

Legal Issues Surrounding the Referendum on Independence for Scotland

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The 2014 referendum: Towards a consensual process – The Edinburgh Agreement: framing the referendum process – Process rules and key issues – After the referendum: Scotland's status under international law – Secession under international law – Membership of international organisations, especially the European Union

INTRODUCTION

On 18 September 2014 a referendum will be held in Scotland. It will pose the following question to the people: 'Should Scotland be an independent country?' If a majority of voters say yes to this proposition Scotland will withdraw from the United Kingdom (UK), ending a union formed in 1707 and offering an unclear future for one of Europe's oldest nation states. The significance of this process for other European states and for the European Union (EU) project itself is also considerable. Never before has part of an EU member state broken away while simultaneously seeking to remain a member of the EU as a new state. Important questions arise. The UK is an important member; would its influence within the EU diminish with the loss of an important part of its territory and territorial waters? Will Scottish independence offer encouragement to other highly mobilised sub-state nationalist movements in Belgium and Spain for example, while providing a precedent for access to international and European institutions for secessionist territories? These questions are political in nature and rather than attempt to answer them directly, this paper will address the legal context which must condition how such questions are addressed.

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We will look first at the domestic constitutional situation in the United Kingdom. It is notable that an intergovernmental agreement has been reached by the UK and Scottish Governments setting out a framework for the process rules which will govern the referendum. This is itself remarkable. The UK Government has entered consensually, if somewhat reluctantly, into a process which could lead to the break-up of the state, a level of acquiescence which is itself unprecedented in the EU context. We will consider the key elements of the referendum process which are being set out in detailed legislation by the Scottish Parliament, assessing the prospects for a fair constitutional referendum. Secondly, we will turn to the possible implications of a majority yes vote for Scotland and the United Kingdom under international law. Would Scottish independence be characterised by the international community as a case of secession or as bringing about the dissolution of the UK? What challenges would Scotland face in seeking recognition as a new state and in succeeding to the UK's international obligations? And, most crucially, how would an independent Scotland come to take up membership of international institutions, in particular the United Nations and the EU?

THE 2014 REFERENDUM: TOWARDS A CONSENSUAL PROCESS

Constitutional background

The referendum has been a central feature of recent Scottish constitutional history. An attempt to introduce devolution in 1979 failed following a referendum in which the threshold for support was not met.¹ This failure led to an extra-parliamentary campaign for devolution through the 1980s and 1990s. This culminated in another referendum in 1997 in which the people of Scotland voted for the establishment of a Scottish Parliament with some limited tax-varying powers. The consequent Scotland Act 1998 set out the powers not only of the parliament, which was formally inaugurated on 1 July 1999, but also of the executive branch of the devolution settlement, the Scottish Executive. The Scottish Executive was renamed the Scottish Government by the Scotland Act 2012, which gives further powers to the Scottish Parliament and clarifies various other aspects of the relationship between the devolved Scottish institutions and the central UK institutions.

It is against this institutional context that the Scottish National Party (SNP) achieved an electoral breakthrough in 2007. It was elected as the largest party within the Scottish Parliament but, without an overall majority of seats, it operated as a minority government from 2007 to 2011. A referendum was proposed

¹ 51.6% voted yes, but on a turnout of 63.8% this fell short of the required 40% of registered voters needed for the Scotland Act 1978 to be implemented.

in a White Paper, *Your Scotland, Your Voice: A National Conversation* in 2009,² which also established a 'national conversation', seeking to engage the public and civil society in debating Scotland's constitutional future. But the proposal went no further than this. Without majority support in the Scottish Parliament, in the end no referendum bill was introduced.

The SNP was however able to form a new government in 2011, this time with an overall parliamentary majority. The party had fought the Scottish general election that year with a manifesto commitment to hold a referendum on independence³ and in January 2012 the Scottish Government announced its intention to do so in the autumn of 2014. A consultation paper (*Your Scotland, Your Referendum*) was published, setting out detailed proposals for how this referendum would be organised and regulated. A draft Referendum Bill to this effect was published which asserted the authority of the Scottish Parliament to hold a referendum, while a public consultation exercise was embarked upon.⁴ The United Kingdom Government immediately challenged the legislative competence of the Scottish Parliament to pass this bill, and in doing so launched its own consultation process.⁵

The first half of 2012 was consumed by debate about the powers of the Scottish Parliament to authorise a referendum under the Scotland Act 1998. Commentators differed sharply on this point,⁶ and for a time it appeared as if the issue might find its way to the United Kingdom Supreme Court for adjudication. The Scottish Government was itself guarded about the nature of the Scottish Parliament's powers, going no further than to suggest that the Scottish Parliament had power to hold a consultative rather than a binding referendum, since the union between Scotland and England was a reserved matter under the Scotland Act 1998.⁷

² <www.scotland.gov.uk/Publications/2009/11/26155932/0>, visited 23 July 2013.

³ 'Re-Elect: A Scottish Government Working for Scotland', SNP Manifesto, 2011 <http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf>, visited 23 July 2013.

⁴ 'Your Scotland, Your Referendum: A Consultation Document', Scottish Government, 25 Jan. 2012, <www.scotland.gov.uk/Publications/2012/01/1006>, visited 23 July 2013.

⁵ 'Facilitating a Legal, Fair and Decisive Referendum in Scotland', Scotland Office, Office of the Advocate-General for Scotland and Cabinet Office of the UK Government, 19 Feb. 2013 <www.gov.uk/government/policies/facilitating-a-legal-fair-and-decisive-referendum-in-scotland>, visited 23 July 2013.

⁶ Contrast: Adam Tomkins, 'The Scottish Parliament and the Independence Referendum', *UK Constitutional Law Group blog*, 12 Jan. 2012, <<http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>>, visited 23 July 2013, with Gavin Anderson et al.: 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate', *UK Constitutional Law Group blog*, 31 Jan. 2012, <<http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>>, visited 23 July 2013.

⁷ In 'Your Scotland, Your Referendum', *supra* n. 4, paras. 1.5-1.9, the Scottish Government stated its preference for a short, direct question about independence, and took the view that there were suitable questions which would be within the legislative competence of the Scottish parliament.

It did however acknowledge the UK Government's publicly stated view that legislation for any form of referendum on independence would be outwith the existing powers of the Scottish Parliament.⁸

THE EDINBURGH AGREEMENT: FRAMING THE REFERENDUM PROCESS

In the end the two governments reached a settlement on 15 October 2012 when an agreement ('The Edinburgh Agreement'⁹) was signed. The governments agreed that the referendum should:

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people;
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.

The agreement and its associated 'memorandum of agreement' also confirmed that the referendum legislation to be passed by the Scottish Parliament should set the date of the referendum; the franchise; the wording of the question; rules on campaign financing; and miscellaneous other rules for the conduct of the referendum.

The agreement has been consolidated by formal legal authority from the UK executive and parliament. A draft Order in Council (a form of secondary legislation made by the UK Government and authorised by Section 30 of the Scotland Act 1998) was attached to the agreement.¹⁰ This Section 30 Order devolves to the Scottish Parliament the competence to legislate for a referendum which must be held before the end of 2014.¹¹ It is of considerable significance not only that the UK Government has accepted the fundamental principle that the Scottish people have the right, by way of referendum, to determine whether or not they will remain within the United Kingdom, but that both governments have been able to reach agreement as to the referendum process, accepting that the detailed process rules should be set by the devolved institutions in Scotland. This contrasts sharply with

⁸'Your Scotland, Your Referendum', *supra* n. 4, para. 1.7.

⁹Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 Oct. 2012, <www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>, visited 23 July 2013.

¹⁰This has now been passed by the UK Parliament: the Scotland Act 1998 (Modification of Schedule 5) Order 2013 (S.I. 2013/242) (hereafter, 'the Section 30 Order').

¹¹The Section 30 Order, para. 3.

so many states where the issue of secessionist or sovereignist referendums has been the source of such deep and protracted disagreement.¹²

Already the procedural rules for the referendum have been taking shape, with one bill now enacted and the other before the Scottish Parliament. The franchise rules for the referendum are set out in the Scottish Independence Referendum (Franchise) Act ('the Franchise Act'), introduced into the Scottish Parliament on 11 March, and enacted on 7 August. This bill required to pass through the Scottish Parliament quickly to facilitate the registration of voters, particularly new voters since the franchise for the referendum is extended to 16 and 17 year olds. The Scottish Independence Referendum Bill was introduced into the parliament on 21 March 2013 and is expected to be passed in November.¹³

PROCESS RULES – KEY ISSUES

We will now address some of the key process issues.

