the EU**

152. Scotland's position within the EU will depend on the EU's own legal order. But there are no legal rules within the EU that specifically govern whether it can automatically succeed to membership (as distinct from the non-legal considerations that might govern any negotiated outcome – which might be more important in practice).
153. On the face of the EU treaties and other indications, it seems likely that Scotland would be required to join the EU as a new Member State. We will discuss its position from this perspective first. We will then go on to note the possible complications that may arise if the ECJ were to attach some independent significance to EU citizenship in the form of individual rights.

### **(i) The position under the EU treaties**

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

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

<sup>119</sup> See Jacqu  J-P, 'German unification and the European Community' (1991) 2 *EJIL* 1.

shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

155. In other words: a state must apply for membership, the relevant organs of the EU must consider it in accordance with certain procedural requirements, and the existing EU Member States and the applicant state must unanimously ratify a treaty on its admission.
156. Whether the accession process could be varied in Scotland's case, given that it is already subject to EU law as part of the UK, might be a subject for negotiations. But the ultimate result of Scotland's accession would probably be the same: a treaty making any amendments to the EU treaties required by an increase in membership.
157. The *Treaty Concerning the Accession of Croatia to the European Union* is indicative of the amendments that must still be made to the EU treaties on the accession of a new state now the EU treaties have been amended by the *Treaty of Lisbon*. Most fundamentally, on ratification by the existing Member States it will insert Croatia into *TEU* Article 52,<sup>120</sup> which states, referring to both that treaty and the *Treaty on the Functioning of the European Union (TFEU)*:<sup>121</sup> 'The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic [and so on, listing the current member states by their official names].' Other amendments made for Croatia's accession include adjustments to the number of ECJ judges and to the capital and board of directors of the European Investment Bank.
158. Similar amendments would be required for Scotland to become an EU Member State.
159. In contrast, beyond the list of Member States in *TEU* Article 52 and the special status of certain overseas countries and territories under *TFEU* Article 355, the EU treaties do not define the territory of EU Member States. In *Hansen v Hauptzollamt Flensburg*, the ECJ held that it followed from a previous incarnation of those two provisions (*Treaty establishing the European Economic Community* Article 227) that 'the status of the French overseas departments within the Community is primarily defined by reference to the French constitution under which, as the French Government has stated, the overseas departments are an integral part of the Republic'.<sup>122</sup> This confirms that more generally a Member State's territory depends on that Member State's own constitution, not on the EU treaties. No treaty amendment is therefore required simply as a result of a change to the borders of a state's territory.
160. This suggests that it is open to the UK to change the territorial scope of the treaties unilaterally by granting Scotland independence. The treaties would continue to apply to the reduced territory of the rUK but would, on their face, cease to apply to an independent Scotland unless amended.

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<sup>120</sup> *Treaty Concerning the Accession of Croatia to the European Union*, 9 December 2011, Art 13.

<sup>121</sup> Consolidated version: (2010) OJ C83/47.

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

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

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

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

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

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

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

<sup>123</sup> See Lane, 'Scotland in Europe' in Finnie (1991) 143, 151.

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

<sup>125</sup> See further Lane, 'Scotland in Europe' in Finnie (1991) 143, 150–1.

<sup>126</sup> See *ibid* 143, 152.

<sup>127</sup> Ziller J, 'The European Union and the territorial scope of European territories' (2007) 38 *VUWLR* 51.

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

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

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

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

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

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

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

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

<sup>128</sup> Now see *TEU* Art 52 and *TFEU* Art 355.

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

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

166. Assuming that Scotland would indeed have to accede to the EU as a new state, it would be a matter for the accession process whether it could do so on similar terms to the UK. There is no rule that, for example, it would somehow automatically be entitled to the UK's opt-outs from the euro or justice and home affairs. The terms of accession would have to be agreed with other Member States.
167. These preliminary conclusions are, however, subject to a caveat: the ECJ might be expected to resist allowing part of a current EU Member State to withdraw automatically from the EU, especially insofar as it would affect the individual rights of current EU citizens. This possibility is discussed below.

