Secession and Dissolution in European Union Member States: A Prospective Analysis of the Consequences for European Union Membership

Darren Harvey*

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* Darren Harvey LL.B., LL.M., Research Assistant at the Jean Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. (University of Virginia) at the Europa-Institut of Saarland University.

https://doi.org/10.5771/1435-439X-2013-4-403 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

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I. Introduction

In what many observe to be a direct result of the current economic crisis, separatist movements around Europe are enjoying an unprecedented rise in popularity and influence.[1]

Following years of peace and relative political stability – as evidenced by the winning of the Nobel peace prize in 2012 – the demands from various regional movements for greater autonomy or even complete independence are growing in intensity. The outcomes of recent elections in places like Scotland, Flanders and Cataluña have raised many questions in relation to the makeup of existing EU member states. What were once perceived to be merely whimsical aspirations of minority groups must now be given considerable attention, with existing state structures in Europe facing the very real possibility of fragmentation.

Should these movements succeed in their ambitions to redefine national legal and political landscapes, what would the consequences be for both pre-existing member states and newly created independent entities with regards to EU membership? Would the European Union, in its current form, be both willing and able to address the many complex legal issues that would arise from the division of one or more of its member states?

In light of the forthcoming referendum on Scottish independence from the United Kingdom, the first part of this paper shall focus on the specifics of this case in an attempt to answer the broader question of how an instance of secession from an

1 *Ehlers/Hoyng/Schult/Zuber*, Debt Crisis Gives European Separatists a Boost, Spiegel International Online of 10/9/2012; *Williams*, Across Europe, nations are turning in on themselves, Guardian of 22/7/2012.

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existing member state may impact EU membership.[2] The second section of this paper focuses on the hypothetical scenario of a complete dissolution of an existing EU member state and the ways in which this not entirely farfetched occurrence could be handled with regards to EU membership.

From the outset it is crucial to note that within the EU there is no precedent for what happens when a metropolitan part of a current member state becomes independent. The situation is further complicated by the fact that there is no express provision in the EU treaties to deal with such a scenario and, as a consequence, any study on this topic will necessarily include a degree of speculation.[3] Nevertheless, it is submitted that one may look to various alternative sources of law and practice in an attempt to adequately address the questions raised above. In so doing, attention will be paid to the public international law doctrines of state continuity and state succession and how they may be applied in general to the question of membership in international organizations. Additionally, consideration shall be given to the extent to which the internal legal regime of the EU, although devoid of any express legal provisions on the matter, may nevertheless impact any future decision on EU membership following an instance of secession from, or the dissolution of, an existing member state.

As previously outlined, the UK is currently facing the prospect of radical constitutional transformation on accounts of there being a legally binding referendum on Scottish independence scheduled to take place in 2014.[4] In the event that the people of Scotland vote in favour of independence in this referendum, it is clear that a great number of questions would arise with regards to EU membership including: If Scotland was to become an independent state by virtue of independence from the UK, would EU membership be automatically retained? Or would a formal accession process have to be undertaken in a similar manner to third country candidates for accession?[5] Furthermore, would a newly independent Scottish state continue to be

2 Whilst aware that there are several secessionist movements in many EU member states, it is submitted that the most relevant movement at present, in terms of profile and potential for success, is that of Scotland. It is therefore through specific reference to the forthcoming referendum on Scottish independence and the consequences thereof that the first section of this paper shall proceed.

3 *Crawford/Boyle*, Annex A Opinion: Referendum on the Independence of Scotland – International Law Aspects, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf (15/11/2013), p. 68; *Edward*, Scotland and The European Union, http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx (15/11/2013), para. B.16.

4 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland signed in Edinburgh on 15/10/2012, http://www.scotland.gov.uk/Resource/0040/00404789.pdf (15/11/2013).

5 *Thorp/Thompson*, Scotland, independence and the EU – Commons Library Standard Note, 2012, http://www.parliament.uk/briefing-papers/SN06110 (15/11/2013).

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a member of the EU under the same conditions as the predecessor UK state or would certain conditions be attached to such a process? From an alternative, yet equally contentious perspective, what would the consequences be with regards to EU membership, and the conditions of that membership, for the predecessor state of the UK minus Scotland?

On the one hand, international law, through the doctrines of state continuity and state succession, provides a substantial body of legal principles derived from treaty law and, to a far greater extent, from past practice, which may apply to the question of membership in international organisations. Accordingly, this paper shall seek to evaluate and then apply this area of substantive public international law to the question of EU membership for both the remainder of the UK and Scotland following Scottish independence.

On the other hand, some have argued that the fate of Scotland, or any other comparable secessionist movement, will depend entirely upon the EU's own internal legal order without any need for recourse to general public international law.[6] From this premise it is suggested that the EU treaties sufficiently cover a scenario of this nature and that, more importantly, these rules could result in a different outcome than that under general public international law with regards to EU membership. Accordingly, this paper shall address both arguments during its course in an attempt to reach a balanced and above all pragmatic solution to at least some of the great number of questions raised by the prospect of Scottish independence.

II. The fate of the remainder of the United Kingdom under International Law

1. The Doctrine of Continuity

It is important to note at this juncture that various studies stress that there is a fundamental distinction between state continuity, which deals with situations where the same state continues to exist, and state succession, which concerns the replacement of one state by another with respect to a particular territory.[7]

Where an existing state breaks up, there are at least two possible hypothesis under international law: dissolution involving the splitting up of the existing state into two

6 *Edward*, (fn. 3); *O'Neill*, A Quarrel in a Faraway Country?: Scotland Independence and the EU, 2011, http://eutopialaw.com/2011/11/14/685 (15/11/2013).

7 *Crawford*, Brownlie's Principles of Public International Law, 8th ed. 2012, p. 425.

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or more new state entities; and break up through secession whereby the existing state continues to exist, albeit with a diminished territory and population.[8] This distinction is important from a legal perspective.

Generally speaking, the situation under customary international law is that treaty obligations and membership in international organisations will pass to a continuing state, if it is possible to discern one.[9] Consequently, the question of continuity is said to precede that of state succession and where it can be established that the "same" state continues to exist, the question of succession to rights and obligations does not arise for that particular state.[10] The outcome vis-à-vis the continuity of the remainder of the UK following the independence of Scotland will therefore exert decisive influence on questions of state succession and, ultimately, membership in international organisations. The conventional perspective amongst academics and commentators for many years was that determining the continuity of a state was contingent upon the personality or identity of that state.[11] However, distinguishing cases of identity and continuity from succession can present difficulties, particularly where drastic changes have occurred to a state's territory, government or population.[12] This is due to the fact that international law offers little guidance to answer the highly controversial question as to whether certain factual events involving great territorial changes of a state have to be regarded as a case of dismemberment, where the predecessor state is totally dissolved and several new ones are emerging, or as a case of secession, where the predecessor state, though significantly diminished, continues to exist.[13]

Additionally, there are no well-defined criteria for state extinction:

> "International Law does not contain universally valid and obligatory criteria as to what must be the extent or the nature of territorial changes in order to lead to the extinction of the state".[14]

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8 *Stern*, Dissolution, Continuation and Succession in Eastern Europe, 1998, p. 181.

9 *Thorpe/Thompson*, (fn. 5); *Crawford*, (fn. 7), p. 427.

10 *Marek*, Identity and Continuity of States in International Law, 1968, p. 10; *Mälksoo*, Illegal Annexation and State Continuity, 2003.

11 *Hall*, A Treatise of International Law, 8th ed. 1923, p. 114; *Cohen*, Legal Problems Arising From the Dissolution of the Mali Federation, BYbIL 36 (1960), p. 375; International Law Association (ILA), Rio de Janeiro Conference (2008), Aspects of the Law of State Succession, Draft Final Report, p. 64.

12 The general rule is that internal changes of government do not affect a state's identity: *Crawford*, The Creation of States in International Law, 2nd ed. 2006, pp. 678-680.

13 *Bühler*, State Succession and Membership in International Organisations: Legal Theories and Political Pragmatism, 2001, p. 15.

14 Ibid.

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This has led some authors to suggest that significant or "quantitatively very considerable" territorial changes could indeed affect the continuing identity of a state.[15] However, the majority opinion in scholarship is that, in general, territorial changes do not affect the identity of the state.[16] This position was perhaps best articulated by *Hall* in his theory about the core or nucleus of territory which provides that the identity of a state would subsist so long as part of the territory which can be recognized as the essential portion – through the preservation of the capital or the original territorial nucleus, or which represents the state by continuity of government – remains as an independent residuum.[17]

In addition, a number of criteria have been advanced to help resolve questions of state continuity and these are unquestionably of benefit when evaluating the potential consequences of Scottish independence.[18] The criteria to be taken into account for the determination of the identity or continuity of a state in these circumstances may involve both objective and subjective factors.[19] From an objective perspective, the basic criteria for statehood such as retention of a substantial amount of territory or a majority of the state's population, resources, armed forces or seat of government are of relevance.[20] Additionally, subjective factors such as the state's claim to continuity, the way in which that particular state conceives itself and, most importantly, the international recognition of, or acquiescence in, this claim by third states of the international community and relevant international organizations will be of relevance.[21]

Accordingly, a fair judgement of the continuity problem cannot content itself with leaving political factors out of consideration and with concentrating on a supposedly "pure" legal solution.[22] This is why many of the rules in this field have

15 Ibid. quoting *Guggenheim*, Lehrbuch des Völkerrechts, 1948, p. 406; *Stern*, Report préliminaire sur la succession d'états en matière des traits, in: ILA Report of the Sixty Seventh Conference held at Helsinki, 1996, pp. 655 and 658.

16 *Shaw*, International Law, 6th ed. 2008. p. 960; *Bühler*, (fn. 13).

17 Ibid.

18 *Crawford*, (fn. 7), p. 427.

19 This position is supported by the majority of scholars in this field, see *Mullerson*, The continuity and succession of states, by reference to the former Yugoslavia and USSR, International and Comparative Law Quarterly 42 (1993), p. 476 et seq.; *Crawford*, (fn. 12), p. 670. But note *Marek*, Identity and Continuity of States in Public International Law, 1995, p. 129 who is critical of recognition as a criterion of identity.

20 *Williamson*, State Succession and Relations with Federal States, panellist's remarks, 86 ASIL Proc.1 (1992), p. 14; *Williamson/Osborn*, A US Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the USSR and Yugoslavia, Virginia Journal of International Law 33 (1993), p. 268.

