INDEPENDENCE: IN OR OUT OF EUROPE? AN INDEPENDENT SCOTLAND AND THE EUROPEAN UNION

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I. INTRODUCTION

THERE is a question mark over the future of the nation-state in Europe. National monetary policy has been transferred to the European level in most European Union member States. Over the next ten years the EU will have a stronger role in defence and foreign policy, immigration and law enforcement. The very policies that supposedly define the concept of national sovereignty are no longer the exclusive domain of national governments.

At the same time devolution is accelerating in some parts of the EU. Regional politicians have long dreamt of creating a "Europe of the regions", in which sub-national governments, in alliance with Brussels, replace nation-states as the building blocks of an ever-closer union. The Treaty on European Union gave regional and local governments a small role in EU policy making but, by and large, it is the member States that have determined how to take the views of devolved governments into account. In the United Kingdom, the new Scottish Parliament and devolved executive will have a modest say over British EU policy positions.

But some nationalist political parties would prefer their nations or regions to be independent States inside the EU. This position is particularly attractive since—at least for the time being—the smaller member States have disproportionate influence within the EU. For example, the United Kingdom with a population of 59 million has ten votes in the Council of Ministers, but Denmark with a population of only 5.3 million has three votes, and Luxembourg has two votes for only 0.4 million people.[1] Hence the slogan of the Scottish National Party: "Independence in Europe".[2] The SNP believes that an independent Scotland would automatically become a member State of the European Union.[3] But is this correct?

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1. Art.205(2) EC.
2. See *Election Manifesto*, SNP, Apr. 1997.
3. See *The Legal Basis of Independence in Europe*, SNP, Feb. 1997.

The extent to which a successor State inherits the rights and obligations of its predecessor is governed by international law, by the law of State succession. In relation to Scottish independence, two issues arise. Firstly, whether Scotland gaining independence would be a case of secession from the United Kingdom or mean the dissolution of the United Kingdom and the creation of two new states, Scotland and "the rest". Secondly, to what extent would the new State of Scotland succeed to the rights of its predecessor State, the United Kingdom.

If, on Scottish independence, the United Kingdom remained in being, albeit with shrunken borders, then issues of State succession would arise only in relation to Scotland. The United Kingdom would continue in existence, retaining the same legal personality in international law as it had had previously. It would continue to enjoy the rights and be bound by the obligations of the numerous treaties to which it is a party[4] and its membership of the many international organisations (the United Nations, the International Monetary Fund, the World Bank, the European Union and so on) of which it is a member would continue. If, on the other hand, the United Kingdom ceased to exist, then the rump of the former United Kingdom would be in the same position as Scotland in respect of issues of State succession. This could have far reaching consequences, particularly given that (as I will argue) there is no automatic succession to the membership of international organisations in international law.

This paper considers these issues. It first discusses whether Scottish independence would mean the dissolution of the United Kingdom as a matter of constitutional law. It goes on to consider the position under international law (and also to ask what relevance has domestic law in deciding this issue). Following the conclusion that Scottish independence would be a case of secession, not of dissolution, it discusses what consequences that would have for Scottish membership of international organisations, in particular the European Union.

II. SCOTTISH INDEPENDENCE: THE CONSTITUTIONAL IMPLICATIONS

THE SNP claims that Scottish independence would result in the dissolution of the United Kingdom. This claim appears to be based on the supposed effects of the 1707 union legislation.[5] The Articles of Union, negotiated by commissioners on behalf of the English and Scottish

4. With the exception, of course, of those treaties specifically relating to activities on Scottish territory.

5. The Union with England Act 1707 of the Scottish Parliament and the Union with Scotland Act 1706 of the English Parliament. The English Act incorporated the terms of the Scottish Act with the addition of provisions safeguarding the status of the Church of England. The difference in dates arises from the fact that at the time Scotland had adopted the Gregorian calendar but England had not.

Parliaments and incorporated into the two Acts of Union, are, it is claimed, the constitutional foundation of the United Kingdom. Were they to be revoked, such as by Scotland gaining independence, then the UK would be dissolved. Such a view, however, misstates both the legal effects of the Acts of Union and their status in United Kingdom constitutional law.

Article I of the Articles of Union provides that "the two kingdoms of England and Scotland shall upon the first day of May which shall be in the year one thousand seven hundred and seven and for ever after be united into one kingdom by the name of Great Britain ...".[6] Two previously independent States were merged into one. The kingdoms of England and Scotland ceased to exist and a new State, Great Britain, was created.[7] Nor have these arrangements remained untouched since 1707. In 1800, by another Act of Union, this time with Ireland, the United Kingdom of Great Britain and Ireland was created. In 1922, the Irish Free State seceded from the United Kingdom, which changed its name to the United Kingdom of Great Britain and Northern Ireland.

Although the 1707 Acts of Union are constituent documents, in that they were part of the process by which the UK came into being, it is not the case that a change in their provisions would end the United Kingdom's existence. Traditionally, it is a fundamental principle of the British constitution that Parliament is sovereign.[8] No Parliament can bind its successor; what one Parliament makes, another Parliament may unmake. In cases of conflict between two Acts of Parliament the latter in time prevails, regardless of whether the earlier Act purports to be binding in perpetuity.[9]

In consequence, although a number of the provisions of the Acts of Union do purport to bind Parliament in perpetuity, the Acts can be

6. See the Union with Scotland Act 1706 (6 Anne c.11).

7. "the States—the kingdoms of Scotland and England—ceased to exist on May 1, 1707, when they merged their identity in the new State of Great Britain. ... Two international persons disappeared in 1707—the obligants under the treaty—and a new international person took their place. This new State, though I believe 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 no party." (T. B. Smith, "The Union of 1707 as Fundamental Law" [1957] P.L. 99 at 106).

8. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution,* London, 10th edn, 1959, pp.39–40.

9. See *Vauxhall Estates Ltd* v. *Liverpool Corpn* [1932] 1 K.B. 733 and *Ellen St Estates Ltd* v. *Minister for Health* [1934] 1 K.B. 590.

amended or repealed at Parliament's pleasure.[10] Indeed, a mere four years after the union between England and Scotland, by restoring lay patronage in the Church of Scotland by the Patronage (Scotland) Act 1711 the British Parliament legislated in clear breach of the union legislation.[11] Other examples can be given: the alteration of the name of the State[12] and the design of the national flag; the abolition of the Scottish Court of Admiralty, and of the requirements that professors and masters in universities, colleges and schools subscribe to the Confession of Faith and that ministers of the Church of Scotland subscribe to the concession in the form required by the Protestant Religion and Presbyterian Church Act 1707; and the numerous changes made to the organisation and government of the Church of Scotland.[13] In no case has any such legislation been held by any court, English or Scottish, to be invalid by reason of such breach.[14] As Professor Munro states: "there is no instance of legislation being held invalid as being contrary to the Acts of Union; no court in the United Kingdom has ever claimed that it could exercise such a powers; and on some occasions courts have expressly denied that such a power exists under our constitution".[15] The Acts of Union have no higher status in UK constitutional law than any other law.

The United Kingdom is not merely some form of joint venture between England and Scotland. The States of England and Scotland no longer exist. Nor is the United Kingdom a federal State where the powers of both federal and local government are defined and delimited by some superior constitutional document. Despite devolution, Parliament rests supreme,[16]

10. See A. W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, London 12th edn, 1988, chap.4.; S. A. de Smith & R. Brazier, *Constitutional and Administrative Law*, Harmondsworth, 7th edn, 1994, chap.4 (which concludes, at pp.78–79, that "the immunity of the surviving fundamental principles of the Union from legislative encroachment by the United Kingdom Parliament without Scottish consent is probably to be regarded as a matter of convention rather than strict law"); and C. R. Munro, *Studies in Constitutional Law*, London, 1987, chap.4. For contrary views see H. Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government*, Belfast, 1968, pp.17–23; J. D. B. Mitchell, *Constitutional Law*, 2nd edn, 1968, pp.69–74; T. B. Smith, *ibid*; and D. N. MacCormick, review of S. A. de Smith, *Constitutional and Administrative Law* 1st edn, [1973] P.L. 174.

11. In the Acts of Union, the (Scottish) Protestant Religion and Presbyterian Church Act 1707 was to be "held and observed in all times coming as a fundamental and essential condition of any treaty or union ... without any alteration thereof or derogation thereto in any sort for ever".

12. See the text of Art.1 of the Articles of Union above.

13. See C. R. Munro, *ibid.*, for a full discussion of these issues.

14. There are *dicta* in two Scottish cases, *MacCormick* v. *Lord Advocate* [1963] S.C. 396 and *Gibson* v. *Lord Advocate* 1975 S.L.T. 134, that legislation contrary to the fundamental terms of the Articles of Union would be unlawful (if unjusticiable), but in recent years the Scottish courts have been anxious to avoid the issue of whether they have a power to review legislation for such compatibility. See *Pringle, Petitioner* 1991 S.L.T. 330 and *Murray* v. *Rogers* 1992 S.L.T. 221.

15. Munro, *ibid*, at p.72.

16. See Article s.28(7) of the Scotland Act 1998.

the United Kingdom remains a unitary State and Scotland an integral part of the United Kingdom with no higher status under the constitution than any other administrative area.[17] This being the case, it is difficult to see why Scotland separating from the rest of the UK should mean that the UK ceases to exist as a matter of domestic law.

Ireland became a part of the United Kingdom in 1801 in the same manner as Scotland had in 1707, by Acts of Union passed by the British and Irish Parliaments.[18] As with the 1707 legislation, the union was stated to be "for ever".[19] In addition, Article 5 of the Act provided that:

> the churches of England and Ireland as now by law established be united into one Protestant Episcopal Church to be called the United Church of England and Ireland and that the doctrine, worship, discipline and government of the said United Church shall be and shall remain in full force for ever, and that this be deemed and taken to be an essential and fundamental part of the Union.

The wording of the provision seems explicit. However, despite it the Irish Church Act 1869 disestablished and disendowed the Episcopal Church in Ireland. An attempt was made to challenge the Act on the ground that the Queen's assent to it was contrary to her coronation oath as set out by the Act of Settlement.[20] Although it was not expressly put that the legislation was contrary to the Union with Ireland Act, in dismissing the action Cockburn CJ stated, without qualification, that "there is no judicial body in the country by which the validity of an act of Parliament could be questioned",[21] a conclusion which would appear to apply with equal force to such an argument. A provision which not only was stated to apply in perpetuity, but which was described as being "essential and fundamental" to the Union could be repealed by a later Act of Parliament with no other effects.

Further, in 1922 the Irish Free State, comprising of 26 of the 32 counties of Ireland, left the United Kingdom.[22] As a result, all of the provisions of the Union with Ireland Act have been repealed or amended.[23] If the SNP's view was correct, the United Kingdom should have ceased to exist in 1922. Yet the case was treated, both internally and externally, as being one of secession, not as meaning the dissolution of the UK. The Irish Free

17. In this sense Tony Blair (*The Scotsman*, 4 Apr. 1997) was entirely correct when he compared the Scottish Parliament to a parish council.