Franchise

Both governments agreed in the Edinburgh Agreement that it was for the Scottish Government to propose – and the Scottish Parliament to determine – what the franchise for a referendum on Scottish independence should be. The Referendum Bill provides that details of who can vote in the referendum are as contained in the Franchise Act.¹⁴ The general franchise demarcation in the latter Act is uncontroversial. The franchise for the referendum is the same as for Scottish Parliament elections and local government elections,¹⁵ mirroring the franchise used in the Scottish devolution referendum in 1997. One consequence is that EU and Commonwealth citizens who are resident in Scotland will be able to vote in the inde-

¹²Two very pertinent comparators are: Canada, in respect of which see the battle for control of the referendum process in Quebec: Bill C-20, 2nd sess, 36th parliament, 48 Elizabeth II, 1999 (as passed by the House of Commons 15 March 2000) (Clarity Act 2000) s 1(1) on the one hand, and An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec state, Quebec National Assembly, 1st sess, 36th leg Bill 99 (assented to 13 Dec. 2000) s 3, on the other; and Spain: see Elisenda Casanas Adam, 'Another Independence Referendum in 2014? Recent Developments in Catalonia', *Scottish Constitutional Futures Forum blog*, <www.scottishconstitutional-futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/1031/Elisenda-Casanas-Adams-Another-Independence-Referendum-in-2014-Recent-Developments-in-Catalonia.aspx>, visited 23 July 2013. See also Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford, Oxford University Press 2004), chapter 8.

¹³Scottish Parliament Bill 25 [as introduced] Session 4 (2013). (The bill is hereafter cited as 'Referendum Bill'.)

¹⁴Referendum Bill, section 2.

¹⁵Franchise Act, section 2.

pendence referendum. This is a notable privilege; for example, EU citizens domiciled in the Netherlands at the time of the referendum on the draft Constitutional Treaty were not accorded such a right.

One major difference from the 1997 franchise, however, is the provision in the Franchise Bill extending the vote to those aged 16 and 17.¹⁶ This is a radical departure; never before have people under the age of 18 been entitled to vote in a major British election or referendum.¹⁷ Another notable provision of the Franchise Act excludes convicted persons from voting for the period during which they are detained in a penal institution.¹⁸ This exclusion will apply even if the current ban on prisoners voting is modified in relation to elections prior to the date of the referendum. This has been a controversial topic in the United Kingdom ever since the European Court of Human Rights ruled that the blanket ban on prisoner voting in UK elections violated Article 3 of Protocol 1 of the European Convention on Human Rights.¹⁹ It would seem, however, that section 3 of the Franchise Bill does not violate the Convention since A3P1 guarantees 'the free expression of the opinion of the people in *the choice of the legislature*' (emphasis added), which is generally taken to refer exclusively to parliamentary elections and to exclude referendums.²⁰

The referendum question

The UK Government has taken great interest in the referendum question itself and agreement on the parameters of the question was central to the former agreeing to the Section 30 Order. The Scottish Government in the course of 2012 mooted the possibility of a multi-option referendum, offering voters three options: independence, the status quo, and possibly a third option of enhanced devolution, or 'devo-max' as it came to be known. The UK Government was adamant that the referendum should be held on the issue of independence only. The Section 30 Order provides that the referendum is to be concerned with 'the independence of Scotland from the rest of the United Kingdom' and that there can be only 'one

¹⁶ Franchise Act, section 2(1)(a).

¹⁷ The age of 18 as the threshold for UK elections is set out in the Representation of the People Act 1983, section 1(d).

¹⁸ Franchise Bill, section 3.

¹⁹ *Hirst v. the United Kingdom* (No. 2) [2005] ECHR 681.

²⁰ Stephen Tierney, 'Possible Vires Issue in Relation to Section 3 of the Scottish Independence Referendum (Franchise) Bill', Advisory Paper submitted to the Scottish Parliament Referendum Bill Committee, 18 March 2013, <www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/20130321_Letter_to_DFM_on_prisoners_voting_rights.pdf>, visited 23 July 2013. The exclusion does seem likely to be challenged in the Scottish courts: Severin Carrell, 'Scottish Prisoners Challenge Ban on Voting in Independence Referendum', *The Guardian*, 28 June 2013.

ballot paper at the referendum [...] giv[ing] the voter a choice between only two responses.²¹

The draft question set by the Scottish Government in 'Your Scotland, Your Referendum' has also been subject to, and altered in consequence of, independent oversight. The regime for independent assessment of referendum questions in the UK is set out in the Political Parties, Elections and Referendums Act 2000 (PPERA), a UK wide statute covering electoral practice. Where a bill is introduced into the UK Parliament which provides for the holding of a referendum, and this bill specifies the wording of the referendum question, the Commission 'shall consider the wording of the referendum question, and shall publish a statement of any views of the Commission as to the intelligibility of that question.'²² Notably, the Electoral Commission goes about its task of assessing intelligibility by convening focus groups etc. to test the question empirically, assessing how well it is understood by voters.²³

Initially, however, the regulatory regime in relation to the Scottish independence referendum was not clear since PERA does not apply to referendums organised by the Scottish Parliament. This meant that the Electoral Commission had no legally guaranteed role in relation to the 2014 referendum. Despite this, following conclusion of the Edinburgh Agreement, the Scottish Government decided to send its proposed question for review to the Electoral Commission. The proposed question at this stage was: 'Do you agree that Scotland should be an independent country?' The Commission in its subsequent report took issue with the phrase 'do you agree', suggesting it could lead people to vote yes. It therefore suggested a change to the question.²⁴ This has been accepted by the Scottish Government and the new question is now contained in the Referendum Bill. The question is: 'Should Scotland be an independent country? Yes/No.'²⁵

Information to, and participation by, citizens

The Referendum Bill also formalises a more general oversight role for the Electoral Commission. Among a number of statutory duties the Commission is given

²¹ Section 30 Order, para. 3.

²² PERA, section 104(2).

²³ E.g., Electoral Commission, 'Referendum on the UK Parliamentary Voting System: Report of Views of the Electoral Commission on the Proposed Referendum Question', 2010 <www.electoralcommission.org.uk/__data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf>, visited 23 July, 2013; Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question', 30 Jan. 2013 <www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-on-advice-on-referendum-question.pdf>, visited 23 July, 2013.

²⁴ Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', *supra* n. 23.

²⁵ Referendum Bill, section 1.

the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum.²⁶ This is likely to be a challenging role, particularly in explaining the referendum question. In March 2013, John McCormick (Electoral Commissioner for Scotland) and Andy O'Neill (Head of Office Scotland for the Electoral Commission) provided evidence to the Referendum Bill Committee in the Scottish Parliament in relation to this draft provision and fielded questions from committee members on how best to register and inform voters, particularly the new category of young voters; how best to mobilise an information campaign, using new techniques through social media etc.; and how best to overcome apathy among minority groups.²⁷ The most difficult task for the commission would seem to be in promoting understanding of the question. There is already a heated debate between the UK and Scottish Governments as to what 'independence' will mean for Scotland, one issue being how easily Scotland would access membership of international organisations (*see infra*, 'After the referendum'). It is hard to see how the Electoral Commission could attempt to produce an objective account of a number of highly technical and fiercely contested issues, concerning not only international relations but also defence, economic relations, the question of a currency union, the disentanglement of the welfare state, national debt etc., particularly when so many features of the post-referendum landscape would be contingent upon negotiations between the two governments in the event of a majority yes vote. In further evidence to the Committee in May Mr McCormick said that the commission would 'not seek to explain to voters what independence means' but would offer information 'aimed at ensuring that all eligible electors are registered and know how to cast their vote.'²⁸

Referendum period/moratorium

The Referendum Bill sets a regulatory period of 16 weeks before the referendum within which the statutory regime of campaign regulation will take effect, setting limits on campaign expenditure.²⁹ Since the referendum will still be one year away by the time the Referendum Bill is passed, this leaves a lengthy period within which the referendum campaigns will not be subject to this detailed model of regulation. Another set of regulations introduce what is known as a 'purdah' period. This is common in UK elections. Under PPERA there is to be no promotional activity by government, local authorities or public bodies during the 28 day

²⁶ Referendum Bill, section 21.

²⁷ Scottish Parliament Referendum (Scotland) Bill Committee, 21 March 2013, Official Report, col. 263-281

²⁸ Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col. 431.

²⁹ Referendum Bill, section 10 and Schedule 4, Part 3.

‘relevant period’ prior to an election poll. This period will run in parallel with the last four weeks of the regulatory period. This provision is largely replicated in relation to the Scottish Government and a wide range of other public bodies which must not engage in promotional activity in the four weeks prior to the referendum.³⁰ The UK Government also committed to be bound by equivalent restrictions in the Edinburgh Agreement.³¹

FUNDING AND SPENDING RULES

Funding

Efforts are made within the Referendum Bill to ensure equality of arms between the two campaign groups. Each side in the campaign can apply to the Electoral Commission to be appointed as one of two ‘designated organisations’, and both the Yes Scotland and Better Together campaign groups have intimated their respective intention to do so. One notable feature of the Referendum Bill is that there is to be no public funding for the two designated organisations. This is a conscious departure from PPERA which does offer public funding for referendums. The decision not to fund the 2014 referendum was a political one taken by the Scottish Government. It has not resulted in any significant disagreement, presumably because both campaigns expect to be amply funded by private donors.