21 *Mullerson*, (fn. 19), p. 476; *Bühler*, (fn. 13), p. 18.

22 See ibid., p. 5 quoting *Fiedler*, Das Kontinuitätsproblem im Völkerrecht, 1978.

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been developed in response to particular political changes and such changes have not always been treated in a consistent manner by the international community.[23]

Turning to consider the above in light of a potential breakup of the United Kingdom, there can be little difficulty, when applying the objective criteria detailed above, in identifying the remainder of the United Kingdom as the sole continuing state under international law.

Indeed, it is well established in both international legal doctrine and practice that secession of territory from an existing state will not affect the continuity of the latter state, even though its territorial dimensions and population have been diminished.[24] In such a case, the existing state remains in being, complete with the rights and duties incumbent upon it, save for those specifically tied to the ceded or seceded territory.[25] Based on these considerations the UK Foreign and Commonwealth Office has stressed that the overwhelming weight of international precedent suggests that the remainder of the UK would continue to exercise the existing UK's international rights and obligations following Scottish independence; whereas an independent Scotland would constitute a new state under international law.[26]

Furthermore, from a subjective perspective, the UK government believes that this outcome would be recognized by the international community.[27] Put differently, the UK government has clearly expressed its intention to declare that the remainder of the UK will be the continuator state of the UK for the purposes of international rights and obligations in the event that the people of Scotland vote in favour of independence.

2. Asserted Continuity

Whilst it would be absurd to suggest that the international community would not recognize the remainder of the UK as the continuator state following Scottish independence, one must not simply discard the potential impact that subjective factors may have upon questions of continuity more generally.

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23 See generally *Shaw*, State Succession Revisited, Finnish Yearbook of International Law 5 (1994), p. 34.

24 From an objective standpoint, the loss of around 5 million Scottish citizens from a nation of over 60 million would certainly not constitute a change of such fundamental proportions as to call into question the continuity of the remainder of the UK following Scottish independence.

25 *Shaw*, (fn. 16), p. 960; *Bühler*, (fn. 13); *Crawford/Boyle*, (fn. 3), p. 72.

26 *Happold*, Independence: In or Out of Europe?, An Independent Scotland and the European Union, International and Comparative Law Quarterly 49 (2000), p. 15.

27 Written evidence from the Foreign and Commonwealth Office (SCO 8), Foreign Affairs Committee inquiry into the foreign policy implications of and for a separate Scotland, 24 September 2012, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/643/m08.htm (15/11/2013), § 9.

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When surveying past practice, it is submitted that subjective factors, specifically the willingness of the international community to accept a particular state's claim to continuity, may indeed prove to be of crucial importance when deciding the permissibility of any proposed continuity. In this respect *Crawford* notes that although recognition of claims to continuity may not definitively determine the outcome of any claim to continuity by a particular state, such recognition is persuasive:

> "Thus it was the general refusal of third states, and not only the other former Yugoslav Republics, to accept the FRY's [Federal Republic of Yugoslavia] claim to continuity with the SFRY [Socialist Federal Republic of Yugoslavia] that prevailed".[28]

Owing to the fact that this paper is an attempt to demonstrate the ways in which not only the UK and Scotland, but also movements in other states, may be dealt with under international law, it is worthwhile embarking on a further analysis of the concept of asserted continuity, its usage in the past and its impact upon questions of continuity more generally.

The paradigm case of asserted continuity is the Russian Federation following the breakup of the Union of Soviet Socialist Republics (USSR) in 1990-1991. Although the facts surrounding the "dissolution" of the USSR are not analogous to the separation of Scotland from the UK, the underlying concept of asserted continuity by a state is of value. In fact, from a purely legal perspective it was doubted whether Russia could claim to be the continuator state of the former USSR at all.[29] Following political unrest and subsequent declarations of independence in many of the former Soviet Republics, the Russian Federation, the Republic of Belarus and Ukraine declared that they had established a "Commonwealth of Independent States (CIS)".[30] In the preamble to the agreement establishing the CIS the parties declared that "the USSR is ceasing its existence as a subject of international law and a geopolitical reality."[31] Following this agreement, a meeting between eleven soviet Republics declared that "with the establishment of the Commonwealth of Independent States the USSR ceases to exist".[32]

However, upon this declared and agreed dissolution of the USSR, Russia declared that it was the continuator state of the former USSR[33] and wrote to the UN Secre-

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28 *Crawford*, (fn. 12), p. 670.

29 This paradox between legal doctrine and political reality may be of the utmost importance within the context of the potential dissolution of an EU member state, discussed in section VI of this paper.

30 Declaration by the Heads of State of the Republic of Belarus, the RSFSR and Ukraine, Minsk on 8/12/1991, UN-doc. A/46/771, Annex II (1991).

31 Agreement establishing the Commonwealth of Independent States, Preamble, Minsk on 8/12/1991, UN-doc. A/46/771, Annex II (1991).

32 Alma Ata Declaration of 21/12/1991, reprinted in ILM 31 (1992), p. 149.

33 *Blum*, Russia Takes over the Soviet Union's Seat at The United Nations, European Journal of International Law 3 (1992), p. 354.

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tary General to assert that the Russian Federation would be retaining its membership of the UN, its permanent seat on the UN Security Council and would be maintaining full responsibility for the rights and obligations of the former USSR under the UN Charter.[34] These assertions caused a degree of doctrinal controversy since, from a purely legal perspective, dissolution would exclude continuity[35] on accounts of the former USSR ceasing to exist as a subject of international law and there therefore being no possibility for a continuator state.[36]

Nevertheless, the international community accepted these assertions without complaint and Russia took over the seat of the former USSR at the UN Security Council, in the UN General Assembly and in all other organs.[37] The response of what was then the European Communities (EC) was that the international rights and obligations of the former USSR, including those under the UN Charter, would continue to be exercised by Russia.[38] Accordingly, the position of the Russian state that it was for all international legal purposes the continuator state of the former USSR – and the manner in which the international community accepted Russia's assertion – was of decisive importance. This willingness to allow for Russia to assume the position of the continuator state of the former USSR despite that state apparently no longer existing was clearly down to political considerations. Several global considerations were at play in this scenario and the international community recognized that the consequences which would flow from the dissolution of the USSR would have been incredibly problematic. As *Stern* has noted, the void created by the dissolution was intolerable due to its effect on numerous fragile equilibrium; most important of which was the USSR's permanent seat on the UN Security Council.[39] It was therefore only by accepting that Russia was the continuator state of the former USSR that the opening of various Pandora's boxes including re-negotiation of the UN Charter could be avoided.[40]

For the purposes of this paper it is clear that the question of dissolution of the United Kingdom would simply not arise within the context of Scottish independence.[41] Nevertheless, it is illustrative of the extent to which political will and consensus may override purely legal considerations within the context of fundamental

34 Russian letter to UN Secretary General of 24/12/1991, UN-doc. 1991/RUSSIA, International Legal Materials 31 (1991), Appendix.

35 *Stern*, (fn. 8), p. 181.

36 *Pustogarov*, Russia's Regional Responsibility and International Law, International Affairs (Moscow) 64 (11/1994).

37 *Bühler*, (fn. 13), p. 154; *White*, The Law of International Organisations, 1996.

38 Declaration of the European Communities of 23/12/1991, EC Bull 12, 121 (1991).

39 *Stern*, (fn. 8), p. 181.

40 Ibid.

41 Despite such an argument being put forward by certain sections of the pro-independence movement in Scotland, see generally *Crawford/Boyle*, (fn. 3), p. 82.

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alterations to existing state structures. The reaction of the international community, and specifically that of what was then the European Community (now EU), therefore provides considerable support for the aforementioned assertion of the UK government that the remainder of the UK would be recognized as the continuator state, and thus retain all of the former UK's international rights and obligations following Scottish independence. This position is further supported by *Crawford* and *Boyle* in their jointly published legal opinion on the international law aspects of Scottish independence.[42]

3. Continuity with regards to International Organisations

Having established that the remainder of the UK would in all likelihood be deemed to be the continuing state following Scottish independence, it does not necessarily follow automatically that the remainder of the UK would continue to be a member state of all the international organisations to which the previous UK state was a member. International organisations must therefore be examined more closely.

The starting point when conducting an analysis on the specific issue of membership in international organisations following some form of alteration to a state's previous make up is the rules of the organization itself. Accordingly, the rules of the specific international organisation will prevail over general rules of international law when determining the manner in which membership will be retained or otherwise obtained.[43] The problem with the European Union, and many other international organisations, however, is that there are no rules in the Union's founding treaties to deal with a situation in which an existing member state is fundamentally altered by virtue of a section of its territory and population separating from the preexisting state to form a new state. Accordingly, one must look to the academic literature, largely derived from past practice, in an attempt to establish some rules.

Generally speaking, continued membership in international organisations will proceed, absent of any relevant rules within the international organisation's constituent document(s), in the same manner as general international law discussed above. Accordingly, the outcome with regards to membership in international organisations will depend on whether a new state is formed or an old state continues in a different form.[44] A classic case would therefore be the partition of British India in 1947 in which India was considered by the United Nations General Assembly to be the continuation of the previous entity, whereas Pakistan was regarded as a new state which had to apply for admission to the UN. As has been pointed out on more than one occasion, the UN considered this particular case to be on a par with previous

42 Ibid.

43 *Klabbers*, Introduction to International Institutional Law, 2002, p. 115; *O'Brien*, International Law, 2001, p. 598.

44 *Shaw*, (fn. 16), p. 985.

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examples in which a part of an existing state had separated to form a new state; such as the Irish Free State separating from the UK and Belgium separating from the Netherlands.[45]

In both these instances the remaining portions of each respective state continued as existing states. It is clear to see from this example that principles relating to continuity derived from past practice within the realms of general international law were readily applied to the specific question of membership in international organisations by the UN.

Staying within the UN context, the Sixth Legal Committee of the UN General Assembly sought to address the question of what legal rules were to be applied when, in the future, a state or states enters into international life through the division of a member state of the United Nations.[46] The memorandum of the secretariat of the UN General Assembly, which was addressed to the committee, is of significance to the question of how the remainder of the UK may be treated following the independence of Scotland:

> "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."[47]

The situation is similar with regards to membership of international organisations out with the United Nations. In concluding his seminal volume on state succession and membership in international organisations, *Bühler* stresses that, almost without exception:

> "Membership in International Organisations is inseparably linked with the continuing international personality of the member concerned. As a consequence, constitutional or territorial changes do not affect membership, unless the 'extinction of the state as a legal personality recognized in the international order' is shown."[48]

From this, one may conclude that the remainder of the UK would be in a position, under international law, to retain the membership of the former UK in international organisations including the EU, despite the fact that a part of its territory had

45 *O'Connell*, State Succession In Municipal and International Law, vol. II, 1968, p. 183; *Schermers/Blokker*, International Institutional Law, 3rd ed. 1995, p. 73.