18. See the Union with Ireland Act 1800 (59 & 60 Geo. 3 c.67).

19. Art.1, *ibid.*

20. *Ex parte Canon Selwyn* (1872) 36 J.P. 54.

21. *Ibid*, at 55.

22. See the Articles of Agreement for a Treaty between Great Britain and Ireland, 6 Dec. 1921, incorporated as the schedule to the Irish Free State Act 1922.

23. In particular, the Act has been amended so that it no longer applies to the territories now comprising the Republic of Ireland. See s.6, the Irish Free State (Consequential Provisions) Act 1922 and Order in Council S.R. & O. 1923 No.405.

State was seen as a new State.[24] It was not seen as succeeding to the United Kingdom's membership of what international organisations then existed and had to apply for membership of the League of Nations. The United Kingdom, on the other hand, was seen as continuing to exist with the same rights and duties as it had had previously save as they related to the territory comprising the Free State.

The Irish experience, then, reinforces our two conclusions. Firstly, that "fundamental" or "inviolable" provisions of the union legislation can be repealed just as may any other provisions of any other Act of Parliament; and, secondly, that the breaking away from the United Kingdom of territory in contravention of the union legislation does not entail the dissolution of the United Kingdom as a State as a matter of constitutional law.[25]

III. SECESSION OR DISSOLUTION? THE POSITION IN INTERNATIONAL LAW

As mentioned above, two issues would arise on Scotland gaining independence. They can now be more precisely defined as whether Scottish independence would be a case of secession or mean the dissolution of the United Kingdom as a matter of international law, and what consequences would each situation have for Scotland's relationship with the international organisations of which the UK was previously a member. These two issues will be dealt with together. International organisations, in determining issues of State succession, tend to consider the categorisation of the break up of a State and the consequences of that categorisation at the same time. Very few international organisations have any provisions in their constituent instruments on succession to membership. It is to their practice that one must look. It will be seen, however, that such practice is largely consistent and based on a belief that there are rules of international law applicable in such situations.

A. The Vienna Convention on Succession of States in Respect of Treaties

The SNP, however, bases its view that Scotland would inherit the treaty obligations of the United Kingdom, including membership of the

24. Strictly speaking, the Free State became a self-governing Dominion within the British Empire and was treated as such by the English courts. There is no doubt, however, that it was treated by the international community as possessing legal personality. The League of Nations registered the 1921 Treaty under Art.18 of the Covenant despite British objections that it was not an international agreement. See Robert MacGregor Dawson (Ed.), *The Development of Dominion Status 1900–1936*, London, 1939, at p.252 and D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 1967, Vol.II, p.123.

25. Indeed, the paradox is that if certain of the provisions of the Articles of Union are inviolable, then Scottish independence would be impossible as being contrary to Art.I.

European Union, on the provisions of a treaty, on Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.[26] Article 34 falls within Part IV of the Convention dealing with the uniting and separation of States and deals with the succession of States in cases of separation of parts of a State. It provides that:

> 1. When a part or parts of a 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;
>
> ...

However, there are two problems with respect to the application of this provision in respect of Scotland's membership of any international organisations of which the United Kingdom is a member: one deriving from other provisions of the Convention, the other from its status as a treaty.

Firstly, Article 34 is, in respect of succession to membership of international organisations, subject to Article 4 of the Convention, which states that:

> The present Convention applies to the effects of a succession of States in respect of:
>
> (a) any treaty which is the constituent instrument of any international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;
>
> ...

Consequently, it cannot be said that, as a rule, the Vienna convention permits a seceding State to succeed to membership of those international organisations of which its predecessor State is a member. When reporting to the General Assembly on its draft articles on succession of States in respect of treaties,[27] which formed the basis for the Vienna Convention, the International Law Commission, in its commentary on Article 4,[28] stated that:

> In many [international] organizations membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State, simply by reason of the

26. (1978) 17 I.L.M. 1488

27. Report of the International Law Commission on the work of its twenty-sixth session, 6 May–26 Jul. 1974, UN Doc. A/9610/Rev.1, in (1974) Y.B.I.L.C., vol.II, pt.1, pp.174–269.

28. Which is, save for a consequential amendment, identical to Art.4 of the Convention.

fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization.[29]

Secondly, although the Convention is now in force,[30] the United Kingdom is not a party to it. Indeed, neither is any member State of the European Union.[31] It follows, therefore, that the treaty is not applicable and that the issue falls to be governed by customary international law. As the International Law Commission's commentary states, practice supports the view that successor States do not automatically succeed to the membership of international organisations. And, although the International Law Commission's researches were largely concerned with issues of State succession arising from decolonisation, more recent events also support their conclusions.

B. The practice of the United Nations

India was an original member of the United Nations. Before the date set for the separation of India and Pakistan, the Secretariat of the United Nations requested an opinion from the Assistant Secretary-General for Legal Affairs on what effect that event would have upon membership and representation in the United Nations. His opinion was that India continued as a State with all treaty rights and obligations and, consequently, with all the rights and obligations of membership of the United Nations. Pakistan, conversely, would be a new non-member State and would have to apply for admission to the United Nations.[32]

On Pakistan becoming independent, the Security Council took the view that it should be admitted to membership. The Security Council's recommendation was transmitted to the General Assembly, which, despite the arguments of some delegates that Pakistan should be seen as having succeeded to the membership of British India on the same basis as India, admitted Pakistan as a member of the United Nations. However, in the light of such objections, the General Assembly also considered that there was a more general issue at stake: what were the legal rules to which a State or States entering into legal life through the division of a member State of the United Nations should be subject? This question was referred

29. (1974) Y.B.I.L.C., vol.II, pt.1, pp.177–178.