The Edinburgh Agreement also covers funding and expenditure issues.³² Building on this, the Referendum Bill contains detailed provisions on a range of funding issues. A ‘Campaign Rules’ provision creates a regulatory regime through which funding, spending and reporting will be administered.³³ This is generally in line with standard PPERA rules. A ‘Control of Donations’ provision³⁴ indicates what types of donation are allowed and what constitutes a ‘permissible donor’.³⁵ Under these provisions an application must be made for this status. There are also reporting requirements which mean that reports on donations received will require to be prepared every four weeks.³⁶ These rules will again be overseen by the Electoral Commission.

³⁰ Referendum Bill, section 10 and Schedule 4, para. 25.

³¹ For comment on this by Deputy First Minister Nicola Sturgeon, *see* Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols. 554 and 560.

³² Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, *supra* n. 9, paras. 24–29.

³³ Referendum Bill, section 10 and Schedule 4.

³⁴ Referendum Bill, section 10 and Schedule 4, Part 5.

³⁵ Referendum Bill, section 10 and Schedule 4, para. 1(2).

³⁶ Referendum Bill, section 10 and Schedule 4, para. 41.

Spending limits

Within the Referendum Bill there are four categories of actors entitled to spend money during the campaign period: designated organisations (which can each spend up to GBP 1,500,000);³⁷ political parties as ‘permitted participants’;³⁸ other ‘permitted participants’ who may spend up to GBP 150,000;³⁹ and other participants spending less than GBP 10,000, which means they do not require to register as permitted participants.

Political parties as ‘permitted participants’ have a spending limit of either GBP 3,000,000 multiplied by their percentage share of the vote in the Scottish Parliament election of 2011, or a minimum of GBP 150,000. By the formula for political parties the distribution between political parties represented in the Scottish Parliament is as follows:

Scottish National Party: GBP 1,344,000
 Scottish Labour Party: GBP 834,000
 Scottish Conservative & Unionist Party: GBP 396,000
 Scottish Liberal Democrats: GBP 201,000
 Scottish Green Party: GBP 150,000

The Referendum Bill also defines ‘campaign expenses’. These include campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media relations, transport, rallies, public meetings or other events. This also extends to notional expenses such as use of/sum of property, services or facilities etc.⁴⁰ There are also detailed rules on reporting of expenditure.⁴¹

It seems that these rules will lead to a generally level playing field in terms of expenditure within the regulatory period. For example, the total spending limit for the two pro-independence parties (SNP and Greens) is almost equal to that for the three unionist parties – Labour, Conservative and Liberal Democrat. But given that these spending limits only apply in the 16 weeks before the referendum, arguably this leaves the possibility that one side could heavily out-spend the other before this period begins.⁴² It should be observed, however, that these rules

³⁷ Referendum Bill, section 10 and Schedule 4, para. 18(1).

³⁸ Referendum Bill, section 10 and Schedule 4, para. 18(1).

³⁹ Referendum Bill, section 10 and Schedule 4, para. 17.

⁴⁰ Referendum Bill, section 10 and Schedule 4, paras. 9 and 10.

⁴¹ Referendum Bill, section 10 and Schedule 4, paras. 20–24. The Electoral Commission has a power to issue guidance on the different kinds of expenses that qualify as campaign expenses: section 10 and Schedule 4, para. 10.

⁴² Both campaign leaders in evidence to the Committee also recognised that the GBP 150,000 limit for permitted participants presented an opportunity for individuals to spend large sums of money. See, Blair McDougall, Campaign Director, ‘Better Together’, evidence to Scottish Parlia-

reflect the spending limit recommended by the independent Electoral Commission.⁴³

Finally, the Referendum Bill provides for civil sanctions⁴⁴ and criminal offences⁴⁵ in relation to various categories of electoral malpractice and the Electoral Commission is given an important role in enforcing the former.

AFTER THE REFERENDUM: INTERNATIONAL LAW ISSUES

In light of the Edinburgh Agreement the UK Government is committed to respecting the result of the referendum and, if there is a majority Yes vote, it seems certain that it will engage in negotiations towards independence. But as the Electoral Commission has suggested, there would still be a range of issues to be resolved between Scotland and the UK concerning the terms of independence⁴⁶ which could mean that these negotiations will by no means be straightforward. The Electoral Commission recommends that the UK and Scottish Governments 'should clarify what process will follow the referendum in sufficient detail to inform people what will happen if most voters vote "Yes" and what will happen if most voters vote "No".'⁴⁷ They go so far as to recommend that both governments 'should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative – two different explanations – could cause confusion for voters rather than make things clearer.'⁴⁸

The Scottish Government intends to publish a White Paper in the autumn of 2013 elaborating in detail its independence proposal. Already we have clues to suggest that the Scottish Government aspires towards maintaining some aspects of union with the UK, including possibly some shared institutions. For example, Alex Salmond, the First Minister of Scotland, in a speech in January 2012 said: 'when you consider our shared economic interests, our cultural ties, our many friendships and family relationships, one thing becomes clear. After Scotland becomes independent, we will share more than a monarchy and a currency. We will share a social union.'⁴⁹

ment Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols. 472 and 477; Blair Jenkins, Campaign Director, 'Yes Scotland', evidence to Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col. 477.

⁴³ Electoral Commission, 'Electoral Commission advice on spending limits for the referendum on independence for Scotland', 30 January 2013.

⁴⁴ Referendum Bill, Schedule 6.

⁴⁵ Referendum Bill, Schedule 7.

⁴⁶ Electoral Commission, 'Referendum on independence for Scotland', *supra* n. 23, para. 5.41.

⁴⁷ Electoral Commission, 'Referendum on independence for Scotland', *supra* n. 23, para. 5.42.

⁴⁸ Electoral Commission, 'Referendum on independence for Scotland', *supra* n. 23, para. 5.43.

⁴⁹ Alex Salmond, 'An Independent Scotland Will Be a Beacon of Fairness', *The Guardian*, 23 Jan. 2013. See also 'Your Scotland, Your Referendum', *supra* n. 4, Foreword by Alex Salmond.

It is impossible at this time to predict how post-referendum negotiations between the two governments would go and what if any elements of union would survive Scottish independence.⁵⁰ In the remainder of this article, therefore, we will instead try to cast light on the position of an independent Scotland under international law.

SCOTLAND'S STATUS UNDER INTERNATIONAL LAW

An independent Scotland would be a new state in international law. How then would it take its place within the international community, making the transition to membership of international organisations, in particular the European Union? This is a major question in the political campaign leading up to the 2014 referendum. But it is a question that is difficult to evaluate for two reasons. The first is the political heat which it has generated. It is obviously very important for the Scottish Government and the Yes Scotland campaign to emphasise the ease with which Scotland would move to statehood, succeed to the UK's international treaty rights and obligations, and accede to membership of international organisations. Conversely, it is in the interests of the UK Government and the Better Together campaign to make voters focus upon the challenges of separation, one of which they contend is the difficult, time-consuming and potentially costly pathway to international institutions within which Scotland may lose some of the advantages, such as opt outs from aspects of the EU treaties which it currently enjoys as part of the United Kingdom. Secondly, some of the issues involved are currently indeterminable. This is particularly the case in relation to the European Union. The debate about international institutions has tended to focus on membership of the EU given the political and economic salience of Europe for Scotland; but it is also the case that the issues are particularly complex in this regard since the situation of a territory leaving an existing EU member state while seeking to retain membership of the EU is itself unprecedented.

We will address the following issues in order:

- how to characterise Scotland's move to statehood: dissolution, secession or negotiated independence;
- secession under international law;
- recognition;
- succession;
- membership of international institutions;

⁵⁰ See generally Tom Mullen and Stephen Tierney, 'Scotland's Constitutional Future: The Legal Issues' (5 June 2012), Edinburgh School of Law Research Paper No. 2013/16, <<http://ssrn.com/abstract=2235348>> or <<http://dx.doi.org/10.2139/ssrn.2235348>>, visited 23 July 2013.

- the special case of the EU.

EMERGENCE OF SCOTLAND AS A NEW STATE

In the first place, how should the emergence of Scotland as a new state be characterised under international law, and how is it likely to be characterised by the international community? Specifically, would the withdrawal of Scotland from the United Kingdom be treated as a case of secession, or would the United Kingdom be considered to have dissolved? Secession is a process whereby part of the territory of an existing state and its people separate from that state, leading to the creation of a new state.⁵¹ In a case of state dissolution the United Kingdom would cease to exist as a legal person and two, or more, entirely new entities would emerge. Put another way, will the remaining United Kingdom be treated as a continuing state, or would there be a situation of state succession for the UK as well as for Scotland?