46 Memorandum prepared by the Secretariat, The Succession of States in relation to Membership in the United Nations, UN-doc. A/CN.4/149, p. 103, printed in Yearbook of ILC, vol. II, 1962.

47 Ibid.

48 *Bühler*, (fn. 13), p. 285.

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broken away as a result of Scottish independence. The only way in which this would not be possible would be for the international community to deem that the UK, as an entire state, had ceased to exist.[49]

4. Continuity within the context of the EU?

When looking specifically to the European Union context, one must not lose sight of the fact that the constituent treaties of the EU make no provision for the breakup of an existing member state. Whereas, based on the above, continued membership of the EU would appear to be straightforward for an existing EU member state which loses a part of its territory through secession, the conditions of such membership are likely to require revision, and in some instances require a complete redrafting. As *Brownlie* has pointed out in relation to what may be described as the "provisional nature" of continuity:

> "Political and legal experience provide several examples of situations in which there is continuity, but the precise circumstances, and the relevant principles of good law and policy, dictate solutions which are only partly conditioned by the element of continuity."[50]

Brownlie then gives a number of examples including of the Treaty of St. Germain which dealt with the destruction of the Austro-Hungarian Empire and which adopted a position of continuity of obligations with modifications.[51] Accordingly, it would not be unreasonable to suggest that even although the remainder of the UK will in all likelihood retain EU membership by virtue of its position as the continuator state following Scottish independence, the conditions of that membership may, and in some cases will, require adjustment.

III. Consequences for the remainder of the UK's EU membership

1. Members of the European Parliament

The composition of the European Parliament is currently in a state of flux with the transitional measures that were put in place following the entry into force of the Lisbon Treaty being inapplicable to the next European Parliamentary elections

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49 It is submitted that this would be virtually impossible within the specific context of the UK and Scottish Independence. However, this may not be as clear cut with regards to other separatist movements within other EU member states, see section 6 on Belgium for example.

50 *Crawford*, (fn. 7), p. 424.

51 Ibid., p. 81.

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in 2014.[52] Accordingly, Article 14 TEU, which caps the number of the Members of the European Parliament (MEPs) at 751, will apply to the next general election in May 2014 and changes will have to be made to the number of MEPs that each member state may return to the European Parliament.[53]

At present, the number of MEPs that each member state may send to the European Parliament is related to that member states' population;[54] albeit not proportionally since smaller member states are disproportionately over represented.[55] Due to their comparable population sizes of over 60 million people, France (74), Italy and the UK (73) are entitled to return more MEPs to the European Parliament than less populated states. However, there is no exact formula which accurately takes populations into account when seeking to apportion seats in the European Parliament and the rules applicable to the Parliament's composition are the result of political agreement in accordance with the principle of "digressive proportionality".[56]

With the entry into force of the Treaty of Lisbon, the distribution of seats is determined by a proposal from the European Parliament which requires unanimous adoption by the European Council. At the time of writing, the European Parliament's Committee on Constitutional Affairs has recently published a draft report on the composition of the European Parliament for the 2014 elections.[57] Under this proposal, the UK in its current form would continue to have 73 MEPs despite several other member states losing out on at least one MEP each in order to accommodate the accession of Croatia (2013) and to bring the parliament's composition into accordance with Article 14(2) TEU. The draft report is clearly intended to garner support from the EU's largest member states due to the fact that any legislative proposal will require unanimous consent from the European Council.[58] It would therefore appear to be the case that the rules which are eventually adopted with regards to the 2014 election will allow the larger member states, including the UK, to retain an almost identical number of MEPs.

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52 For an overview of the current composition of the European Parliament, http://www.europarl.europa.eu/sides/getDoc.do?type=IMPRESS&reference=20100223BKG69359&language=EN (15/11/2013).

53 Unless the European Parliament succeed in achieving a minor treaty amendment relating to its composition, see *Craig/De Burca*, EU Law: Text, Cases and Materials, 5th ed. 2011, p. 52.

54 European Parliament Summary, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0010_en.htm (15/11/2013).

55 *Craig/De Burca*, (fn. 53), p. 52.

56 Which dictates that smaller member states be over represented.

57 European Parliament, Draft Report on the Composition of the European Parliament with a view to the 2014 Elections of 22/1/2013, 2012/2309(INI).

58 The report goes as far as making an explicit commitment to ensuring that the German Constitutional Court's concerns are respected with regards to the number of German MEPs.

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At present, the UK has 73 MEPs, six of which were elected by the Scottish public and, as noted above, these figures are likely to remain almost identical for the 2014 European Parliamentary elections. Regardless as to the relationship between a future independent Scotland and the EU, it is clear that the six MEPs returned to the European Parliament by the Scottish public would no longer continue to be classified as UK MEPs following Scottish independence. The question therefore arises as to what would happen to the six UK MEPs who were elected by the Scottish people whilst Scotland was still a part of the UK? Of course, in the event that Scotland was in some way able to retain its membership within the EU following independence – something which is dealt with below – then there would be little problem at all with the six MEPs elected by the Scottish electorate simply becoming Scottish, as opposed to British, MEPs.[59] Alternatively, in the event that Scotland did not remain automatically within the EU following independence, a question would arise with regards to the Scottish MEPs. Operating under this framework, it would appear that the fate of European Parliamentary seats vacated by virtue of Scottish independence could be decided in the following ways:

a) Option 1: Reduction in number of the remainder of the UK MEPs

According to the 2011 UK census, there are roughly 5.3 million people currently living in Scotland. In the event that a majority of the Scottish electorate was to vote for independence and leave the UK, there would be around an 8 % decline in the UK population[60] as well as a significant drop in economic output.[61] One possible consequence of this drop in population would be that the remainder of the UK would suffer a reduction in the number of elected candidates (MEPs) that it could return to the EU Parliament due to the fact that the number of MEPs per member state is linked to population size.

In this regard it is foreseeable that upon 6 seats becoming available by virtue of Scottish independence, several member states who lost seats as a result of the 2014 election rules would seek to claw back their losses. Member states wishing to gain seats from this situation could therefore suggest that the rules on the number of MEPs per member state be revised in order to account for the fundamental change to the UK brought about by Scottish independence. Proposals to amend the composition of the European Parliament are not unheard of and Spain managed to

59 In fact, Scotland may receive an increase of in their allocation of MEPs on accounts of the digressive proportionality principle which seeks to ensure that smaller EU member states are over represented.

60 BBC Online of 17/12/2012, 11 things we learned from the Scottish 2011 Census, http://www.bbc.co.uk/news/uk-scotland-20754751 (15/11/2013).

61 For an analysis of the Scottish economic situation relative to that of the UK as a whole, see House of Lords Select Committee on Economic Affairs, The Economic Implications for the United Kingdom of Scottish Independence, Oral and Written Evidence, published on 25/7/2012.

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successfully push through such a proposal in 2009. The appeal of re-distributing these newly vacated seats to other EU member states following Scottish independence would be that the remainder of the UK would have a number of MEPs which more accurately reflected its reduced population size. Additionally, from the pro-European standpoint, reducing the number of MEPs that the remainder of the UK could send to the European Parliament would deny the popular Eurosceptic parties from bolstering their ranks with additional politicians.

b) Option 2: The six MEPs would pass to the remainder of the UK by virtue of continuity

Under this possibility, the six seats would simply be retained by the remainder of the UK state and be distributed amongst existing remainder of the UK constituencies with by-elections being held in those constituencies to determine who would fill the new seats. This position is supported by the doctrine of continuity by virtue of the fact that the rules governing European Parliamentary elections give the UK a *right* to a specific number of MEPs and this right would automatically pass, in identical terms, to the remainder of the UK following Scottish independence. Past practice also lends support to this outcome with the case of Algerian independence from France providing some guidance. In the early days of what was then the European Communities, Algeria was still an integral part of France comprising 15 départements which had elected their own representatives to the French National Assembly since 1870.[62] Additionally, Algeria did not fall within the list of overseas countries and territories associated with the EEC under Articles 131-136 EEC but were actually included in the EEC itself.[63] Upon achieving independence from France in 1962, the population of France was considerably reduced but this did not result in any revision of France's level of participation in EEC institutions: in particular, the number of French representatives in the European Parliamentary Assembly was not reduced.[64]

Furthermore, it may well be in the interests of certainty and stability to decide that the remainder of the UK could retain the same number of MEPs as the former UK. After all, even with the loss of 5.3 million citizens due to Scottish independence, the remainder of the UK would continue to be one of the most populous member states in the European Union with its population still several million people greater than that of Spain.[65]

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62 *Biondi/Eeckhout/Ripley*, EU Law after Lisbon, 2012, p. 143.

63 Listed in Annex IV to the 1957 EEC treaty; also see *Biondi/Eeckhout/Ripley*, (fn. 62), p. 143; *Tsagourias*, Scotland: Independence and Membership of the UN and the EU, German Yearbook of International Law 55 (2012), p. 523.

64 Ibid.

65 Spain has a population of around 45 million and has 54 MEPs, http://europa.eu/about-eu/countries/member-countries/index_en.htm (15/11/2013).

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Overall, regardless of how the EU decides to apportion the number of MEPs per member state for the 2014 elections, it is clear from the above analysis that problems could arise in the event that Scotland became an independent country. At present there is nothing in the EU treaties or secondary legislation which would provide a concrete answer to this particular problem and from a broader perspective it is unclear how the only directly elected institution of the EU would deal with an instance of secession or dissolution in one of its member states. As long as political considerations continue to dominate the rules governing successive European elections, it is not unforeseeable that a situation such as Scottish independence could lead to protracted political discussions and disagreements. From a purely legal standpoint however, the doctrine of state continuity would provide the unequivocal solution that the remainder of the UK retain the same number of MEPs as the former UK and a by-election be held to elect six new remainder of the UK MEPs.