30. It came into force on 6 Nov. 1996, but as of 19 Aug. 1999 only 17 States (Bosnia, Croatia, the Czech Republic, Dominica, Egypt, Estonia, Ethiopia, Iraq, Morocco, Saint Vincent and the Grenadines, Seychelles, Slovakia, Slovenia, Macedonia, Tunisia, Ukraine and Yugoslavia) are parties to it. See the UN Treaty Database at http://wwww.un.org/Depts/Treaty/.

31. This point is expressly made by Garzon Clariana, Principal Legal Adviser, Legal Service of the European Commission, in his survey on "La succession dans le Communautés Européennes", in Geneviève Burdeau and Brigitte Stern (Eds), *Dissolution, Continuation et Succession en Europe de l'Est*, Paris, 1994.

32. For the text of the opinion, see D. P. O'Connell, *ibid.*, vol.II, pp.184–185.

to the General Assembly's Sixth (Legal) Committee, which adopted the following general principles:

> 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 not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
> Beyond that, each case must be judged according to its merits.[33]

It has been argued that these principles are tautologous, but this is unfair. At the least, as Scharf says, the first principle "suggests there is a presumption against treating a State's UN membership as extinguished despite the division or dismemberment of the State",[34] and the second principle implies that there can only be one continuor State (which is only logical). The principles do not, however, lay down criteria for determining whether a State is a continuor State. For that one must look to the practice of the UN in subsequent cases.

The practice of the United Nations since 1947 has, in general, been in accordance with the principles laid down by the Sixth Committee. When Singapore, by mutual consent, seceded from Malaysia in 1965, Malaysia remained within the United Nations whilst Singapore had to apply for membership.[35] Similarly, following the unilateral secession of Bangladesh from Pakistan in 1971, Pakistan retained its membership of the UN whilst Bangladesh had to apply to join.[36] On the break-up of the Soviet Union at the end of 1991, the Russian Federation, as continuor State of the USSR, took over its UN membership and permanent seat on the Security Council; the other former Soviet republics (with the exception of the Ukraine and Belarus, who were original members of the United Nations)

33. See (1947–48) U.N.Y.B., pp.39–40.
34. Michael P. Scharf, "Musical Chairs: The Dissolution of States and Membership in the United Nations" (1995) Cornell I.L.J. 29 at 36.
35. See S. Jayakumar, "Singapore and State Succession: International Relations and Internal Law" (1970) 19 I.C.L.Q. 398.
36. Bangladesh's first application for UN membership was vetoed by China. It was finally admitted in 1974. See James Crawford, *The Creation of States in International Law*, Oxford, 1979, at pp.135–136

had to apply for membership.[37] On the dissolution of Czechoslovakia at the end of 1992, both the Czech Republic and Slovakia applied anew for membership of the UN. Finally, when Eritrea seceded from Ethiopia in 1993 it applied for membership of the UN, while Ethiopia remained a member State.

There have been some exceptions, but they merely prove the rule. On Syria's secession from the United Arab Republic in 1961, Syria resumed its membership of the UN without having to make a re-application to join. Syria had, however, previously been an original member of the United Nations, and the UAR had been in existence for less than four years before its collapse and had never been more than an imperfect union. The view seems to have been taken that the post-1961 Syrian Arab Republic was not a new State but rather was, in law, the same State as the pre-1958 Republic of Syria.[38]

A more interesting example is that of Yugoslavia. Upon independence Slovenia, Croatia, Bosnia-Herzegovina and Macedonia all applied and were accepted to membership of the United Nations. The Federal Republic of Yugoslavia (Serbia and Montenegro) claims that it is in law the same entity as the Socialist Federal Republic of Yugoslavia and that, as such, it is already a UN member State. The UN Security Council, however, took a different view. In Resolution 777 of 19 December 1992 it declared that the Socialist Federal Republic of Yugoslavia had ceased to exist and that, therefore, the Republic of Yugoslavia could not continue the old Yugoslavia's membership of the United Nations. It recommended that the General Assembly decide that the Federal Republic of Yugoslavia was required to apply for membership of the UN. This the General Assembly duly did.[39] As a consequence, the FRY is in a state of limbo. Pending admission to the United Nations as a new member, it is banned from participation in the work of the UN, but permitted to maintain a UN mission, fly its flag and circulate documents.[40]

This course of events has not been without its critics.[41] The criticisms have, however, been directed against the decision that the Socialist Federal Republic of Yugoslavia had ceased to exist, not that its successor States had to apply for UN membership. In relation to this first issue, undoubtedly the UN's position was influenced by Yugoslavia's pariah

37. The Baltic States (Estonia, Latvia and Lithuania) did so not as States that had seceded from the Soviet Union, but as States who had recovered their independence upon the ending of an illegal occupation. See R. Mullerson, "The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia" (1993) 24 I.C.L.Q. 473, at pp.480–83.