The latter situation (state dissolution) seems very unlikely. A precedent for state dissolution is the collapse of the Socialist Federal Republic of Yugoslavia (SFRY). Here the Federal Republic of Yugoslavia (Serbia and Montenegro) claimed to be the legal and political continuation of SFRY. The Badinter Commission, established to assess legal issues arising out of the Yugoslav crisis, in its first Opinion took the view that the state was ‘in the process of dissolution’, a decision which then led to the various other Opinions on recognition of the former republics etc.⁵² The division of Czechoslovakia was also treated as dissolution of the state. The two emerging states – the Czech Republic and Slovakia – reached agreement to the effect that Czechoslovakia would cease to exist and that neither would claim to be the continuing state.⁵³

With so few precedents, no general treaty rule applicable to all situations, and the intensely political nature of state collapse/secession, there is no hard and fast line demarcating the point at which loss of territory results in dissolution rather than secession, but the general predisposition of international law is to favour state continuation where possible. Indeed, the fact that the Czech Re-

⁵¹ See, for example, the characterisation of secession by the Supreme Court of Canada when addressing the analogous case of Quebec, as ‘the effort of a group or section of a State to withdraw itself from the political and constitutional authority of that State, with a view to achieving statehood for a new territorial unit on the international plane’, Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 83.

⁵² Badinter, Opinion No. 1, 31 ILM (1992), 1494. See Allain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’, 3 *European Journal of International Law* (1992) p. 178-185.

⁵³ Anthony Aust, *Handbook of International Law* (Cambridge, Cambridge University Press 2010) p. 370-371.

public and Slovakia believed it necessary to say, expressly, that there would be no continuation of the old Czechoslovakia and, instead, that they were forming two successor states suggests that continuity is otherwise the default position.⁵⁴ James Crawford has observed that ‘a state is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three.’⁵⁵ The loss by Pakistan of over half its population in the secession of Bangladesh did not result in dissolution. Also, despite the loss of the significant territory of South Sudan (its population level was disputed but constituted between 22-30% of the Republic of Sudan before the south gained its independence), the Republic of Sudan continues its international personality. Certainly Scotland constitutes a significant area (almost one third) of the United Kingdom’s land mass, but it contains less than 10% of the population. The territories of England, Wales and Northern Ireland would all still be contained within the United Kingdom and the UK would retain ‘its principal governmental institutions.’⁵⁶ These factors suggest a strong presumption in favour of the UK’s continuation.

The question of dissolution/secession has been considered by James Crawford in the opinion cited above and written jointly with Alan Boyle. This was commissioned by the United Kingdom government and addresses the international legal aspects arising from Scottish independence. As noted, it was published as an annex to a broader report by the UK Government itself. The report is a political document which seeks to emphasise that an independent Scotland would face considerable difficulties, not least in seeking membership of international organisations. An important caveat then is that this paper has a political purpose and seeks to influence the referendum debate. That said, the annexed Opinion offered by the highly respected Professors Crawford and Boyle should be taken on its own merits. Crawford and Boyle consider not only the separation versus dissolution scenario but also a third possibility, reversion, whereby Scotland would somehow revert to its pre-1707 status as an independent state. They consider it very unlikely that Scottish independence would be widely understood in this way, and in any case such a conceptualization would have limited relevance since the vast majority of international obligations to which Scotland would wish to succeed, including membership of international institutions, have been entered into by the United Kingdom much more recently.

⁵⁴ I am grateful to Tom Grant for this observation.

⁵⁵ James Crawford, *Creation of States in International Law*, 2nd edn. (Oxford, Oxford University Press 2006) p. 417.

⁵⁶ James Crawford and Alan Boyle, ‘Referendum on the Independence of Scotland – International Law Aspects’, Opinion published in annex to the UK Government’s ‘Report on “Devolution and the Implications of Scottish Independence”’, UK Government, Cm 8554, Feb. 2013, para. 69. (The Opinion is hereafter cited as ‘Crawford and Boyle’.)

Crawford and Boyle distinguish the Scottish/UK situation from the SFRY and Czechoslovakia cases, arguing that it is highly unlikely either that the United Kingdom would agree to a Czech-Slovak scenario upon the departure of Scotland or that the UK's claim to be the continuing UK state would be seriously contested. The most obvious analogy to the independence of Scotland it seems is the withdrawal of the Irish Free State from the United Kingdom which did not affect the continuation of the United Kingdom as a state.⁵⁷

Any risk that the independence of Scotland could be seen as bringing about a dissolution of the state could also be greatly reduced by an agreement between Scotland and the UK. This is clearly feasible. In the Edinburgh Agreement we see a consensual approach to the referendum process. If this level of pragmatism were to continue into negotiations towards independence then an explicit declaration that both parties consider the UK to be a continuing state could possibly be secured. Indeed, it seems likely that a fundamental condition for such negotiations on the part of the UK Government would be the Scottish Government's recognition of the UK's continuation as the UK state, and it is hard to see how it would be in the interests of the Scottish Government to press the dissolution argument. This situation is not without precedent. The continuation of Russia as the USSR state was aided by agreement of the other members of the Commonwealth of Independent States.⁵⁸ It is not sufficient to say that the SFRY was deemed to have dissolved merely because of the lack of any such agreement, but it is notable that consensus among the republics was lacking in this case.⁵⁹

In the end, the response by other states and international organisations to the independence of Scotland from the UK will be heavily influenced by political considerations. It would seem that the political significance of the UK as a member of the EU, NATO and the Security Council of the United Nations would all be important factors in encouraging others to view it as the continuing state. The fact that Russia could continue as a permanent member of the Security Council, avoiding the need to revisit how membership of that body is constituted, was without doubt a significant factor in the international community treating Russia as the USSR's continuation. Similar considerations may well attend the status of the UK were Scottish independence to come about.⁶⁰ The examples of Sudan already mentioned and of Ethiopia continuing after the loss of Eritrea also bolster this argument. It is, therefore, highly likely that Scottish withdrawal from the United Kingdom would be treated by the international community as a case

⁵⁷ Matthew Happold, 'Independence: In Or out of Europe? An Independent Scotland and the European Union', 49 *International and Comparative Law Quarterly* (2000) p. 15 at p. 19-20; Crawford and Boyle, *supra* n. 56, para.68.

⁵⁸ On Russia see Crawford and Boyle, *supra* n. 56, para. 57.

⁵⁹ Badinter, *supra* n. 52.

⁶⁰ See also Crawford and Boyle, *supra* n. 56, paras. 69-70; para. 131.

of secession from the continuing state of the United Kingdom, although, as we will see, Crawford and Boyle's characterization of this as 'negotiated independence'⁶¹ may well have a significant bearing in how Scotland would be treated by the international community, distinguishing the Scottish case significantly from the more typical problem under international law of 'unilateral secession'.

SECESSION UNDER INTERNATIONAL LAW

If there is no attempt by the United Kingdom to oppose independence this should in turn avoid the need for any serious debate about the legality of the act of secession under international law which focuses upon secession as a unilateral act invariably opposed by the host state. Nonetheless, following a yes vote in the referendum, in the event that no agreement results from negotiations between the two governments as to Scotland's independence from the United Kingdom (and while this may seem unlikely at present, we ought not to discount the possibility), it is relevant to consider the international law position on unilateral secession.

The International Court of Justice in 2010 offered an advisory opinion on the Kosovo declaration of independence. The majority on the Court took the view that international law contains no 'prohibition on declarations of independence' from a host state, but nor does it expressly authorise such declarations.⁶² Notably, the Advisory Opinion of the Court is limited to dealing with the declaration of independence rather than with the lawfulness of secession itself.⁶³ But arguments before the Court submitted by other states are illuminating. While most states which offered a view did not consider international law to contain a right to secede, some argued that in limited circumstances such a right does exist. For example, the Netherlands argued that secession was justified in the Kosovo case because of the systematic violation of civil and human rights of Kosovans over a long period;⁶⁴ a position which echoes the 'remedial right' of secession articulated in normative terms by political theorists.⁶⁵ This argument, however, was not addressed by the Court⁶⁶ which focussed attention on declarations of independence rather than

⁶¹ Crawford and Boyle, *supra* n. 56, para. 90.

⁶² International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion) 22 July 2010 (hereafter 'Kosovo Advisory Opinion'), paras. 79-84.

⁶³ Kosovo Advisory Opinion, *supra* n. 62, para. 83.