2. Voting rights in the Council

Prior to the Lisbon Treaty changes, the EU treaties directed the Council to normally act by a majority of its members. Now, following the Lisbon Treaty, the Council is required to act by qualified majority voting (QMV) except where the Treaties provide otherwise.[66] In other words, QMV has become the normal voting procedure; even though unanimity has been maintained in relation to some politically sensitive areas such as taxation, foreign policy and defence.[67] As a system of voting, QMV as it operates in the Council gives a particular number of votes to each member state according to their demographic weight with the result being that the largest member states in terms of population have the most votes. At present France, Germany, Italy and the UK have 29 votes each in the Council with the number of votes attributed across all 27 member states totalling 345.[68] Under the ordinary legislative procedure, which is used to adopt the vast majority of EU legislation, a threshold of at least half the EU member states coupled with a specific number of weighted votes in the council must be met in order to adopt the proposed legislation.

This traditional system of weighted voting has always been criticised for being overly complex and yet had proved incredibly difficult to revise due to small, medium-sized and large member states having different demands.[69] The Lisbon Treaty has made a significant breakthrough in this regard, however, by introducing a new "double-majority" voting system which, despite its own set of problems, removes the

66 Article 16(3) TEU.

67 *Pech*, The Institutional Development of the EU Post-Lisbon: A case of plus ça change…?, DEI Working Paper 11-5, 2011.

68 Lisbon Treaty, Protocol 9.

69 *Craig*, The Treaty of Lisbon, Process, Architecture and Substance, European Law Review 33 (2008), p. 154.

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weighted voting element. Accordingly, from 1 November 2014 a qualified majority will be defined as at least 55 % of the members of the Council – which at present is 15 member state or more – and representing member states comprising at least 65 % of the Union's population.[70]

With regards to the issue of Scottish independence it is submitted that under the old system of weighted voting the remainder of the UK would most probably have retained its 29 votes in the council despite its drop in population. The reason behind this assumption is that the weighted voting rights did not accurately reflect the member state's population sizes with political considerations certainly playing a role. This is best illustrated by the fact that during previous attempts to renegotiate voting weights France would insist upon retaining the same number of votes as Germany for symbolic reasons, despite having a population which is around 20 million people smaller.

On the other hand, owing to the fact that the weighting of votes was decided on a political level, it would have been at least theoretically possible for the remainder of the UK to have suffered a reduction in the number of votes it received in the Council on accounts of its reduced population size. Under the new system, which does directly account for the population of member states, the remainder of the UK would lose a degree of voting power as a consequence of Scottish independence. The effect that this would have in practice would be limited with the prospect of having EU measures imposed upon the remainder of the UK despite voting against the proposal not likely to increase to any appreciable extent thanks to a loss of 5 million people.

3. Opt-outs

The European integration project has at its core a determination to achieve an ever closer union amongst the peoples of Europe.[71] Built into this principle is the notion that increased levels of integration is a one way street, with member states gradually transferring a greater number of powers to the European level and thus creating a cohesive and united European order.[72] However, it became apparent that such a high degree of integration and uniformity was not supported by certain member states and as a consequence a considerable degree of differentiation or flexibility was introduced by the Maastricht Treaty (TEU).[73] Consequently, successive EU treaties

70 Article 238(3) TFEU. Note that the new definition of QMV will not come into effect before 1/11/2014.

71 Preamble and Article 1 TEU.

72 Paraphrased from *Curtin*, The Constitutional Structure of the Union: A Europe of Bits and Pieces, Common Market Law Review 30 (1993), p. 67.

73 *Craig/De Burca*, (fn. 53), p. 16.

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consolidated this more flexible approach by introducing provisions which allow a certain number of willing member states to make use of the EU's institutions and procedures in order to achieve "closer cooperation".[74] Additionally, the EU treaties now provide in Article 20 TEU for the possibility for a group of willing member states to request authorization from the EU to exercise closer cooperation on a case by case basis under certain conditions (this is known as "enhanced cooperation").[75] On the other hand, the EU treaties also make it possible for member states not to participate in certain policies pursued within the EU framework though so called "opt-outs", or to only participate partially in some policies.[76]

The prospect of a more flexible or differentiated integration, as opposed to a more uniform model, clearly appealed to the UK who, to a greater extent than any other member state, have exercised their right to opt-out from a variety of EU initiatives. Amongst these opt-outs are: the exemption from the obligation to join the Euro currency, the justiciability of the Charter on Fundamental Rights, various opt-outs from the area of freedom, justice and security and the non-participation in the Schengen zone. Based on the proposition that the remainder of the UK will be considered the sole continuing state for the purposes of international law, the remainder of the UK would automatically continue to benefit from all of the former UK's opt-outs following Scottish independence.

Turning to the future, however, it is poignant to note that there is an increasing feeling of resentment emanating from other member states towards the UK as a result of their persistent opting-out and hindering of further European integration at what appears to be every possible opportunity. Accordingly, one must not dismiss the possibility of certain member states seeking to reshape the remainder of the UK's future engagement with the European Union in the event of Scotland breaking away through independence. The loss of 5.2 million citizens, along with a considerable proportion of revenues from commodities such as oil, would certainly place the remainder of the UK in a weaker position economically and politically on the European stage, thus perhaps reducing their substantial bargaining power and influence.

Of the many theories on European integration, the idea that different speeds of integration is temporary has been debated for decades and was widely discussed following the *Tindemans* report in 1975.[77] According to this view, European integra-

74 *Piris*, The Future of Europe: Towards a Two Speed EU?, 2012, p. 61.

75 Ibid.

76 *Stubb*, A Categorization of Differentiated Integration, Journal of Common Market Studies 34 (1996), p. 283.

77 For an overview of the concept of differentiated integration see *Avbelj*, Differentiated Integration – Farewell to the EU-27?, German Law Journal 14 (2013), pp. 191-212.

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tion is something which may be conducted at differing speeds initially by allowing member states considerable room for manoeuvre through the flexibilities of the treaties, but ultimately every member state will participate to the same extent within a more unified European Union.[78] Although this view lost its appeal over the years it has made something of a resurgence in light of the Eurozone crisis and offers one of many possible ways for the EU to proceed in the future without dramatic treaty changes. There is reason to believe that the bulk of member states, who have so far participated fully in all aspects of further integration, will demand that member states that have not done so begin to catch up. This in and of itself will clearly resonate with some member states who may wish to pressurize a newly depleted UK in terms of power and influence to jump on board with further integration or lose out on membership entirely.

From a different perspective, it has become abundantly clear in recent times that the Eurozone crisis has necessitated closer cooperation and deeper integration between its 17 member states. The question to be raised in light of this realization is the extent to which the European Union will also pursue a level of deeper integration as a unified organization of 28 member states. With the rise of growing economies in places like China, India and Brazil many have come to realize that no European state will be able to compete with these emerging forces on their own and have stressed that a much more closely knit and cooperative European continent is not only desirable, but essential for Europe's long term prosperity.[79] As a consequence, the political climate may be such that, come Scottish independence, the EU's member states will be pursuing a more uniform programme of further integration with less room for the UK to manoeuvre in the form of opt-outs and abstentions from participation in certain policy fields.

The above discussion in relation to the consequences for the remainder of the UK following Scottish independence is merely an overview of a few key areas in which a continuator state's EU membership conditions may, and in some cases will, require alterations. Although the position under public international law is unequivocal with regards to the remainder of the UK retaining EU membership, it is clear that the precise shape and nature of this continued membership will be determined ultimately by political considerations.

78 *Stubb*, (fn. 76), p. 287.

79 *Piris*, (fn. 74), pp. 8-19.

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IV. The position of an Independent Scotland under International Law

This paper shall now move to consider the consequences for a newly independent Scotland in the likely event of the remainder of the UK being recognized as the continuator state of the former UK for the purposes of International rights and obligations.

1. Secession as State Succession

Defining the concept of state succession has in and of itself proved to be rather problematic. The Vienna Convention on the Succession of States in Respect of Treaties 1978[80] is often cited as being of limited impact and influence with respect to questions of state succession. This is due to the fact that there have been very few ratifications of the convention and, perhaps more importantly, state practice over the years has tended to diverge from the provisions of the convention.[81]

Nevertheless, it is submitted that it may be useful as a guideline within the context of Scottish independence. Indeed, the Arbitration Commission of the Conference for Peace in Yugoslavia (*Badinter* Commission) noted that despite applicable principles being scarce, and that most instances of state succession would require analysis on a case by case basis, the 1978 (and 1983) Vienna Conventions do offer some guidance.[82]

The 1978 Vienna Convention, which resulted from a study conducted by the International Law Commission aimed at rectifying the unsatisfactory nature of the law of state succession at the time, provides that: "succession of states' means the replacement of one state by another in the responsibility for the international relations of territory"[83] and this definition was endorsed by the aforementioned *Badinter* Commission.[84] Despite the fact that the vast majority of studies on state succession make reference to this definition,[85] much discussion continues to this day over an appropriate definition for this phenomenon in international law and this has led to a plethora of divergent vocabulary, drawn from a number of different sources, being utilized in an attempt to do so.

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80 Vienna Convention on Succession of States in Respect of Treaties, 1978, UN-doc. A/CONF.80/31.

81 *O'Brien*, (fn. 43), p. 589.

82 Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission), Opinion No. 9 on settlement of problems of state succession.

83 Article 2(1)(b) Vienna Convention on Succession of States in Respect of Treaties.

84 Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission), Opinion No. 1 on Questions Arising from the Dissolution of Yugoslavia, reproduced in International Legal Materials 31 (1992), p. 1497; *Shaw*, (fn. 16), p. 959.

85 *Bühler*, (fn. 13), p. 5.

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O'Connell defines state succession as "a transfer of territory from one national community to another"[86] whereas *Brownlie* states that "State succession arises when there is a definitive replacement of one state by another in respect of political sovereignty over a given territory in conformity with international law."[87] *Craven* opts for a more concise definition in his seminal Article on the topic, describing state secession simply as "a change in sovereignty over territory".[88] Indeed, the great diversity of proposed definitions on the topic has prompted one writer to remark that there are as many definitions for state succession as there are writers[89] and, as a result, it is sensible to regard the expression as an omnibus expression designed to cover a wide number of factual situations.[90]

In light of the fact that the term state succession is generally accepted to be nothing more than an umbrella term to cover various factual situations, the factual situations themselves require definition. In this regard it is generally accepted that state succession may include:

> "a merger of two states to form a new state; the absorption of one state into another, continuing state; a cession of territory from one state to another; secession of part of a state to form a new state; the dissolution or dismemberment of a state to form two or more states, or the establishment of a new state as a result of decolonization."[91]

Once again the terminology in this area tends to vary from author to author,[92] and as can be seen from the above, there are many different political events which may be taken to be examples of state succession. Thankfully, this does not prevent on from ascertaining a common foundation upon which such varied political events ultimately rest. Thus, the common feature in any description of the types of political events which may be classified as state succession is that in each scenario it is clear that a once recognized entity disappears, in whole or in part, and is succeeded by some other authority.[93]

Operating under *Shaw's* above quoted definition, it is clear that in the event that the Scottish public was to vote in favour of independence, an instance of secession from

86 *O'Connell*, State Succession in Municipal and International Law, vol. I, 1968, p. 3.