38. See Richard Young, "The State of Syria: Old or New?" (1962) 56 A.J.I.L. 482.

39. In GA Res. 47/1, 22 Sept. 1992.

40. See Michael C. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties" (1977) 1 Max Planck Y.B. of U.N. Law 231.

41. See Yehuda Z. Blum, "UN Membership of the 'new' Yugoslavia: Continuity or Break?" (1992) A.J.I.L. 830.

status, but it was not without justification. The situation was that four out of the six constituent republics of the State seceded, leaving the rump State with a mere 40% of its old territory and 45% of its original population.[42] Indeed, previous to the United Nations' decision, the Badinter Arbitration Committee, established by the European Community and its member States, had come to the same conclusion, holding in an opinion dated 14 January 1992 that "the Socialist Republic of Yugoslavia is in the process of dissolution".[43]

As a result of an extensive survey of UN practice, Scharf comes to the following conclusions:

> The Indian, U.S.S.R., Yugoslavia and Czechoslovakia cases suggest that in determining whether a potential successor is the continuation of a member or whether the member's international personality has been extinguished, the relevant factors include whether the potential successor has: (a) a substantial majority of the former member's territory (including the historic territorial hub), (b) a majority of its population, (c) a majority of its resources, (d) a majority of its armed forces, (e) the seat of government and control of most central government institutions, and (f) entered into a devolution agreement on UN membership with the other components of the former State.[44]

C. *The practice of the international financial institutions*

Although expressly confined to membership of the United Nations, these rules seem to have been applied by most international organisations when faced by issues of State succession to membership.[45] The practice of the international financial institutions (the International Monetary Fund[46] and the World Bank[47]) has been somewhat different, but not in any way that would support the SNP's arguments. In the case of the separation of

42. See Blum, *ibid*, at p.833.

43. Opinion No.1 of the Arbitration Committee of the International Conference on Yugoslavia, reprinted in the Appendix to A. Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples" (1992) 3 E.J.I.L. 178, at 183.

44. Scharf, *ibid*, at 67.

45. The specialised agencies have in general followed the lead of the Security Council and General Assembly on these issues.

46. See Hans Aufricht, "State Succession under the Law and Practice of the International Monetary Fund" (1962) 11 I.C.L.Q. 154; Joseph Gold, *Membership and Nonmembership in the International Monetary Fund*, Washington, DC, 1974: and Paul R. Williams, "State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations" (1994) 43 I.C.L.Q. 776.

47. See Paul R. Williams, *ibid*; Louis Forget, "La succession d'états en Europe de l'Est et les organisations financières internationales: l'experience de la Banque Mondiale", in Geneviève Burdeau and Brigitte Stern (Eds), *ibid.*; and Ibrahim F. I. Shihata, "Matters of State Succession in the World Bank's Practice", in Mojmir Mrak (Ed.), *Succession of States*, The Hague, 1999.

India and Pakistan, India was seen as continuing in its membership of the IMF with an undiminished quota,[48] whilst Pakistan had to apply for membership in accordance with the procedures set out in the IMF Articles of Agreement. The IMF took the same view with regard to the separation of Malaysia and Singapore, and of Pakistan and Bangladesh. In the case of the secession of Syria from the United Arab Republic, the Fund permitted the Syrian Arab Republic to resume the membership of the Republic of Syria, but the two components of the UAR had never merged their monetary competences.

On the break up of Yugoslavia and Czechoslovakia, the IMF permitted a form of "conditional succession", which allowed the successor States of those two federations to succeed to membership of the IMF on condition that they undertook a number of obligations towards the Fund. In relation to this practice, however, two points must made. Firstly, the option of "conditional succession" only arose after a determination had been made that the situation was one of the dissolution of the predecessor State, rather than the secession of one or a number of States from that predecessor.[49] Second, in both cases succession to membership was not automatic. The Fund required that the successor States fulfil a number of conditions before they were permitted to succeed to membership. In particular that they assume responsibility for a specified share of the predecessor State's debt to the Fund; accept the obligations of membership as set out in the IMF Articles of Agreement; and (in the case of the successor States to the former Yugoslavia), in the opinion of the Fund, be able and willing to perform those obligations.[50]

The practice of the World Bank has closely followed that of the IMF.[51] In both cases, the reason for such an approach was the same. Both Yugoslavia and Czechoslovakia were debtors of the IMF and the World Bank, who, in consequence, wished to avoid any default by ensuring that all the outstanding obligations of the two States were assumed by their successors. The case can be seen as partaking in elements of the law of State succession to public debts as well as to the membership of international organisations.

48. Under Art.III(2)(d) of the Fund's Articles of Agreement, a member State's quota may not be reduced except with its permission.

49. "s'il s'agissait d'une séparation, l'État membre restant, qui était la Republique fédérative de Yougoslavie (Serbie et Monténégro), continuerait l'existence de l'État d'origine, et continuerait d'être déteneur des droits et obligations de l'État d'origine dans les organisations [the IMF and the World Bank]. Les autres États issus de la séparation ne pourraient dans cette hypothèse devenir membres que par las processus normal d'adhersion." (Louis Forget, *ibid*, at p.108).

50. Indeed, the Federal Republic of Yugoslavia's application was refused by the Fund on the ground that it would be unable to perform its obligations under the Articles of Agreement.

51. This is unsurprising, as membership of the IMF is a condition of membership of the World Bank. See Art.II(1)(b) of the World Bank Articles of Agreement.