⁶⁴ See Kosovo Advisory Opinion, Written Statement of the Kingdom of the Netherlands, <www.icj-cij.org/docket/files/141/15652.pdf>, visited 23 July 2013.

⁶⁵ Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford, Oxford University Press 2004).

⁶⁶ Notably, the ICJ specifically refused to address the issue of remedial secession: Kosovo Advisory Opinion, *supra* n. 62, para. 83.

acts of secession themselves, and kept narrowly to the specifics of the Kosovo case and its unique international situation. We do, however, find these issues addressed by the Supreme Court of Canada (SCC) in the Quebec Secession Reference, where some credence seems to be given to the remedial theory as applicable in exceptional circumstances. This case emerged from the referendum held in Quebec in 1995. The Court was asked three questions on the domestic and international legality of Quebec Secession. The one I will address here is the second question as to whether the Quebec government had the right to effect the secession of Quebec from Canada unilaterally.⁶⁷

The Court's opinion, rendered as a collective decision of the whole Court, expressed the view, similar to that later voiced by the ICJ, that international law neither gives an explicit right of secession nor expressly denies it.⁶⁸ It did, however, suggest that what it called 'unilateral secession' was not authorised under international law, something which could be deduced from the fact that secession is only authorised in exceptional circumstances, namely where a community within a state is subject to oppression.⁶⁹ The Court took the view that, in the absence of such oppression, and where unilateral secession is incompatible with the domestic constitution of the state in question, international law would not expressly authorise secession.⁷⁰ The Canadian constitution facilitated a representative system of government within which 'residents of the province freely make political choices and pursue economic, social and cultural development.'⁷¹ In such a situation Quebec did not have a right to secede unilaterally under international law,⁷² leaving international law neutral on the issue, a conclusion which led the Court to devote most of the Opinion to a consideration of the domestic constitutional position of Canada in relation to the secession of Quebec.

One other general point to emerge from the Kosovo Opinion, however, is that while international law does not proscribe secession, it does take a view on how

⁶⁷ Reference re Secession of Quebec [1998] 2 S.C.R. 217 (hereafter 'Quebec Reference'). Both governments sought learned opinions on the international law issues. For a useful collection of these, see Anne Bayefsky (ed.) *Self-Determination in International Law. Quebec and Lessons: Legal Opinions* (Springer 2000).

⁶⁸ Quebec Reference, *supra* n. 67, para. 112.

⁶⁹ Quebec Reference, *supra* n. 67, para. 112.

⁷⁰ It should be noted however that the Supreme Court of Canada's excursion into the 'remedial secession' doctrine seems intended to explore whether secession under some circumstances becomes a right. The discussion of the remedial secession doctrine was tangential to the main Opinion and the Court remained fairly evasive in the language it used. In any event, even assuming some remedial right does exist under international law, this does not necessarily mean that secession is not permissible where 'remedial circumstances' are not met; but simply that it is not a right, but nor is it prohibited. I am grateful to Jure Vidmar for discussion of this point.

⁷¹ Quebec Reference, *supra* n. 67, para. 136.

⁷² Quebec Reference, *supra* n. 67, para. 138.

an act of secession is effected. If unlawful force (involving an act of aggression by a third state⁷³) is used to achieve secession, international law applies the sanction of illegality to such an act.⁷⁴ Even in situations where there is no external act of aggression, but the conduct of the secessionist party is in breach of some fundamental rule, the Security Council may condemn a declaration of independence; but this the Court described as 'exceptional' and so 'no general prohibition against unilateral declarations of independence' can be inferred from cases like Southern Rhodesia.⁷⁵ The Scottish scenario clearly has nothing to do with use of force; nor does it involve grave breaches such as have attracted Security Council condemnation in the past. The neutral position therefore applies; international law would not prohibit a declaration of Scottish independence, but in a similar way to the situation of Quebec, nor would international law expressly authorise Scottish secession.

As with Quebec, the constitutional context is therefore crucial. And unlike attempts by many other sub-state peoples around the world, since the inauguration of the UN Charter, to secure independence by way of secession, a Scottish declaration of independence would, it seems, come with the consent of the United Kingdom in light of the Edinburgh Agreement. If there is a negotiated agreement between the two governments, or in any event provided the United Kingdom does not oppose the independence of Scotland, arguing it to be unlawful under international law, this should in turn avoid the need for any serious debate about the legality of the act of secession under international law.⁷⁶

RECOGNITION

One of the first tasks facing an independent Scotland would be to gain the recognition of other states. Recognition is itself a complex and contested area of international law. There is no institution authorised to determine definitively the legitimacy of claims to recognition as a new state. Indeed, the generally held view is that recognition is a uniquely political act, operating largely if not entirely at

⁷³ Kosovo Advisory Opinion, *supra* n. 62, para. 80.

⁷⁴ Kosovo Advisory Opinion, *supra* n. 62, para. 81.

⁷⁵ Kosovo Advisory Opinion, *supra* n. 62, para. 81. Indeed, the only such resolution adopted by the Security Council under Chapter VII was in relation to Southern Rhodesia's declaration of itself as a republic, and this came five years after it initially declared independence. UN Security Council Resolution 277, 18 March 1970 (although note also UN Security Council Resolution 216, 12 Nov. 1965).

⁷⁶ It is notable that Crawford and Boyle premise their Opinion 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.' Crawford and Boyle, *supra* n. 56, para. 14. Instead they characterise the most likely scenario as 'negotiated independence', paras. 22.2; 90.

the discretion of states. Therefore, the recognition of new states emerges from state practice on an individual basis, against the backdrop of international diplomacy; it is often of the greatest sensitivity and in some cases of the greatest importance to a state's own self-interest. The result is a decentralised practice from which it can be difficult for international lawyers to make much sense.

One starting point, albeit a not entirely helpful one, is the Montevideo Convention which establishes conditions a territory would need to meet to constitute a state.⁷⁷ Article 1 of the Convention does not mention recognition but a prohibition of premature recognition can arguably be deduced from the failure of a territory to satisfy the fundamental requirements of statehood set out in the Convention. In particular, the new state must be able to demonstrate that it exercises governmental control of a clearly defined piece of territory with a clearly defined population; and hence that it has the capacity to enter into relations with other states.⁷⁸ These are largely conditions of viability. It seems that Scotland would meet all of these criteria quite comfortably. While the Montevideo Convention has nothing explicit to say about recognition, some juridical rules have been emerging over the past two decades which, at least within Europe, go some way in attempting to prescribe when a recognising state should or should not offer recognition to a new state.⁷⁹ These stem largely from attempts in the 1990s to introduce some consistency to recognition of successor states in light of the collapse of the USSR and SFRY. To this end the European Communities in 1991 established Guidelines on the Recognition of New states. These guidelines established criteria not contained within the Montevideo Convention, although it should also be mentioned that these are non-binding and were not always followed in practice. The criteria were stated in fairly general terms but they included requirements that a territory seeking recognition as a new state should have respect for the rule of law, democracy and should guarantee minority rights.⁸⁰ Once again it seems clear that an independent Scotland would fully comply with these conditions and, as such, the recognition criteria which emerged in the European Com-

⁷⁷ Montevideo Convention on the Rights and Duties of States of 1933 165 *League of Nations Treaty Series* 19. An important caveat here is that the Convention has a very narrow subscription. See: Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents', 37 *Colum. J. Transnat'l L.* (1999) p. 403.

⁷⁸ Montevideo Convention on the Rights and Duties of States of 1933 165 *League of Nations Treaty Series* 19.

⁷⁹ N. Tsagourias, 'International Community, Recognition of States, and Political Cloning', in C. Warbrick and S. Tierney (eds.), *Towards an 'International Legal Community'? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law 2006) p. 211-240.

⁸⁰ Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union', 31 *International Legal Materials* (1992) p. 1486-1487.

munities' Guidelines in the early 1990s would not be any impediment to recognition of Scotland as an independent state.

It is also notable that the Supreme Court of Canada in the Quebec Reference referred to another possible condition for recognition which would be relevant to the Scottish case. The Court suggested that the decision by third states whether or not to recognise Quebec following a unilateral secession could turn on the domestic legality of the act.⁸¹ As a matter of political practice, therefore, it certainly seems that other states would be influenced by the attitude of the United Kingdom to Scottish independence. The UK's acceptance of Scotland's independence in the event of a Yes vote and the likelihood of negotiations between the two governments to this end would, it seems, greatly assist an independent Scotland in the search for early international recognition, and presumably also membership of international organisations.

SUCCESSION

Scotland may well be recognised as an independent state, but how would it take its place within the international community? Succession is the situation where one state replaces another state in assuming international legal responsibility for territory.⁸² Another important set of issues concerns whether or not, and if so how, Scotland would succeed to the rights and responsibilities that currently apply to the United Kingdom.