87 *Crawford*, (fn. 7), p. 423.

88 *Craven*, The problem of State Succession and the Identity of States under International Law, European Journal of International Law 9 (1998), p. 145.

89 *Talari*, State Succession in Respect of Debts: the Effect of State Succession in the 1990s on the Rules of Law, Finnish Yearbook of International Law 7 (1996), p. 140.

90 *O'Brien*, (fn. 43), p. 587.

91 *Shaw*, (fn. 16), p. 959.

92 From a US perspective see Restatement (Third) of the Foreign Relations Law of the United States Pt. II (1987), s208.

93 *Shaw*, (fn. 16), p. 957.

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the existing UK state would be taking place.[94] Having ascertained this, the question to be resolved is which legal rules and principles of the law of state succession may be applied to such a situation. From the outset it is important to highlight some problems that one inevitably encounters when embarking on an analysis of this nature. Firstly, legal doctrine in the field of state succession continues to be shrouded in great uncertainty and controversy and this is clearly illustrated by Opinion No. 1 of the *Badinter* Commission on Yugoslavia in which it was stated that "there are few well established principles of international law that apply to state succession."[95] The complexity of the issue is further illustrated in the judgments of various national courts which have stressed that not many settled legal rules have emerged as yet within this field[96] and that it therefore remains one of the most disputed areas of international law.[97]

One of the great difficulties underlying the notion of state succession, therefore, is the perceived absence of a comprehensive body of norms in international law which govern all instances in which there is a creation, disappearance or mutation of the legal order of the state.[98] Whilst it should always be borne in mind that State succession is a political phenomenon and that in practice the many issues are guided not by legal, but extra juridical pragmatic considerations, it is nevertheless submitted that one may ascertain certain rules, or perhaps even mere guidelines, from legal doctrine which may apply in the event of secession from an existing EU member state.

2. Secession generally under International Law

It must be acknowledged that, outside of the decolonisation context, secession as a political phenomenon has never been encouraged by the international community[99] and there have been very few instances of secession since 1945.[100] Furthermore, almost every instance of secession in history has involved a reluctance on the part of

94 See *Tsagourias*, (fn. 63), p. 511. In contrast, it is submitted that in the case of Flanders breaking away from Belgium would be treated as a dissolution or dismemberment, see section VI of this paper.

95 Badinter Commission, (fn. 82).

96 *Crawford*, (fn. 7), p. 424.

97 German Federal Supreme Court, case No. 2 BGs 38/91, *Espionage Case*, International law Reports 1994, p. 77 et seq.

98 *Craven*, (fn. 88), p. 150.

99 See 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations G.A. Res. 2625, UN-doc. A/RES/25/2625 of 24/10/1970.

100 *O'Brien*, (fn. 43), p. 594; *Orakhelashvili*, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo, Max Planck Yearbook of United National Law, vol. 12, 2008, p. 14.

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the existing sovereign to allow a section of its territory to gain independence with the inevitable result being a great deal of violence and loss of human life.[101] In contrast, the potential secession of Scotland will certainly be conducted through entirely peaceful means[102] with a legally binding agreement in force between the governments of the UK and Scotland which guarantees that the result of the referendum will be respected.[103] The following analysis will therefore proceed with reference to the general principles of international law related to secession and membership in international organizations whilst cognizant of the fact that Scotland would leave the UK amicably – something which may bear considerable weight in the future.

Generally speaking, the traditional customary international law rule with regards to the status of a seceding territory is that the newly created state, in this case Scotland, will commence international life free from the treaty rights and obligations of its former sovereign, in this case the UK.[104] Past practice strongly supports this view with the secession of Belgium from the Netherlands (1830); Cuba from Spain (1898); Finland from Russia (1919) and Pakistan from British India (1947) all resulting in the newly independent states beginning life free from the rights and obligations of their predecessors.[105] This position is often labelled as the "clean slate" principle and was widely applied to cases of decolonization in order to ensure that states emerging from colonial rule would not be bound by unwanted treaties that were entered into by their previous rulers.[106]

3. The Vienna Convention on the Succession of States in Respect of Treaties 1978

The Vienna Convention is viewed as building upon the traditional clean slate principle with regards to "Newly Independent States" by providing that:

> "A newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession

101 The most prominent example in living memory is the secession of Bangladesh from Pakistan in 1971 which, according to various estimates, resulted in the death of anywhere between 300,000 and 3 million people.

102 Although some authors have entertained the utterly fatuous idea that the situation in Scotland could descend into something akin to the Balkans in the 1990s. See http://www.economist.com/blogs/easternapproaches/2012/04/scottish-independence-and-balkans (15/11/2013).

103 Agreement between the United Kingdom Government and the Scottish Government, (fn. 4).

104 *O'Connell*, (fn. 45), p. 88; Third US Restatement of Foreign Relations Law (1987) s210(3).

105 *Shaw*, (fn. 16), p. 974.

106 For an overview of the history and applicability of the clean slate principle, specifically in relation to the decolonization process, see Separate Opinion of Judge *Weeramantry*, Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia), ICJ Reports 1996, p. 643; *Gardiner*, International Law, 2003, p. 187.

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> of States the treaty was in force in respect of the territory to which the succession of States relates."[107]

Therefore, if Scotland were to be classified as a newly independent state then it would, according to Article 16 of the Convention, begin life with a clean slate and free from all treaty obligations of the former UK, including EU membership. It is, however, generally accepted that Article 16 of the Convention was intended to apply specifically to states emerging from a process of decolonization; a view supported by several scholars[108] and by the fact that proposals to include a category of "quasi newly independent states", which would include states emerging outside the colonial context, was rejected.[109] Operating under this definitional framework, it is obvious that Scottish independence should in no way be considered analogous to that of a process of decolonization and in this respect should be considered to be out with the definition set out in Article 16 of the Convention.

Article 34 of the Convention, in stark contrast to Article 16 above, provides that:

> "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 […] 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".

Accordingly, Article 34(1) of the Convention would appear to support the EU treaties continuing in force for both the remainder of the UK and Scotland following independence by virtue of secession. However, two crucial objections may be made to this proposition. Firstly, the Convention has not garnered much support from states, and has come into force only recently with a very small number of parties. It is thus generally not considered to be reflective of customary international law, especially in its abolition of the aforementioned clean slate rule, which, when applied, would produce an outcome exactly opposite to the one advocated in the Vienna Convention.[110]

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107 Article 16 Vienna Convention on Succession of States in Respect of Treaties.

108 *Shaw*, (fn. 16), p. 977; O'Brien, (fn. 43), p. 595; Brownlie, Principles of Public International Law, 7th ed. 2008, p. 661.

109 Report of the ILC on the Work of its 26th Session, Draft Articles on Succession of States in respect of Treaties, with Commentaries, Commentary to Art. 4, reproduced in Yearbook of the International Law Commission 1974, vol. II, p. 260; *Kamminga*, State Succession in Respect of Human Rights Treaties, European Journal of International Law 7 (1996), p. 471.

110 *Milanovic*, The Tricky Question of State Succession to International Responsibility, European Journal of International Law Blog "EJIL Talk" of 16/2/2009, http://www.ejiltalk.org/the-tricky-question-of-state-succession-to-international-responsibility (15/11/2013); see also *Malone*, International Law, 2008, p. 22.

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Additionally, Article 4 of the Convention states that:

> "The present Convention applies to the effects of a succession of States in respect of: any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization".[111]

Based on this Article it is clear that the rules on how a state may acquire EU membership as laid down within the EU's constituent treaties (at present the TEU and TFEU) will be determinative and take precedence over the rules enshrined in the Vienna Convention.

Indeed, out with the Vienna Convention system the issue of succession to membership in international organisations would appear to be settled beyond any reasonable doubt despite there never being a specific treaty drafted on this particular issue.[112] As *Bühler* notes in his comprehensive overview of the topic, past practice provides almost unanimous support for the principle that specific rules of international organisations, and therefore the rules for acquiring membership within that organisation, will take precedence over the general legal regime of state succession to treaties.[113] It is therefore unsurprising that the prevailing doctrine is to the effect that so far as new states may succeed to treaty obligations of their predecessors under principles of general international law – something which is itself highly debatable in light of the customary international law "clean slate" principle[114] – such principles have no application to membership in international organisations.[115]

Within the United Nations framework the abovementioned UN General Assembly sixth legal committee memorandum proclaimed 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

111 Article 4(a) Vienna Convention on Succession of States in Respect of Treaties.

112 The International Law Commission has failed on more than one occasion to have the issue included in its future work agenda with the result being that no comprehensive study has ever been conducted in this field. For an overview of the attempts to include a study of state succession and membership in international organisations within the ILC's work agenda see *Bühler*, (fn. 13), p. 1 et seq.

113 Ibid., p. 290.

114 With regards to succession to treaties generally there are some who argue that, despite the clean slate principle, international law provides for automatic succession to human rights treaties. Whilst this is often supported by human rights lawyers, it is in fact highly controversial and is not supported by much state practice, see generally *Rasulov*, Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?, European Journal of International Law 14 (2003), p. 141; *Kamminga*, (fn. 109), p. 469.

115 Draft Articles on Succession of States in Respect of Treaties, (fn. 109), p. 177 et seqq., para. 2; *Brownlie*, (fn. 108), p. 665.

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> of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter."[116]

In concluding this section, it would appear to be the case under public international law that an independent Scotland would be required to apply for EU membership through the process set out in Article 49 TEU.