### (ii) Potential complications

168. State practice supports the view that the nationality of a population follows a change of sovereignty, subject to any particular arrangements. Previous arrangements for succession, such as the peace treaties that reorganised certain European states after the First World War, have given nationals of the predecessor state a right of option. Rather than raise the prospect of statelessness, such arrangements have treated individuals as nationals of one state and terminated such nationality only if an individual exercises the option to that effect.<sup>131</sup>
169. The International Law Commission's *Articles on the Nationality of Natural Persons in Relation to the Succession of States*<sup>132</sup> take a similar approach. Article 4 provides that states shall take all appropriate measures to prevent statelessness. The Articles then deal specifically with the category into which the separation of Scotland from the UK is likely to fall:<sup>133</sup>

#### *Article 24*

#### *Attribution of the nationality of the successor State*

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

- (a) persons concerned having their habitual residence in its territory; and
- (b) subject to the provisions of article 8:
  - (i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;
  - (ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

<sup>131</sup> See *Brownlie's Principles* (8th edn, 2012) 433–6.

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

<sup>133</sup> See also Arts 5 and 11 generally and Arts 22–3 on the dissolution of states.

*Article 25**Withdrawal of the nationality of the predecessor State*

1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.
2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:
  - (a) have their habitual residence in its territory;
  - (b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;
  - (c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

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

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

170. An arrangement of this kind might be envisaged for the UK. Depending on its terms, some of Scotland's population might retain UK nationality (and thus EU citizenship).
171. Nonetheless, the status of future Scottish nationals who do not also retain their UK nationality as current citizens of the EU does raise questions. It is conceivable that the ECJ might attach independent significance to EU citizenship in the form of individual rights. Although it is not necessary to discuss the content of any such rights, there is a real possibility that their existence might influence the ECJ in its approach to Scottish independence if Scotland did not become an EU Member State.
172. There is, of course, the preliminary question of how the ECJ would even have the opportunity to consider Scottish independence, and in particular to consider it on the basis only of existing EU law. In practice this is unlikely:
  - 172.1 A case relevant to Scottish independence would have to come before the ECJ. This might happen, for example, if an individual argued before a UK court that some action by the UK connected with Scottish independence was incompatible with EU law and if the UK court then made a preliminary reference to the ECJ. But whether this would happen and whether it would happen in time to influence the process of Scottish independence and EU accession may be doubtful.
  - 172.2 In any event, there is virtually no chance that the ECJ would be called on to consider the question on the basis solely of existing EU law. More likely, the UK, Scotland and the EU will negotiate and agree on arrangements for Scottish independence that would form the actual subject matter of any consideration by the ECJ. This view is strengthened by the fact that there is no express provision on the point in the

EU treaties: it will probably be treated as *sui generis* matter to be dealt with by the member states, at least initially, rather than the ECJ.

173. Nevertheless, arguments have been made by others that appear to be premised on existing EU law rather than on any agreement that might be reached between the parties. It is not possible to do much more than speculate. But there seem to be two main lines of argument that the ECJ might consider, neither of which seems likely.

174. First, Lane, writing before the EC became the EU, concludes that Scottish independence would require the EC's concurrence and probably also negotiations in good faith:

Independence in Europe for Scotland (and for England) can be brought about only if action at the national level proceeds concurrently with action at the Community level, thus producing, at the end of the day, an agreed result which necessarily includes the concurrence of the Community institutions and all member states. A Scotland bent upon independence grounded in the clear democratic support of the Scottish people would create a moral and, given the international law principle of self-determination, probably a legal obligation for all member states to negotiate in good faith in order to produce such a result, but this solution lies essentially in the domain of politics, not law. And that is a different matter.<sup>134</sup>

175. His suggestion that the principle of self-determination would create a legal obligation to negotiate in good faith is dubious. Outside the colonial context, the principle of self-determination is controversial. The Canadian Supreme Court has held that 'a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire'. In metropolitan territories such as Scotland, 'peoples are expected to achieve self-determination within the framework of their existing state' and a state that 'respects the principles of self-determination in its internal arrangements ... is entitled to maintain its territorial integrity under international law'.<sup>135</sup> This does not, of course, detract from Lane's point that if Scots voted for independence in a referendum, the parties might feel morally or politically obliged to smooth its path.

176. It also does not prejudice the position within the internal EU legal order. In *Van Gend en Loos*,<sup>136</sup> the ECJ held that what is now the EU 'constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'. In *Grzelczyk*,<sup>137</sup> it held that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.