Unlike the situation with state recognition, state succession has been the subject of considerable attention by the International Law Commission of the United Nations, resulting in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts 1978 (which is not yet in force)⁸³ and the Vienna Convention on Succession of States in respect of Treaties 1978 (the 1978 Convention; in force 1996).⁸⁴ Despite this work by the ILC the area is nonetheless complex and subject to considerable confusion and disagreement.⁸⁵ It seems

⁸¹ Quebec Reference, *supra* n. 67, para. 143. Although the Court did recognise (para. 155) that 'this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession.' In state practice perhaps a more important issue than domestic legality is acceptance of the secession (and recognition of the new state) by the state being seceded from. This was the turning point in Bangladesh's emergence as a state. I am grateful to Matthew Happold for discussion on this point.

⁸² Malcolm N. Shaw, *International Law*, 5th edn. (Cambridge, Cambridge University Press 2003) p. 864.

⁸³ <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-12&chapter=3&lang=en>, visited 23 July 2013.

⁸⁴ <http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf>, visited 23 July 2013. The United Kingdom is not a state party to the Convention.

⁸⁵ Shaw, *supra* n. 82, p. 863.

certain that an independent Scotland would assume responsibility for the international relations of the territory of Scotland under international law but that does not mean that it will succeed *automatically* to all of the UK's rights and responsibilities, to treaties, and in particular to membership of international organisations.

There is a tension here. On the one hand, the 'leading view' according to Shaw is that 'the newly created state will commence international life free from the treaty rights and obligations applicable to the former sovereign.'⁸⁶ On the other, the 1978 Convention provides: '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.'⁸⁷ By the latter provision Scotland would continue to be bound by the rights and responsibilities under treaties in force for the UK unless, in the course of negotiations towards independence, agreement was reached to the contrary or if it became clear from such negotiations that the application of the treaty in respect of Scotland would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.⁸⁸ However, it should be noted both that the UK is not a party to the 1978 Convention and that, as Shaw suggests, it is unclear whether its Article 34 constitutes a rule of customary law. This view is echoed by Aust: 'The 1978 Convention is largely an example of the progressive development of international law, rather than a codification of customary international law, and is therefore not a reliable guide to the customary law rules on treaty succession.' Aust therefore suggests it is better to rely on post-World War II state practice as indicating certain, evolving, customary law principles. He does not take a definite position on whether these principles do or ought to support the provisions of the 1978 Convention.⁸⁹ Accordingly, Shaw is clear that: 'in the vast majority of situations the matter is likely to be regulated by specific arrangements.'⁹⁰ The position therefore remains inconclusive but it seems highly likely that Scotland's succession to the vast majority of treaties would in practice be unproblematic. For the avoidance of doubt it would probably make sense for an independent Scotland to accede to major multilateral treaties in any case. Finally, and assuming the continuation model, the UK state would continue to function as before, be recognised as identical to the state as it existed prior to the secession, would continue to enjoy the same rights

⁸⁶ Shaw, *supra* n. 82, p. 879.

⁸⁷ The 1978 Convention, Art. 34.

⁸⁸ The 1978 Convention, Art. 34.

⁸⁹ A. Aust, *Modern Treaty Law and Practice*, 2nd edn. (Cambridge, Cambridge University Press 2007) p. 369.

See also R. Mullerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia', 42 *ICLQ* (1993) p. 473, 488.

⁹⁰ Shaw, *supra* n. 82, p. 885.

and owe the same obligations, and retain UK membership of international organisations.

MEMBERSHIP OF INTERNATIONAL ORGANISATIONS

Scottish succession to membership of international organisations is an intense political issue. Regardless of the disagreement surrounding the meaning of Article 34 of the 1978 Convention, we need to treat this as a separate issue. The same Convention is clear that succession to constituent instruments of an international organization is: 'without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.'⁹¹ In other words, international organisations control their own membership and any special rules they set for membership supersede principles of general international law.

The starting point in considering how Scotland would achieve membership of international organizations, therefore, is the constitution of each organization. It is beyond the scope of this paper to address each of the organisations of which the UK is a member state, but let us look to the United Nations as the most important example, before turning to the European Union as another highly significant treaty institution.

THE UNITED NATIONS

It is clearly for the United Nations to define its own membership. It seems highly likely that the United Nations will treat the UK as the continuing state and that an independent Scotland would, as a new state, be required to apply for membership. In terms of precedents, when India was partitioned upon independence from Britain into India and Pakistan, the UN treated India as the continuing state and Pakistan had to apply for membership. This has led to a general approach being taken by the General Assembly to the effect 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.⁹²

⁹¹The 1978 Convention, Art. 4.

⁹²Sixth Committee of the General Assembly, 1947-1948) UNYB 39-40. Cited by Crawford and Boyle, *supra* n. 56, para. 127.

On the other hand,

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.⁹³

Subsequent cases support this position, with Singapore applying for new membership and Malaysia retaining its membership status in 1965, Bangladesh applying for membership while Pakistan continued within the UN in 1971, Montenegro applying for new membership while Serbia continued membership in 2006, and South Sudan applying for new membership in 2011 with the remaining Republic of Sudan treated as the continuing state for the purposes of membership of the UN. Other new States such as the Czech Republic, Slovakia and Eritrea have also had to apply for membership as did the former republics of the SFRY, including the Federal Republic of Yugoslavia.

Scotland would, therefore, require to apply for membership under Article 4 of the Charter. There do not seem to be any significant obstacles here. The conditions for admission are that the candidate territory be a state; be peace-loving; accept the obligations of the Charter; be able to carry out its Charter obligations; and be willing to do so. Without going into details it seems clear Scotland would satisfy each of these criteria. In terms of process, admission depends upon a recommendation by the Security Council and a decision of the General Assembly taken by 'a two-thirds majority of the members present and voting.'⁹⁴ This happened within a few days of application in the cases of Eritrea and South Sudan. Of course, if the United Kingdom were to object to Scottish independence, then Scotland could find it difficult to obtain the required level of support within the General Assembly for admission, and as a continuing permanent member of the UN Security Council the UK could also attempt to use its veto to prevent a recommendation that Scotland be admitted. Each of these scenarios seems highly unlikely. Since we might reasonably anticipate negotiations between the UK and Scottish Governments leading to agreed terms for Scottish independence, and since an independent Scotland would most probably be considered an important ally by the UK, it is realistic to assume UK support for Scotland's UN membership application.

⁹³'Succession of States and Governments. The Succession of States in Relation to Membership in the United Nations: Memorandum Prepared by the Secretariat', A/CN.4/149 and Add.1, II *Yearbook of the International Law Commission* (1962), para. 16.

⁹⁴Charter of the United Nations, Art. 18(2).

THE EUROPEAN UNION

The way in which an independent Scotland would arrive at membership of the European Union has been a source of particularly heated debate on account both of the centrality of EU membership to the Scottish Government's plans for independence and the indeterminate nature of the question. This debate has also become somewhat dislocated by an attempt to arrive at a definitive account of the legal position. It would seem that insufficient attention is being paid to the conditioning political factors that could well come into play in the event of a majority Yes vote in the referendum; factors which could well lead to negotiations to bring Scotland into the European Union at the time of its independence from the UK, thereby avoiding the lengthy accession process designed for new States joining from outside the Union.

There is no clear precedent here. The cases of Algeria and Greenland are often referred to, but both are very different from that of Scotland. The territory of Algeria, as part of France, was subject to the Treaty of Rome. When it became independent in 1962, however, it ceased to be so while France continued as a member state of the EEC. Greenland joined the EEC as part of Denmark's accession in 1973. Greenland was later accorded home rule by Denmark and at this time (1982) a referendum was held in which the people of Greenland voted to leave the Communities. Denmark negotiated Greenland's withdrawal from the EEC, and after lengthy negotiations Greenland left in 1985 while Denmark's membership continued otherwise unchanged.⁹⁵ However, neither the independence of Algeria which was in effect a French colony, nor the withdrawal of Greenland which is itself not an independent State, offer a direct analogy to the Scottish case.⁹⁶ The really novel situation should Scottish independence come about is that Scotland, unlike Algeria or Greenland, would be seeking not to leave the EU but to achieve membership, and the challenge it would pose would be whether it would be possible, or indeed desirable, for the European Union and its Member States to effect this without any interim period of non-membership.

The EU treaties do not provide for a situation of secession and then purported accession to membership by part of a member state. This has led some to argue that Scotland would indeed be treated in the same way as any applicant state and would require to follow the accession route laid down in Article 49 TEU (hereafter 'formal accession'). By this provision a new state needs to apply for EU membership leading to an accession agreement that would require to be agreed unanimously and ratified by all member states. There are a number of criteria

⁹⁵ Frederik Harhoff, 'Greenland's Withdrawal from the European Communities', 20 *Common Market Law Review* (1983) p. 13.