4. The EU application process

In light of the above it would appear to be beyond any reasonable doubt that Scotland would begin life as a new state under international law and would consequently be obliged to re-apply for membership in international organisations including the European Union. In addition, statements made by senior European officials both past and present demonstrate that this is likely to be the position adopted by the European Union in relation to new states that come into existence through secession from an existing EU member state. According to commissioners *Prodi* in 2004 and *Barroso* in 2012, the EU treaties apply to the member states and when a part of the territory of a member state ceases to be a part of that state, e.g. because the territory becomes an independent state, the treaties will no longer apply to that territory, with the consequence being that the newly independent state will have to re-apply for EU membership.[117] In addition, Commissioner *Barroso* also claimed in 2012 that joining the EU is:

> "a procedure of international law. A state has to be a democracy first of all and that state has to apply to become a member of the European Union and all the other Member States have to give their consent. A new state, if it wants to join the European Union, has to apply to become a member of the European Union like any state."[118]

Consequently, the view of senior EU officials is that the EU treaties apply to the member states and that when a part of the territory of a Member State ceases to be a part of that state, the newly independent state will have to re-apply for EU membership under the procedure laid down in Article 49 TEU.[119] Logically, this would also

116 The Succession of States in relation to Membership in the United Nations, Memorandum prepared by the Secretariat, UN-doc. A/CN.4/149 and Add, p. 103, printed in Yearbook of ILC, vol. II, 1962.

117 Answer given by *Prodi* on behalf of the Commission on 1/3/2004, OJ C 84 E of 3/4/2004; Scottish independence: Commission President José Manuel Barroso's written correspondence with acting chairman of House of Lords Lord Tugendhat dated 10/12/2012, http://www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-committee/publications/previous-sessions/session-2012-13/reply-letter-to-lord-tugendhat-101212 (15/11/2013).

118 Scottish independence: EC President José Manuel Barroso on new states membership, BBC News of 12/12/2012, www.bbc.co.uk/news/uk-scotland-scotland-politics-19567650 (15/11/2013).

119 Ibid.

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mean that an independent Scotland would no longer benefit from the UK's opt-outs from policy fields like the Euro currency and Schengen and, should Scotland re-apply for EU membership, the prospects of obtaining similar opt-outs in the future would be very slim indeed.[120]

This position of re-application clearly operates from the starting point of looking at the status of Scotland under public international law following the date of separation from the remainder of the UK i.e. to Scotland post 2016. In so doing, the entire argument is conducted within the parameters of traditional public international law with the inevitable outcome being that Scotland would be treated as a new state for the purpose of international rights and obligations. When framed in this manner, one inevitably reaches the conclusion that Scotland would be precluded under the laws of state succession to succeed to membership in international organizations including the EU.[121] Accordingly, Scotland would, upon gaining independence, begin life out with the scope of application of the EU's constituent treaties and thus have to re- apply for EU membership under the procedure laid down in Article 49 TEU.

However, it is envisaged that within the specific context of a yes vote in favour of Scottish independence in 2014, Scotland will not begin life as an independent state until 2016.[122]

Historical examples illustrate that, after a democratically agreed and accepted expression of political will, a period of transition between the result of the vote and the required constitutional change is inevitable. Indeed, of all the new states which have become UN members since 1945, 30 became independent following a referendum on independent statehood with the average length of time between the referendum and Independence Day being approximately 15 months.[123] It is therefore submitted that the abovementioned view fails to account for any transitional period prior to the official date of separation from the remainder of the UK by simply insisting that Scotland would have to re-apply for membership after becoming a new state. Clearly, a situation of such complexity demands a far more nuanced approach and should be viewed not solely from the position of public international law but also from the view point of the internal legal order of the EU.

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120 This would certainly be the case with regards to the Euro currency which all new accession states are legally obliged to join after a certain period of time. See for example: Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union.

121 *Happold*, (fn. 26), p. 30; *Boyle/Crawford*, (fn. 3), p. 98.

122 Document published by the Scottish Government, Scotland's Future: from the Referendum to Independence and a Written Constitution, 2013, http://www.scotland.gov.uk/Resource/0041/00413757.pdf (15/11/2013), p. 10.

123 Ibid.

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V. The Alternative

With regards to its international legal status, it has often been argued that the European Union, with its high degree of constitutional development and supranational components, no longer resembles an international organisation within the traditional sense of the term.[124] Instead, some view the EU as some form of embryonic federation inherently committed to a process of growth by which it will become an actual federation.[125] From an alternate perspective that is less explicit on the EU's march towards federalism, *Weiler's* constitutional thesis proclaims that:

> "in critical aspects the Community [EU] has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law".[126]

This perception stems in large part from the ECJ's habitual insistence from the very earliest days of the European integration project that the community (now EU) constitutes a new legal order of international law.[127] In relation to these early landmark judgements, it has been noted that when the ECJ in *Costa/ENEL* expressly contrasted the founding treaty of the then European Communities with "ordinary international treaties", it untied the Community from the existing legal order of public international law.[128] In more recent times, the ECJ in the *Kadi* case[129] sparked an immense debate on this issue by repeatedly emphasizing the separateness and autonomy of the EU legal order from other legal systems and from the international legal order more generally.[130] Accordingly, the EU of today has developed to such

124 Much has been written over the years on the debate over the precise nature of the EU with some suggesting that is neither a state nor an international organisation but as some form of *sui generis* entity. See *Bengoetxea*, The EU as (more than) an International Organisation, in: Klabbers/Wallendahl (eds.), Research Handbook on the Law of International organisations, 2011, pp. 448-465; *Hlavac*, Less than a state, more than an international Organization: The Sui Generis Nature of the European Union, 2010.

125 *Bengoetxea*, (fn. 124), p. 448.

126 *Weiler*, The Reformation of European Constitutionalism, Journal of Common Market Studies 35 (1997), p. 98.

127 The landmark ECJ decisions in *Van Gend en Loos* and *Costa/ENEL* are often quoted as the starting point in this regard where it was stated that the community (now European Union) constitutes a new legal order of international law.

128 Opinion of AG *Maduro* to ECJ, case C-402/05 P, *Kadi*, ECR 2008, I-6351, para. 21.

129 ECJ, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, ECR 2008, I-6351.

130 *De Burca*, The ECJ and the International Legal Order: a Re-evaluation, in: De Burca/Weiler, The Worlds of European Constitutionalism, 2012, p. 119.

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an extent that it now constitutes an autonomous legal order which is separate from the general body of public international law.[131]

When applying this to the question of Scottish independence, or any comparable secessionist movement, the argument is made by some scholars that any question concerning EU membership with regards to both Scotland and the remainder of the UK should, where possible, be dealt with within the EU legal framework. Put differently, recourse should only be had to principles of public international law, in particular the aforementioned rules on state continuity and state succession, in a situation where the EU legal order does not sufficiently deal with the problem.[132] This position in and of itself would be unlikely to cause much controversy. Even those who have written extensively on the international law aspects of this question have been sure to stress the important caveat that Scotland's position within the EU will depend on the EU's own legal order.[133]

The point of departure, however, is the correct manner in which to proceed in light of the fact that the EU treaties do not explicitly deal with questions of membership following secession. As referenced above, commissioners *Prodi* and *Barroso* take the view that the EU treaties apply to the member states and that when a part of the territory of a member state ceases to be a part of that state, the treaties will no longer apply to that territory, with the consequence being that the newly independent state will have to re-apply for EU membership.[134]

In contrast to the above, it has been suggested that despite there being no express provision of EU law which deals with the consequences of EU membership following an instance of secession, such an instance may nevertheless fall entirely within the ambit of the EU legal order. Furthermore, a purposive interpretation of the EU treaties would demand that negotiations take place prior to separation taking effect; thus raising the prospect of Scotland and the remainder of the UK negotiating any future relationship with the EU during the aforementioned transitional period. The central point here is that one must not only look to the express provisions of the treaties themselves but also to their general spirit and purpose. According to *Edward*:

> "The relationship between the UK, the EU institutions and other member states is governed by the EU treaties. The solution to any problem for which the Treaties do not expressly provide must be sought first within the system of

131 *Van Rossem*, Interaction between EU law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not The Community, CLEER working papers 2009/4, p. 18.

132 *Edward*, (fn. 3), para. B.2.

133 *Crawford/Boyle*, (fn. 3), p. 100.

134 Answers by *Prodi* and *Barroso*, (fn. 117).

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> the Treaties, including their spirit and general scheme. Only if the treaties can provide no answer would one resort to conventional public international law (including doctrines of state succession)."[135]

1. The prospect under Article 49 TEU

Article 49 TEU provides that:

> "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

The first condition to be fulfilled therefore is that of being a "European State"; a label that may or may not be applicable to Scotland, or any comparable secessionist movement, during the period in between voting for independence and separating from the existing state entity. Even if one is to accept that Scotland would have to re-apply for EU membership under Article 49 TEU, it has been proposed that this process could begin prior to the date upon which separation from the UK took place. According to this point of view, the concept of European State in Article 49 TEU should be construed as being broad enough to include a state which is inevitably going to become independent in accordance with the constitutional arrangements of the member state of which it already forms a part.[136] The consequence of adopting this expansive approach to the wording of Article 49 TEU would be to allow Scotland to begin negotiating its membership of the EU immediately after a yes vote for independence and therefore whilst still being a constituent part of the UK state. As *Tsagourias* has noted, it can be safely said that Scotland would satisfy the legal, political and economic criteria for membership in light of the fact that EU law already applies to Scotland.[137]

An alternative approach would be to circumvent the need for application under Article 49 TEU entirely. The case of German reunification, although dealing with reunification and involving many significant differences from the situation under examination in this paper, is nevertheless pertinent for the Scottish case from the point of view of procedure. Under pressure to meet the date set for reunification, the EU adopted a simplified procedure for negotiation under which the Commission explored with Bonn and Berlin (the respective capitals of West and East Germany at the time) the changes needed in EU legislation, and its proposals were approved rapidly by the Council of Ministers and European Parliament.[138]

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135 *Edward*, (fn. 3), para. B.

136 *O'Neill*, Scotland, Independence and the EU: The Sturgeon Response, 2012, http://eutopialaw.com/2012/12/14/scotland-independence-and-the-eu-the-sturgeon-response/ (15/11/2013).

137 *Tsagourias*, (fn. 63), p. 528.

138 *Avery*, The foreign Policy Implications of and for a Separate Scotland, House of Commons Foreign Affairs Select Committee Session 2012-2013, HC 643.