177. An argument within EU law that the UK, in negotiating Scottish independence and perhaps its status within the EU, would be bound by a principle of good faith to act in a certain way – precisely what that way would be is a matter for speculation – would have to rely on a creative and expansive reading of EU treaty provisions that has no legal precedent. There is no provision that obviously gives rise to such a requirement.

<sup>134</sup> Lane, 'Scotland in Europe' in Finnie (1991) 143, 154–5.

<sup>135</sup> *Reference re Secession of Quebec* (1998) 115 ILR 536, 594–5; *Brownlie's Principles* (8th edn, 2012) 141–2.

<sup>136</sup> Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>137</sup> Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, § 31.

178. Second, there is a more radical view, held for example by O'Neill, that Scotland's automatic succession to the EU is possible or even required by the EU legal order. O'Neill identifies several arguments supposedly supporting this view:<sup>138</sup>

178.1 In *Rottmann v Bavaria*, a German *Land* had withdrawn German nationality from a man who was also an Austrian national, with the effect that he also lost his Austrian nationality and hence his EU citizenship. The ECJ held that a Member State must exercise its powers to withdraw an individual's nationality compatibly with the principles of EU law (though it left open whether in the instant case, which involved fraud, it was proportionate to withdraw it).<sup>139</sup>

178.2 *TFEU* Article 20(1), which has the effect of precluding domestic measures that deprive EU citizens of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens, coupled with the rights conferred by the instruments mentioned above, might influence the ECJ to rule 'that Scotland and [the rUK] should *each* succeed to the UK's existing membership of the EU, but now as two States rather than as one'.

178.3 O'Neill also argues that if Scotland became independent without automatically succeeding to EU membership then that would be tantamount to a withdrawal outside the framework of *TEU* Article 50.

179. For the reasons already discussed, there is no basis in the EU treaties for the latter argument: Scottish independence would be an event without a clear precedent in EU law and is not clearly governed by any particular provisions of the EU treaties.

180. Nor do the arguments based on EU citizenship go far. They diverge from the apparent expectation of the European Commission, evident from the quotations above, that Scotland would have to accede to the EU as a new Member State. Barroso has also said, in response to a question stemming from a citizens' initiative to ensure that citizens of a future independent Catalan state would remain EU citizens:

The Commission confirms that, in accordance with Article 20 of the [*TFEU*], EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU Member State). It also confirms that in the hypothetical event of a secession of a part of an EU Member State, the solution would have to be found and negotiated within the international legal order. Any other consideration related to the consequences of such event would be of a conjectural nature.<sup>140</sup>

181. This is consistent with *TFEU* Article 20(1), which states:

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

182. That is to say: EU citizenship is stated to be contingent on the nationality of a Member State. This is reinforced by the *Declaration on Nationality of a Member State to the Treaty on European Union*, which was annexed to that treaty and which states: 'The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the

<sup>138</sup> See further O'Neill A, 'A quarrel in a faraway country? Scotland, independence and the EU', 14 November 2011, [eutopialaw.com/2011/11/14/685/](http://eutopialaw.com/2011/11/14/685/).

<sup>139</sup> Case C-135/08, *Rottmann v Bavaria*, 2 March 2010.

<sup>140</sup> Answer given by Mr Barroso on behalf of the Commission, 28 August 2012, [www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN).

nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.<sup>141</sup>

183. In any event, despite these arguments, it is difficult to see how the ECJ could work around the need to incorporate Scotland into the EU treaties and to renegotiate its position relative to other Member States. There is no precedent for such a situation, and in practice the EU and its existing Member States would almost certainly attempt to avoid it. It is unlikely either that the ECJ would come to consider the question in the terms discussed above or that, if somehow it did, it would effectively usurp the role of the Member States in negotiating a political solution by taking an approach comparable to those suggested by Lane and O'Neill.
184. Of course, there might be a distinction between the position in public international law generally and the position in the EU legal order. Public international law (as already discussed) is the proper law for answering questions of state continuity and succession outside the specific context of the EU. Even if the ECJ were to take a different approach, that would not affect the status of the rUK and Scotland generally. It would only affect their position within the EU legal order.

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<sup>141</sup> (1992) *OJ* C191, 98.