⁹⁶ Crawford and Boyle, *supra* n. 56, para. 146.

laid down in Article 49 and if these are met then accession is effected by the unanimous decision of the Council, a majority decision of the European Parliament, and subsequent ratification of the Accession Treaty by the member states in accordance with their own respective constitutions. This seems to be the route envisaged by the President of the European Commission Jose Manuel Barroso who in a letter to the House of Lords Economic Affairs Select Committee on 10 December 2012 suggested that the Treaties would no longer apply to a territory which leaves an existing member state and such a territory would need to apply for membership by the ordinary Article 49 route.⁹⁷ If Scotland requires to go through the general accession route it could be a very time-consuming process which could possibly fail to attract the unanimous consent of existing member states.⁹⁸

But it seems open to question whether formal accession is the only feasible interpretation of the legal path Scotland would be required to follow, or whether in fact there are other options available to the EU through which to effect Scottish membership more quickly, which would in political terms be preferable since they might avoid an interim period of non-membership. In the first place, it can be argued that the formal accession approach places excessive weight upon the extent to which European Union membership rules are dependent upon principles of general public international law. The European Communities/European Union have, for over fifty years, been defined by their own judicial organ as *sui generis*. The Union is conceived not as a classical international organisation but rather a new legal order, creating rights and obligations not only for its member states, but also for its citizens.⁹⁹ On the one hand, the EU has declared its commitment to 'contribute to' the strict observance and the development of international law,¹⁰⁰ but on the other, the Court of Justice of the European Union (CJEU) seems to question the supremacy of international law when it comes into possible conflict with EU law.¹⁰¹ This could well have implications for EU membership rules. As Crawford and Boyle note, while 'public international law... is the proper law for answering questions of state continuity and succession outside the specific

⁹⁷ 'Economic Implications for the United Kingdom of Scottish Independence', House of Lords Economic Affairs Committee, Second Report, 19 March 2013, para. 112.

⁹⁸ Crawford and Boyle, *supra* n. 56, seem to envisage the Article 49 route (para. 154). However, they do leave open the possibility that through negotiations the 'accession process could be varied in Scotland's case' (para. 156).

⁹⁹ See for example, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I and *Flaminio Costa v. ENEL* [1964] ECR 585 (6/64).

¹⁰⁰ Treaty on European Union, Art. 3(5).

¹⁰¹ Joined Cases C-402/05P and C-415/05P *Kadi & Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351.

context of the EU', there might be 'a distinction between the position in public international law generally and the position in the EU legal order.'¹⁰²

This has led a number of commentators to argue that the CJEU would be very reluctant to see Scots lose their EU citizenship for any period of time, and would adapt its rules to try and avoid such a scenario if possible. Arguments that a specific process could, and even should, be tailored to facilitate the membership of an independent Scotland rely both upon the flexibility that comes with the EU's *sui generis* nature, and the importance the Union ascribes to the concept of citizenship, culminating in its entrenchment in the treaties in 1993.¹⁰³

One radical argument advanced by Aidan O'Neill is that so important is this concept of citizenship in the eyes of the CJEU that the Court might be expected to intervene to ensure that Scotland did not in fact leave the EU at all: 'Scotland and [the remaining UK] should *each* succeed to the UK's existing membership of the EU, but now as two States rather than as one.'¹⁰⁴ This citizenship-based argument for 'dual succession' to membership is, however, simply not plausible. First, EU citizenship is contingent on EU membership: an individual requires to possess the nationality/citizenship of a member state if he or she is to benefit from Union citizenship.¹⁰⁵ Also Article 50 permits states to leave the EU. It cannot realistically be argued that the nationals of a state leaving the EU would continue to be treated by the CJEU as EU citizens.¹⁰⁶ One complication here is that the United Kingdom would still be a member of the EU and Scots would not lose their EU citizenship unless either Scotland or the UK deprived them of UK nationality. There is no requirement in international law that nationals of a new state automatically lose the nationality they previously enjoyed. But this is not the point O'Neill seeks to make. He seems to suggest that the fact that Scots are currently citizens of the EU would lead the CJEU to bring about the succession of Scotland

¹⁰² Crawford and Boyle, *supra* n. 56, para. 184.

¹⁰³ Treaty on the Functioning of the European Union, Art. 20.

¹⁰⁴ Aidan O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', *Eutopia law blog*, 14 November 2011, <<http://eutopialaw.com/2011/11/14/685/>>, visited 23 July 2013.

¹⁰⁵ 'Citizenship of the Union shall be additional to and not replace national citizenship', Art. 20(1) TFEU.

¹⁰⁶ The issue is not so much one of the primacy of international law but the fact that statehood is as a matter of logic an anterior condition to membership of a particular international organization, and by definition, to any rights and obligations which attend such membership. Crawford and Boyle acknowledge this: '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.' Crawford and Boyle, *supra* n. 56, para. 184.

itself to membership. But the dual succession argument does not address the following issues that must be settled for Scotland to *accede* to membership: on what terms would Scotland find itself a member of the EU? Would it be required to adopt the euro or not? Would it 'succeed' with or without existing UK Treaty opt-outs? How many seats in the European parliament would it have, how many votes in the Council, etc.? These cannot be matters of succession but inevitably of accession, which the EU by the unanimous consent of its members would require to agree upon. Thirdly, there are also obvious question marks over the legitimacy of the CJEU intervening in this way. To do so would arguably elevate the prerogatives of European citizenship above those of the Union's own member states. It would also 'effectively usurp the role of the Member States in negotiating a political solution.'¹⁰⁷ In this light a judicially manufactured route to automatic succession to EU membership seems untenable.

Nonetheless, Crawford and Boyle do still suggest that the CJEU '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.'¹⁰⁸ This seems to imply that the Court would look to the other institutions and Member States to try to resolve the issue through negotiations. As we have observed they also concede the possibility that the EU might, in negotiations, be willing to adjust the usual requirements for membership in the circumstances of Scotland's case.¹⁰⁹

David Edward, formerly the UK judge on the Luxembourg court, has also entered the debate in the context of negotiations and in doing so offers a more nuanced and plausible suggestion for how Scotland's accession might be managed than the 'dual succession' account. In his view Scotland would not automatically accede to membership but a combination of the *sui generis* nature of the Union and the importance of citizenship to the European project should lead to a more limited, but for an independent Scotland still potentially significant, outcome, namely an obligation on the part of the EU institutions and all the member states including the UK to negotiate the admission of an independent Scotland to the European Union.¹¹⁰

¹⁰⁷ Crawford and Boyle, *supra* n. 56, para. 183.

¹⁰⁸ Crawford and Boyle, *supra* n. 56, para. 167.

¹⁰⁹ Crawford and Boyle, *supra* n. 56, para. 164. Although it should be repeated that the overall sense of the Crawford and Boyle Opinion seems to be the Article 49 route is the more likely road to accession for Scotland.

¹¹⁰ David Edward, 'Scotland and the European Union', *Scottish Constitutional Futures Forum blog*, 17 Dec. 2012, <www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>, visited 23 July 2013.

Given that the EU is a new legal order, the first port of call in addressing the relationship between the United Kingdom, the EU institutions and the other member states is, according to Edward, the treaties themselves, and only if they do not offer an answer should resort be had to public international law. He then turns to Article 50 of the TEU. He observes that, under this provision, the withdrawal of a state from the EU requires negotiation of the terms of this act, and withdrawal will take effect only on the date agreed or two years after notification. This time is needed to unravel 'a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations.'¹¹¹ These obligations are multilateral and often reciprocal. In the case of Scottish independence and the potential withdrawal of the territory of Scotland from the Union, this would involve not only the rights of Scots but also of nationals of other member states, for example foreign students in Scotland and fishermen trawling its territorial waters.

So significant are these rights and relationships that Edward believes Article 50 could plausibly be extended and adapted to the Scottish situation:

in accordance with their obligations of good faith, sincere cooperation and solidarity, the EU institutions and all the Member States (including the UK as existing), would be obliged to enter into negotiations, before separation took effect, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States.¹¹²

One objection of course is that Article 50 is only intended to apply to the withdrawal of member states and not of parts of their territory in the form of new states. But Edward suggests that it would be illogical to conclude that those who drafted the treaty 'intended that there must be prior negotiation in the case of withdrawal but none in the case of separation.'¹¹³ It is possibly in this context that the CJEU might be asked to intervene, and were it to do so,

¹¹¹ Edward, *supra* n. 110.

¹¹² Crawford and Boyle take the view that negotiations to 'adjust the usual requirements for membership in the circumstances of Scotland's case' would not be required 'at least on its face, by the EU legal order' (*supra* n. 56, para. 164). But notably Edward does not seem to be suggesting an adjustment to the requirements of membership, but rather an alternative process by which that membership could be effected. Another issue is whether the EU and the UK would have an obligation to negotiate also because the UK, after Scotland's independence, would be over-represented in the EU organs despite becoming a smaller state. This would be unfair to other member states. The terms of Scotland's admission could be bound up also with these negotiations. I am grateful to Jure Vidmar for discussion of this point.