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During these negotiations the Commission proceeded from the basic assumption that the integration of the territory of the German Democratic Republic (GDR) into the Community by way of German reunification constituted a special case so that Article 237 of the EEC treaty relating to the accession of third states did not apply.[139] It is therefore submitted that a similar recognition of exceptional circumstances, on accounts of the already fully implemented *acquis* and EU citizenship, could be applied in order to negotiate the terms of Scotland's EU membership from inside the EU and thus release them from the obligation to re-apply as a third country accession candidate. In relation to *Barroso's* view that joining the EU is a process of international law, it has been noted in relation to the reunification of Germany that since all the member states, as well as the GDR, were agreed on the mode of integration, the international law problem simply did not arise.[140]

Consequently, if such a course of action were to be followed and a satisfactory outcome was reached during such internal negotiations, there is reason to believe that such an agreement could be implemented in a manner that would ensure a seamless path to continued EU membership for both an independent Scotland and the remainder of the UK upon the date of separation. The success of this approach would rest entirely upon the willingness of all parties concerned to reach an agreement at the political level to allow such an extension of the treaties to a new state without the need for a formal application process under Article 49 TEU. Although not impossible, it is submitted that such an outcome would be highly unlikely on accounts of the apparent unwillingness on the parts of both the EU Commission and certain member states to allow for it.

2. The prospect under Article 50 TEU

It is submitted that Article 50 TEU, which sets out a procedure in order for a member state to negotiate its withdrawal from the EU, is also of relevance to the question of Scottish independence. Although not directly applicable to an instance of secession from an existing member state, Article 50 TEU can nevertheless be taken into account since it evidences the general scheme and spirit of the treaty by requiring member states to negotiate their withdrawal from the EU. The reason why Article 50 requires a period of negotiation prior to withdrawal from the EU is that leaving the Union would involve the unravelling of a complex mix of "budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations."[141]

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139 *Giegerich*, The European Dimension of German Reunification: East Germany's Integration into the European Communities, Heidelberg Journal of International Law 51 (1991), p. 418.

140 Ibid., p. 419, fn. 176.

141 *Edward*, (fn. 3), para. B.5.

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At present, by virtue of its place within the UK, Scotland has already adopted and implemented the full EU *acquis communitaire* and, as a result, EU law already impacts every Scottish citizen's daily life to a considerable extent. Additionally, from a political point of view, Scotland has been in the EU for 40 years[142] and its people have acquired rights as European citizens including the right to move and reside freely within the EU.[143] The crucial point to this line of argument, therefore, is that it would be absurd, at some specific moment in time when separation from the remainder of the UK occurs, to strip Scots of their EU citizenship and declare an immense number of laws and regulations stemming from the EU *acquis* inapplicable to the territory of Scotland.[144] This is all the more troubling when one considers that, according to senior EU officials, the EU treaties would simply cease to apply in their entirety to the territory of Scotland on a particular date. Following the date of separation, Scotland would be treated as any other accession state and accordingly have to go through the procedure as set out in Article 49 TEU in order to re-establish all ties it previously had with the EU the day before it officially separated from the remainder of the UK.

The object of all interpretation lies in the true intention of the lawmakers, whether they are framers of a constitution or a treaty, legislators, or drafters of secondary legislation.[145] When looking to the presumed intentions of the drafters of the EU treaties, *Edward* suggests that it could not have been their intention to dictate that negotiations were necessary in cases of withdrawal under Article 50 TEU but not at all required in cases of separation through secession. In addition, reasons of practicality dictate that the many complex relationships, liabilities and obligations in place in Scotland, which stem from EU law, should not be allowed to simply unravel automatically upon a specific date without taking measures to either prevent, or at least reduce the impact of, such a situation. Further support for this idea can be found in the case law of the ECJ who have consistently adopted a teleological or purposive approach to interpreting various provisions of EU law.[146] It is therefore at least conceivable that the ECJ, if requested to decide on matters linked to Scottish independence, would find that the general scheme and spirit of the treaties dictate that some form of negotiations should take place prior to the date upon which

142 For an overview of Scotland's engagement with the EU over this 40 year period see *Shaw*, Scotland: 40 Years of EU Membership, Journal of Contemporary European Research 8 (2012), p. 547 et seqq.

143 *Avery*, (fn. 138).

144 *Happold*, (fn. 26). On the specific point about citizenship see *O'Neill*, Scotland, Independence and the EU: The Baroso Intervention, 2012, http://eutopialaw.com/2012/12/12/scotland-independence-and-the-eu-the-barroso-intervention/ (15/11/2013).

145 *Fennelly*, Legal Interpretation at the European Court of Justice, Fordham International Law Journal 20 (1996) p. 65.

146 Ibid.; see also *O'Neill*, (fn. 136).

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independence becomes effective in order to prevent an automatic unravelling of the kind referred to above.

In furtherance of this argument, *Edward* draws upon general principles of EU law as enshrined in Articles 2 and 4 TEU. In particular, principles such as respect for democracy, the rights of minorities and the principle of non-discrimination; as well as the principle of sincere cooperation (Article 4(3) TEU) as applied to the EU and its member states are invoked. Against this backdrop the EU and all the member states would be obliged to enter into negotiations – in accordance with the EU obligations of good faith, sincere cooperation and solidarity – before separation took effect in order to determine the fate of both a future independent Scotland and the remainder of the UK with regards to EU membership. This approach, based on a purposive interpretation of the EU treaties – particularly Article 50 TEU – would place all parties involved under a legal obligation to engage in negotiations to resolve the question of EU membership and the conditions thereof prior to separation. This would necessarily involve the UK as the negotiating partner for both the remainder of the UK and Scotland due to the fact that during the transitional period Scotland would remain an integral part of the UK state and would only attain legal autonomy upon the date of separation.[147] There would of course be a strong case to be made for any UK negotiation team during this period containing officials and representatives from Scotland.

The immediate problem to arise out of this solution is whether the UK would really be obliged to negotiate with the rest of the EU on behalf of Scotland during the transitional period; especially in light of the fact that the UK government is vehemently opposed to Scottish independence. The conventional approach to this rather problematic issue would be to simply state that it would be a matter to be resolved politically and not legally. Whilst not denying that this may prove to be correct, one is not left bereft of legal provisions or at least considerations in this scenario. Firstly, as already mentioned, all parties would be under a general obligation of sincere cooperation and good faith stemming from the EU treaties and this may exert some pressure on the UK government to conduct negotiations with their EU counterparts on behalf of Scotland in a manner which did not unduly impede Scotland's attempts to begin life as an EU member state. In this respect one concedes that it may be stretching the aforementioned duties of sincere cooperation and good faith under EU law well beyond their intended purposes to impose such an obligation upon the UK government. Even so, the UK government may be obliged to conduct negotiations on behalf of both the remainder of the UK and Scotland during this transitional period on accounts of UK constitutional law and not EU law. According to the Edinburgh agreement on the referendum on Scottish independence:

147 This was the case with Greenland where Denmark negotiated the island`s withdrawal from the EU since Greenland was a part of Denmark.

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> "The United Kingdom and Scottish Governments are committed […] to working together on matters of mutual interest and to the principles of good communication and mutual respect. […] They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom."[148]

Depending on how one interprets this provision it may indeed be possible to make a legal argument to the effect that the UK government, following a yes vote for Scottish independence in 2014, would be obliged to negotiate in good faith on behalf of both the remainder of the UK *and* Scotland during the 2014-2016 transitional period in an attempt to ensure continued EU membership for both entities.

Having demonstrated that internal negotiations between the EU and its current member states with regards to the way to deal with Scottish independence could indeed be possible within the current EU treaty framework, the logical next step is to analyse the prospects for success of such negotiations. As mentioned above, *Edward* takes the view that such negotiations would have to be conducted within a spirit of cooperation and good faith. Whilst this may be true, some member states (particularly Spain) are likely to be extremely hesitant in entering into negotiations aimed at facilitating the continued EU membership of a state created out of an instance of secession for fear of setting a precedent and encouraging similar movements within their own borders. Since the negotiations would be aimed at ensuring that the remainder of the UK and Scotland remained as EU members upon the date of separation and thus ensure Scotland's "seamless transition from membership as part of the UK to membership as an independent State",[149] a further problem with regards to negotiations is that there would unquestionably be a need to amend the treaties to deal with issues such as budgetary contributions, opt-outs and institutional representation. This would require a common accord to be reached by all of the EU member states at an intergovernmental conference followed by each state ratifying such an agreement in accordance with their own constitutional rules and requirements as set out in Article 48 TEU. Accordingly, it is perfectly possible for negotiations to take place in general good faith and within the spirit of cooperation and nevertheless fail to reach unanimous agreement to amend the treaties.

Returning to the example of Algeria, an entirely different course of action may be possible in light of the fact that following independence the relevant provisions of the EEC treaty continued to apply.[150] In December 1962, six months after

148 Agreement between the United Kingdom Government and the Scottish Government, (fn. 4).

149 *Edward*, (fn. 3), para. B.15.

150 *Tsagourious*, (fn. 63), p. 523.

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independence from France, the President of Algeria sent a letter to the President of the EEC Council of Ministers to request the provisional maintenance of the relevant Articles of the EEC treaty until an agreement could be reached on future EEC-Algeria relations.[151] By implication, therefore, the EEC treaty continued to apply to Algeria in the period between July and December 1962 without any objections or stipulations from either the Algerian state or the EEC. In response to this letter both the Council and Commission responded positively by expressing their intention to examine the situation whilst assuring respect for former responsibilities vis-à-vis Algeria.[152]

From the Algerian example, it has been noted that:

> "it might be possible to conclude that neither side wished to see a sudden and complete rupture between them and they thus allowed an indeterminate legal situation to continue due to important political and economic considerations."[153]

Note however that the Commission has already expressed its position through President *Barroso* that any state coming into existence following its breaking away from an existing EU member state would have to re-apply for EU membership. Therefore, the Commission at least would appear to be unwilling to extend the treaties to Scotland for a provisional period of time until a future Scotland-EU relationship could be resolved.

Nevertheless, the fact that negotiations between all the relevant parties on the future of both Scotland and the remainder of the UK's relationship with the EU is an option – or if one subscribes to *Edward's* view, an obligation – certainly raises the prospect of Scottish independence, or any other comparable secessionist movement, being dealt with exclusively within the parameters of the EU legal order prior to the coming into existence of a new independent state. Whether these discussions take the form of an application for membership during the transitional period between a yes vote in 2014 and independence day in 2016 under Article 49 TEU, or through negotiations with regards to how any future Scotland-EU relationship will operate by applying Article 50 TEU analogously, there can be no doubt that the EU internal legal order provides opportunities to prevent Scotland from being simply thrown out of the EU after voting for independence.