D. The practice of European regional organisations

In Europe, regional organisations have also tended to require successor States to apply for membership. Only one case of succession has arisen in the Council of Europe.[52] Czechoslovakia had been a member of the Council of Europe since 21 February 1991, but on its separation into the Czech and Slovak Republics, the Council of Ministers determined that its membership lapsed and that the two successor States must apply for admittance in the usual manner. This they duly did, being admitted as members together on 30 June 1993. The Conference for Security and Cooperation in Europe,[53] however, has dealt with rather more. The CSCE permitted Russia to continue with the Soviet Union's membership, whilst the other former republics of the USSR had to undertake to fulfil the obligations of membership before their admittance. The same procedure was followed with Slovenia, Croatia, Bosnia-Herzegovina, the Czech Republic and Slovakia.[54] CERN also permitted Russia to continue with the Soviet Union's observer status, whilst requiring the Czech and Slovak Republics to satisfy the normal procedures for admission despite both States' wishes to succeed to Czechoslovakia's membership.[55]

E. The justification of the rules

In each case the rationale behind the adoption of the rules seems to have been the same. Membership of an international organisation gives rise to "rights and obligations of voting, with specific quotas of votes, and obligations of contributing to the organization, with fixed quotas of contributions".[56] A member State has a right to participate in the direction of the organisation and an obligation to contribute to its expenses (which contribution, rather than being a fixed sum payable by each member *pro rata*, is usually based on its ability to pay). A new State must be formally admitted to membership of an international organisation because it is necessary that these matters be negotiated and agreed with the existing member States. Additionally, membership of international organisations generally involves cooperation between the members to attain shared objectives, and in such matters States generally require to be able to decide with whom they work. As Jenks wrote:

52. See Jiri Malenovsky, "La succession au Conseil de l'Europe", in Geneviève Burdeau and Brigitte Stern (Eds).

53. Not an international organisation in the strict sense of the term and still, as the Organisation for Security and Cooperation in Europe, somewhat of an anomaly, being an international organisation without international legal personality.

54. See Emmanuel Decaux, "La succession d'états au sein de la Conférence sur la Sécurite et la Coopération en Europe", in Geneviève Burdeau and Brigitte Stern (Eds).

55. Jean-Marie Dufor and Sophie Gullung, "Le CERN face aux succession d'états dans les pays de l'Est", in Burdeau and Stern, *ibid.*

56. D. P. O'Connell, *ibid*, vol.II, p.183.

> The membership of an international organization has a personal quality and it is both reasonable and psychologically sound and wise that a new member of the international community should be required to apply for membership, particularly in the case of general international organizations for the maintenance of peace and security.[57]

Such a proposition would also seem to apply with particular force to international organisations not of a universal character where membership is restricted to "like-minded" States.[58]

F. Scottish independence: secession from or the dissolution of the UK?

From the survey above it can be seen that other international organisations tend to follow the lead of the UN when making determinations whether any particular instance of a State breaking up is one of secession from a continuor State or of dissolution. It is suggested that this derives not so much from deference to the United Nations, but from an acceptance of criteria used to make such determinations and the reasons behind their use.

Scotland has a population of 5.12 million. The rest of the United Kingdom has a population of 53.87 million, over ten times greater.[59] The rump UK would also retain 68% of the land mass of the former UK[60] and over 90% of its economic wealth. It would include three of the four constituent parts of the United Kingdom and the capital and financial centre, London. Finally, the rump would retain the majority of the instruments of government, most of the civil service and the armed forces and, of course, the United Kingdom's nuclear capacity.[61] Whether there would be a devolution agreement between Scotland and the rump UK is, of course, not something that can be predicted, but even without such knowledge the conclusion must be that the rump UK would satisfy the criteria of a continuor State.

57. C. Wilfred Jenks, "State Succession in Respect of Law-Making Treaties" (1952) 29 B.Y.B.I.L. 105 at 134.

58. The Council of Europe, in determining that the Czech and Slovak Republics must apply for membership, seems to have been influenced by the consideration that respect for the fundamental values on which the organisation is based could not be presumed to have been inherited by the successor States and that, accordingly, there existed a need to evaluate their behaviour before admitting them to membership. Art.3 of the Statute of the Council of Europe requires that "[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms". See Jiri Malenovsky, *ibid*, at pp.134–136.

59. 1997 mid-year estimate. See Daniel Wisniewski (Ed.), *Annual Abstract of Statistics, 1999 edition*, London, 1999, p.33, Table 5.5.

60. As of 31 Mar. 1981. See *supra*, p.5, Table 1.1.

61. The SNP has made it clear that it does not want to retain those elements of the UK's nuclear capacity based on Scottish territory, see the *SNP Manifesto—General Election 1997*, p.31.

However, to a great extent issues of State succession depend on the perceptions of the international community. It is the views of the States who have treaty relations with the United Kingdom and who are members of the same international organisations that count, and States' opinions are often held as much for political as legal reasons. In addition to these legal reasons, there are also a number of practical reasons why States might wish to see the situation as one of secession rather than of dissolution and the rump UK as a continuation of the former undivided State.

In particular, if the United Kingdom ceased to exist then, obviously, it could not continue to be a permanent member of the United Nations Security Council. Article 23 of the Charter of the United Nations states that: "The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Socialist Soviet Republics, the United Kingdom of Great Britain and Northern Ireland, and the United State of America shall be permanent members."[62] In 1992, on the break-up of the Soviet Union, the Russian Federation declared itself and was held by the international community to be the continuation in international law of the old USSR.[63] That the same thing would happen again seems not unlikely. The main reason for the attitude of the international community in Russia's case was that, despite its vicissitudes, it remained a nuclear superpower.[64] Although not in the same league, the rump UK would also retain its nuclear capacity and its power to project force internationally. The question of the membership of the Security Council has long been a subject of dispute. Amendment of Article 23 would reopen the controversy. Far simpler to hold that the UK, although smaller than before, continues to exist.

IV. SCOTLAND AND THE EUROPEAN UNION

CONSEQUENTLY, it appears that Scotland becoming an independent State would not be an event giving rise to the dissolution of the United Kingdom. Scotland would secede from the United Kingdom and any issues of State succession arising would arise in relation to Scotland only.