¹¹³ Edward, *supra* n. 110. Michael Waibel also argues: 'Negotiations, with respect to currency arrangements and all of the complex legal issues raised by Scottish independence, would offer the only sensible way forward', *EJIL: Talk!*, 12 Feb. 2013, <www.ejiltalk.org/boyle-and-crawford-on-scottish-independence/#more-7611>, visited 23 July 2013.

this would be an opportunity to test Edwards' argument concerning a duty to negotiate.¹¹⁴

EU citizenship is central to Edward's argument. The Article 50 duty to negotiate can and should be extended to the Scottish case because of a presumption that the Union has a concomitant duty to avoid a situation where, for a period of time, Scots would be deprived of their rights as citizens of the EU while others in the reciprocal arrangements Edward mentions would see their rights adversely affected. To emphasise the plausibility of his argument he questions the tenability of the alternative scenario, namely that:

at the moment of separation (or on some other unspecified date), and solely by operation of conventional doctrines of public international law without regard to the provisions of the EU Treaties – Scotland, its citizens and its land and sea area would be cast out into legal limbo *vis-à-vis* the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated.

Until that moment, Scotland would remain an integral part of the EU; the Scottish people and all EU citizens living in Scotland would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with Scotland.

Then, at the midnight hour, all these relationships would come abruptly to an end. The *acquis communautaire* would no longer, as such, be part of the law of Scotland. Scotland would cease to be constrained in relation to the rates of VAT and corporation tax. Erasmus students studying in Scotland would become 'foreign students' liable to pay full third country fees, as would students from England, Wales and Northern Ireland. Non-Scottish fishermen would be excluded from Scottish waters. And all the waters between Scotland and Norway would cease to be within the jurisdiction of the EU – an important security consideration quite apart from fishery rights.¹¹⁵

This scenario also presupposes that 'there would be no legal obligation upon the UK, the EU or the other Member States to enter into any negotiations before separation with a view to avoiding such a situation coming to pass.' He considers this alternative, carried to this logical conclusion, to be unconvincing.

But this still stops well short of a dual succession argument. Edward does not consider it feasible that there will be 'a seamless transition from membership as part of the UK to membership as an independent State, subject to negotiation of

¹¹⁴ Another issue is how this question might come before the CJEU. Speculation on this is beyond the scope of this article.

¹¹⁵ Edward, *supra* n. 110. The final point is questionable: the 200 mile exclusive fishing zone under international law has no relevance to security, but the other issues do raise searching questions.

a few details.' Instead, and given the unprecedented nature of the situation, with 'no express provision in the Treaties to deal with it', we must look for a third, and more plausible, scenario based upon 'the spirit and general scheme of the Treaties.' And it is in this context that he arrives at a *via media* by way of the duty to negotiate per Article 50.

In my opinion, the obligations of good faith, sincere cooperation and solidarity, which are incumbent on the EU institutions and all the Member States including the UK, would require them all, *before separation took effect*, to enter into negotiations to determine the future relationship within the EU of the separate parts of the UK and the other Member States. The outcome of such negotiations, unless they failed utterly, would be amendment of the existing Treaties, *not* a new Accession Treaty.¹¹⁶

The force of the argument comes in part from the fact that the author was himself immersed in the highest level decision-making within the EU for so long. Its significance hangs on the final sentence of this last quote. The transition to membership would not be seamless. But it would be categorically different from the Article 49 route which has been advanced by others.

Of course, even if we do take this to be the most plausible scenario by which an independent Scotland would move to membership of the EU, this still leaves open a number of issues, as Edward himself acknowledges. First, who would be involved in such negotiations, how would they take place, would the UK negotiate for Scotland since before independence Scotland would not be a state, or would the UK allow Scotland to negotiate on its behalf? And what of the interim period? What if negotiations within the EU were still on-going after Scotland had achieved independence but before its formal accession to the Union. Here a possible answer is provided by Crawford and Boyle. They do not address Edward's Article 50/citizenship argument, but they do suggest that in the interim period of negotiations, before an independent Scotland accedes to membership of the EU, EU law could continue to have effect in Scotland by virtue of the *European Communities Act 1972* s2(4).¹¹⁷

Another issue which flows from the route Scotland would require to take to membership is the conditions of that membership. It seems clear that Scotland would require to adopt the *acquis communautaire*, but this is already a facet of UK membership and implicitly of the terms of the Scotland Act 1998.¹¹⁸ There are also the questions raised above such as the Treaty opt-outs to which the United Kingdom is party. Would Scotland be able to maintain these? Would it be required to adopt the euro, become part of the Schengen arrangement

¹¹⁶ Edward, *supra* n. 110 (emphasis in original).

¹¹⁷ Crawford and Boyle, *supra* n. 56, para. 165.

¹¹⁸ Scotland Act 1998, ss. 29(2)(d) and 57(2).

etc.?) These issues would be subject to negotiation and the outcome would depend in part upon the attitude of other EU member states and institutions. In any event a new treaty amendment would be needed to provide, at the very least, for distinctive Scottish membership of European institutions, the allocation of parliamentary seats etc., in the absence of the full Article 49 accession process. And such a treaty amendment would still need the ratification of all member states.

Finally, we might reasonably assume that the United Kingdom would be treated as a continuing member of the EU.¹¹⁹ But even here there would seem to be a need for treaty amendments, again to accommodate a smaller UK in a proportionate way within European institutions.¹²⁰ Another complication which is beyond the scope of this article is the Conservative Party commitment to hold a referendum in the UK on membership of the European Union should the Conservative Party be returned to office in the General Election of 2015.¹²¹ This would add another layer of complication if such a referendum were held and resulted in a vote to leave the EU before negotiations on transition to membership of the EU for an independent Scotland had been concluded.

CONCLUSION

The referendum in 2014 will be highly significant. Referendums on sovereignty questions are often deeply contested affairs in which the legitimacy of the process is widely questioned. The Scottish referendum offers a rare opportunity for a fair, lawful process validated by the assent of both governments. In this respect the Edinburgh Agreement is a landmark political event, and the Scottish Parliament has the opportunity to fashion a referendum process that will be seen by winners and losers alike to have been fair and democratic. The two bills going through the Scottish Parliament offer detailed regulation of areas such as the franchise, funding and spending, and the moratorium period prior to the referendum. There is also a significant role for the independent Electoral Commission which has reviewed the question and the financial provisions and which will oversee the operation of these and other regulatory elements.

The real controversy in the referendum will surround the substantive issues at stake. What the Scottish Government means by independence is still to be fully elaborated, and whether in the event of a yes vote there would continue to be

¹¹⁹ Case 148/77, *Hansen v. Hauptzollamt Flensburg* [1978] ECR 1787, which suggests that the limits of the territory of a member state is for the state to define. Cited by Crawford and Boyle, *supra* n. 56, para. 159.

¹²⁰ Crawford and Boyle, *supra* n. 56, para. 150.

¹²¹ <www.conservatives.com/Policy/Where_we_stand/Europe.aspx>, visited 23 July 2013.

elements of union between Scotland and the UK, and what form this might take, is impossible to predict in the heat of a referendum campaign, particularly one in which it is in the best interests of the No campaign to suggest that the transition to independence will be complex and challenging. Although the Electoral Commission is correct to recommend that both governments should agree a joint position about what would follow the referendum in order to give voters important guidance,¹²² this seems politically unrealistic.

The status of an independent Scotland under international law should not present many difficulties. It seems that the UK will be the continuing state and an independent Scotland will be seen as a territory aspiring to new statehood. In the event that a negotiated move to independence is agreed between Scotland and the UK the widespread recognition of Scotland as a state and its succession to international obligations should be straightforward. Scotland would, however, need to apply for membership of international organisations. The example of the United Nations suggests that this too should not be excessively challenging. The really indeterminate case is that of the European Union. Different views have been voiced in this article. That which seems most consistent with the treaty commitments, most particularly to citizenship, is that, since the EU is at liberty to set its own membership rules, a process of negotiations to facilitate Scotland's membership without a period of exit from the Union would seem to be flow from the spirit of Article 50. However, a number of political factors would also come into play, not least the attitudes of other member states, including those which would not like to encourage sub-state nationalists within their own states with the idea that rapid entry to the EU is a realistic possibility. Much then remains unclear. There seems no doubt that an independent Scotland would be a welcome member of the EU, but it is impossible at this point to predict definitively how easily or on what terms such membership could be effected.



¹²² Electoral Commission, 'Referendum on independence for Scotland', *supra* n. 23, para. 5.43.