62. In 1971 the People's Republic of China replaced the Republic of China as a permanent member of the Security Council, but this was the result of the United Nation's recognition of the mainland Communists as the government of China and, consequently, no issue of State succession arose. Plainly, it would be absurd to hold that a State looses its status as a permanent member of the Security Council merely by changing its name. The list in Art.23(1) must be interpreted as referring to the names of the permanent members at the time of the Charter's adoption. See Yehuda Z Blum, "Russia Takes Over the Soviet Union's Seat at the United Nations" (1993) 3 E.J.I.L. 354 at 360.

63. See UN Press Release SG/SM/4692, SC/5362, 31 Jan. 1992.

64. The former republics of the USSR had also so agreed. See the Decision by the Council of Heads of State of the Commonwealth of Independent States, 31 Dec. 1991 (1992) 31 I.L.M. 151. However, the formed republics also stated that the Soviet Union had ceased to exist as a subject of international law. See Yehuda Z. Blum, *ibid.*

In particular, an independent Scotland would not automatically succeed to the membership of the international organisations of which the UK is a member.

Do these rules, however, apply to the European Union? The EU is often, and with justification, not considered to be one international organisation amongst others but something *sui generis*.[65] The EU is often said not to have international legal personality; certainly there are no provisions in the Treaty on European Union granting it legal personality. It is even argued that the EU is not an international organisation at all, but a treaty regime. Even if it is assumed that the EU is an international organisation, its structure is unusual, encompassing, as it does, three international organisations which undoubtedly do have international legal personality.[66] Given this, are the general conclusions set out above applicable to its specific circumstances?

On the face of it, there appears no reason why they should not. The rationale behind the rules would seem to have particular force in relation to the EU, given the heavy financial commitments and onerous obligations member States take on upon joining. It follows then that two questions, in particular, then arise. Is the conclusion that an independent Scotland would not automatically become a member of the European Union, but would instead have to apply for membership, borne out by the terms of the constituent treaties and the practice of the European Union? If it is, then under what conditions would Scotland be admitted?

G. Gaining admission to the European Union

Membership of the European Union is governed by Article 49 of the Treaty on European Union,[67] which states that:

> Any European State which respects the principles set out in Article 6(1)[68] may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> 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

65. For recent discussion of the issue, see Jan Klabbers, "Presumptive Personality: The European Union in International Law", in Martti Koskenniemi (Ed.), *International Law Aspects of the European Union*, The Hague, 1998; and Deirdre Curtin and Ige Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in Paul Craig and Gráinne de Búrca (Eds), *The Evolution of EU Law*, Oxford, 1999.

66. The EC, Euratom and the European Coal and Steel Community, which is, however, soon to be dissolved and its assets taken over by the EC.

67. Consolidated Version.

68. The principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

> 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.

Admission of new member States is by decision of the existing member States. A State accedes to membership by means of a treaty between itself and the member States. The Treaty of Accession itself provides that the new member States are to become members of the EU and the European Communities, while the conditions under which membership has been granted are set out in an annexed Act of Accession.[69]

The second paragraph of Article 49 is very significant. On a State gaining membership of the United Nations, the Charter of the United Nations does not require amendment. On a State gaining membership of the European Union, however, the various constituent treaties do require amendment. In particular, the Treaty Establishing the European Community specifically refers to the various member States. The accession of another State to membership of the EU would necessitate the amendment of the provisions specifying the number of representatives in the European Parliament elected in each member State,[70] the number of weighted votes held by each member State when the Council is required to act by a qualified majority,[71] the number of members of the Commission,[72] the number of Judges of the Court of Justice and of members of the Court of Auditors,[73] and the number of members of the Economic and Social Committee and the Committee of the Regions from each member State.[74] All such amendments must be specified in the Act of Accession.

Amendment of a provision of a treaty cannot take place without the concurrence of all parties to the treaty unless the treaty itself provides for some other means of amendment. In this instance, that only applies in relation to Articles 213(1) and 221 and there only by the Council acting unanimously, which in practice amounts to much the same thing. Consequently, it can be seen that, the structure of the EU's constituent treaties themselves does not permit a State to succeed to membership of the European Union.

69. See I. MacLeod, I. D. Hendry and Stephen Hyett, *The External Relations of the European Communities*, Oxford, 1996, chap.9.

70. Art.190(2) EC.

71. Art.205(2) EC. This provision is also incorporated by reference into the Treaty on European Union, which also requires some decisions to be taken by weighted voting.

72. Art.213(1) EC. In fact, the article merely states that there shall be 20 Commissioners (for 15 Member States), so it might not be necessary to amend it if one of the larger states agreed to have one Commissioner rather than two.

73. Arts.221 and 247(1) EC. In each case the article only provides that there shall be 15 members of each institution. It is clear, however, that this means one member from each member State.

74. Arts.258 and 263 EC.

H. The case of Greenland

It has been argued that the case of Greenland shows that, once in the European Union, a country cannot get out. Scotland forms a part of the territory of the European Union and, says the SNP, it would remain such even following independence. As with Greenland, it could only withdraw from the EU by negotiation and with the consent of the other member States.

Certainly it is true that the European Treaties contain no provision for the withdrawal of a member State. Indeed, Article 51 of the Treaty on European Union states that "[t]his Treaty is concluded for an unlimited period", suggesting that a State cannot unilaterally denounce the treaty and leave the European Union. All this, however, merely begs the question. It may well be illegal for a member State to leave the European Union, but that is not what is at issue. On Scotland gaining independence it would no longer be a part of a member State.

The case of Greenland saw one member State negotiating the withdrawal of a part of its national territory from the scope of the European Treaties. It was not an example of a member State (still less a State that had seceded from a member State) being unable to withdraw from the EC without the consent of the other member States. Greenland joined the EC with Denmark, of which it was an integral part, in 1973. Following the grant of home rule in 1979, the Greenlanders decided by referendum that they wished to leave the European Communities and it was pursuant to this decision that Denmark negotiated Greenland's withdrawal in 1985.[75] It was the very fact that Greenland remained a part of Denmark that made it necessary that its withdrawal from the EC be a negotiated one.

Treaties not relating to a specific part of a State's national territory,[76] such as the constituent instruments of international organisations, generally adhere to the State, not to its territory. As noted above, they are "personal" treaties. The State's borders may change, but providing it remains in being, the State benefits from the rights and must comply with the obligations under the treaty. Those obligations are, however, only with respect to matters within its own jurisdiction, that is, primarily matters within its national territory. If Greenland had seceded from Denmark it can hardly be doubted that Denmark would have remained a member State of the European Communities. It would not, however, have been liable for acts contrary to the European Treaties committed in

75. See Frederik Harhoff, "Greenland's withdrawal from the European Communities" (1983) 20 C.M.L.Rev. 13, and Friedl Weiss, "Greenland's withdrawal from the European Communities" (1985) 10 E.L.Rev. 173.

76. Such as treaties delineating boundaries, involving the joint management of waterways or the joint development of natural resources, or regulating frontier traffic.

Greenland because Greenland would have no longer been a part of Denmark's national territory and Denmark would have no longer been responsible for acts committed by the authorities and inhabitants there.[77]

This is the principle of "moving treaty boundaries". It is a principle which the European Communities have already applied, if in rather different circumstances. The unification of Germany on 3 October 1990 did not see two States merging to become another new State. Rather, it saw the extinction of the German Democratic Republic and the absorption of its territory into the German Federal Republic. The five states forming part of the GDR became *Länder* of the Federal Republic, with East Berlin becoming part of Land Berlin.[78] In response to this situation, the European Commission held that Community law would apply in its entirety to this new territory on the basis of the moving treaty boundaries principle. This view was accepted by the European Council and the other EC organs. None of the member States objected.[79]

Another earlier, and possibly more apposite, example of the principle in action can also be found in the context of the European Communities. At the time of the conclusion of the EC treaty in 1957, Algeria was a part of France. Indeed, it was expressly included in Article 227 of the Treaty besides the *départements français d'outre-mer*. No one, however, suggested that upon gaining its independence in 1962 Algeria became a member State of the EEC.[80] On this basis, if Scotland seceded from the United Kingdom the rump UK would remain a member State of the European Union, but Community law would cease to be applicable in respect of the territory of the newly independent State of Scotland. Scotland forms a part of the territory of the European Union because it is a part of the United Kingdom. If it ceased to form part of the UK, it would cease to be part of the EU.

I. Scottish admission to the European Union

Given this, then, an independent Scotland would have to apply for membership of the European Union in compliance with the procedure set out in Article 49 of the Treaty on European Union.[81] There is no reason to

77. Neither would the newly independent State of Greenland be liable for acts contrary to the European treaties because, as has been shown, it would not have succeeded to Denmark's membership of the EC.

78. See R. W. Piotowicz, "the Arithmetic of German Unification: Three into One Does Go" (1991) 40 I.C.L.Q. 635 and J. A. Frowein, "The reunification of Germany" (1992) 86 A.J.I.L. 152.

79. Frowein, *ibid*, at p.159.

80. See P. Tavernier, "Aspects juridiques des relations économiques entre la CEE et l'Algérie" (1972) 8 R.T.D.E. 1.

81. This is not to say that some interim arrangement might apply in the meantime between Scotland and the European Union, but such an agreement would be at the EU's discretion.

think that Scotland's application would be refused, but the situation might not be ideal from it standpoint. For a start, since membership is only conferred on an applicant by a unanimous vote of the Council of the European Union, then the rump United Kingdom might threaten to veto Scotland's application, even if the threat was not carried out in practice. Even once it had the unanimous support of the existing member States, Scotland would have to negotiate the terms of its accession to the EU. Given that an independent Scotland would have considerably less political clout in Brussels than the UK has to date, Scotland might well lose some of the benefits that it has enjoyed as part of the United Kingdom.

Scotland would almost definitely lose its share of the United Kingdom's budget rebate, negotiated so tortuously by Margaret Thatcher in the 1980s. It might also lose the generous EU structural funds for the Highlands and Islands that were negotiated against the odds by Tony Blair at the Berlin summit of March 1999. On top of that, EU entry might well take time and would need to be ratified by the national parliaments of all the member States. And all this would take place in a political climate that has not fully prepared for the institutional changes that are necessary to accommodate an expanded European Union. Scotland could well find itself jostling with countries like Poland, Hungary and Estonia for priority attention.

Much of this discussion is speculation, but the tentative conclusion that can be drawn from an analysis of the applicable law and practice is that an independent Scotland's position in Europe cannot be taken for granted. Were Scotland to gain independence, it would be the rump UK, not Scotland, that would inherit membership of the EU. Scotland's subsequent route to UK membership could well be a tortuous one. The SNP's use of the phrase "independence in Europe" seeks to persuade the Scottish electorate that it can have its cake and eat it; that Scotland can have both the benefits of independence and the security of membership of the European Union. However, like many political slogans, the phrase misleads. The real situation is that Scotland might end up with all the insecurities of independence and none of the benefits of EU membership.