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151 *Tavernier*, Aspects Juridiques des Relations économiques Entre la C.E.E et l'Algérie, Revue Trimestrielle de Droit Européen 8 (1972), p. 9 et seq.

152 *Biondi et al.*, (fn. 62), p. 144.

153 Ibid.

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VI. Dissolution of an EU member state

Having discussed the ways in which membership of the EU may be determined following an instance of secession of an existing member state, one must now turn to consider the complete dissolution of an EU member state. The first section of this paper focused upon scenarios in which it would be relatively straightforward to ascertain a continuator state in the event that part of a territory of a state achieves independence through secession. This is borne out of the fact that at present the most widely recognized and supported secessionist movements in the EU involve a relatively small section of an existing state's population and territory seeking to achieve independence from a much larger state entity (Scotland and Cataluña seeking independence from the UK and Spain respectively are the clearest examples of this). However, if one is to look beyond these movements at the forefront of national and European political and legal discourse to campaigns which involve a number of objective differences, the conventional dichotomy between continuity and newly independent states is far less straightforward to comprehend and indeed may be rendered inoperable.

For the purposes of this paper an analysis shall focus on Belgium and the calls for independence or at least greater autonomy for the region of Flanders. Admittedly, calls for greater autonomy, which appears to be the policy favoured by the majority of the population in Flanders, would not in and of itself lead to an instance of Flemish secession. Nevertheless there can be no doubt that greater autonomy could constitute a meaningful step towards complete independence and recent electoral victories for the likes of *Bart de Wever's* New Flemish Alliance (NVA) have been interpreted by some as a vital step towards seeking fully-fledged independence from Belgium.[154] It is not the intention of the present author to predict the probability of areas like Flanders ever reaching a stage comparable to that in Scotland of a legally valid and binding referendum on independence. Instead, the sole focus shall be upon the potential legal consequences that would flow from such an eventuality. The fact that initiatives which could in future lead to alterations of existing EU member states in a manner much more dramatic than a simple secession and subsequent identification of a rump continuator state justifies such an examination. The state of Belgium shall be referred to in the following section for the sake of having a clearly defined working example although the same analysis could be conducted with a focus on any number of EU member states in which there is political demand for radical change.

According to the European Commission, Flanders is a region with six million inhabitants, covers 44.8 % of Belgium's 30.528 km^2 territory and accounts for around 60 % of the total population. Flanders' workforce and industry account for 57.7 % of the national GDP with Flemish companies accounting for 83 % of Belgian

154 See *Fontanella-Khan*, Antwerp politician rides secessionist wave, Financial Times of 11/10/2012.

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exports in 2011.[155] Based on this information it is clear to see that any future independence of Flanders from the state of Belgium would entail factual circumstances utterly distinct from the situation with regards to Scotland or Cataluña and may consequently produce different legal effects. Accordingly, could the legal principles developed in the first half of this paper in relation to secession, continuity and state succession be applied to the potential fragmentation of Belgium?

The highly controversial question raised by factual events involving great territorial changes of a kind envisaged by Flemish independence from Belgium, or any separatist movement of comparable proportions in other EU member states, would be whether the predecessor state is totally dissolved with two or more new states emerging; or if this may be deemed an example of secession where the predecessor state, albeit considerably diminished, continues to exist.[156]

Having first addressed these questions from the standpoint of international law, consideration will be given to how the problem of EU membership may be resolved in such a situation.

1. Agreement to dissolve

One possible outcome would be for the relevant authorities in Belgium to conclude an agreement declaring that the state of Belgium had been dissolved and as a result ceased to exist. An agreement of this nature would have the effect of producing two or more newly independent states with no possibility of any new state claiming to be the continuator of the former, and now extinct, Belgian state. The classic example of this would be Czechoslovakia. On 31 December 1992 the Czech and Slovak authorities passed legislation asserting that the state of Czechoslovakia had been dissolved with the consequence being the emergence of the Czech Republic and the Slovak Republic as two new sovereign and independent states.[157]

With regards to international treaties, both the Czech and Slovak Republics expressed their intention to succeed to the international treaties concluded by the former Czechoslovakia and this was accepted by the UN Secretary General who duly deposited the relevant instruments. Thus, succession to multilateral treaties of the former Czechoslovakia was unproblematic.[158]

With regards to constituent treaties of international organisations, however, the situation was different. In light of the fact that Czechoslovakia had ceased to exist on 31 December 1992 there was no continuing international person which could

155 Flanders statistics, http://cordis.europa.eu/flanders/intro_en.html (15/11/2013).

156 *Bühler*, (fn. 13), p. 15; *Shaw*, (fn. 16), p. 960.

157 *Crawford*, (fn. 7), p. 706.

158 Ibid., p. 274.

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claim the original UN membership of Czechoslovakia. This recognition that the former state of Czechoslovakia had ceased to exist, and that both new independent states would have to re-apply for membership in international organisations, was made explicit by the relevant parties and the intention to re-apply expressed in another note to the UN Secretary General. Crucial to this outcome, therefore, was the fact that all parties concerned not only agreed upon the dissolution of the former entity but also that neither of them claimed to be the continuator state. Both new independent states, as successor states, had to re-apply for UN membership. On 19 January 1993 both the Czech Republic and Slovakia were admitted to the UN.[159] Out with the UN framework a similar process of re-application for admission was followed and both new states were accepted as new members without any significant problems.[160]

The uncontroversial nature of the dissolution of Czechoslovakia stems in no small part from the fact that both states amicably agreed to such an outcome and, crucially, the international community accepted the view that the former state was now extinct.[161] Most important of all was that neither state wished to be deemed the continuator state of the former Czechoslovakia. This was well received by the international community since it allowed both newly created states to be given the same status for the purposes of international rights and obligations including membership in international organisations.[162]

Based on the Czechoslovakia example, it is submitted that a similar agreement between Flanders and Wallonia (and perhaps Brussels as an independent region too) to bring the existence of Belgium to an end through dissolution and to create two or more newly independent states would place the EU in a rather uncomfortable position. Firstly, there is no reason to believe that the international community would be unwilling to recognize the dissolution of Belgium if such an outcome was amicably decided between all relevant parties. The consequence, based on the general principle of non-succession to membership in international organisations,[163] coupled with the specific precedent of both Czech Republic and Slovakia having to apply anew for membership in the UN and all other relevant organisations, would be a strong presumption in favour of Flanders, Wallonia and any other newly independent state(s) having to apply for EU membership.

The aforementioned comments made by senior EU officials[164] with regards to the legal relationship between the EU treaties and signatory states would lend further support to the proposition that an agreement to dissolve the state of Belgium, in a

159 *Schermers/Blokker*, (fn. 45), pp. 73 and 77.

160 For an overview see *Bühler*, (fn. 13).

161 *Boyle/Crawford*, (fn. 3), p. 84.

162 *Stern*, (fn. 8), p. 117.

163 See *Bühler*, (fn. 13), fn. 35 et seq.

164 See fn. 117.

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manner comparable to that of Czechoslovakia, would lead to two or more new states being required to re-apply for EU membership. In commenting on the rigidity of the views espoused by EU officials, *Avery* (honorary Director General at the EU Commission) has claimed that if a break-up of Belgium were agreed between Wallonia and Flanders, it is inconceivable that other EU members would require 11 million people to leave the EU and then reapply for membership.[165] And yet, as can be seen from the analysis above, the position under international law, coupled with the way in which the EU treaties have been interpreted by current EU officials, such an outcome would appear likely. It is therefore submitted that the adoption of a more nuanced approach to the question of Scottish independence, which would allow for some form of negotiations during any transitional period prior to fully fledged independence, would place the EU in a far better political position in the future vis-à-vis movements like Flanders.

2. Agreement as to continuity

Realistically speaking, the manner in which any future political agreement between Flanders and the rest of Belgium takes could be decisive. Of all the options available, an agreement between all relevant parties to the effect that Flanders would become a new state through secession from the state of Belgium would be the least problematic. Such an agreement, if accepted by the international community would, from the perspective of international law, leave the state of Belgium intact and in full possession of the former state's rights and obligations including membership in international organisations. The corollary of this would of course be that Flanders would be in the position of beginning life as a new state having to re-apply for membership in international organisations including the EU.[166]

3. No agreement

On the other hand, it would be possible for Flanders to achieve independence from the rest of Belgium without an agreement being reached as to whether or not there would be a continuator state for the purposes of international rights and obligations. Indeed, this would be comparable to the case of Scottish independence where a fully agreed and legally binding referendum is scheduled to take place in the absence of an agreement between the UK and Scottish governments on future rights and obligations under international law, including membership in international organisations.

In this respect the fact that the former Czechoslovakia was not an EU member state is likely to have greatly facilitated the negotiation process through which it was agreed

165 *Avery*, (fn. 138).

166 Unless of course some form of agreement could be reached to allow for Flanders to have a seamless transition to EU membership. This has already been discussed with regards to Scotland.

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that there would be no continuator state. Had the problem of continued EU membership arisen within the context of dissolving the state of Czechoslovakia, it is doubtful whether both sides would have agreed to a state of affairs by which the former state ceased to exist, thus preventing the possibility of a continuator state for the purposes of the former state's international rights and obligations, including membership in international organisations.

As *Malenovsky* has pointed out, the situation could have been entirely different if the respective parties in the case of Czechoslovakia had failed to reach an agreement owing to the fact that the Czech Republic retained 66 % of the former state's population, 62 % of its territory and 71 % of its economic resources.[167] In such a situation, the most probable outcome would have been the Czech Republic both claiming to be the continuator state of the former Czechoslovakia and being treated as such; with the newly independent state of Slovakia coming into existence by virtue of secession.[168] The problem with a state like Belgium, however, is that the distribution of territory, population and government institutions between Flanders, Wallonia and in some cases Brussels, make identifying a continuator state in the event of Flanders achieving independence incredibly problematic.

If one is to look to the well-established objective indicators such as retention of a substantial amount of territory or a majority of the state's population, resources, armed forces or seat of government, it would appear that such indicators would point against the continuity of the remainder of Belgium following Flemish secession.

On the one hand, some authors have taken the position that continuity is not per se affected even in those cases where the territory lost is substantially greater in area than the original or remaining state territory.[169] As *Crawford* points out in this regard:

> "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".[170]

Therefore, it may indeed be possible for the remainder of Belgium, or perhaps even the new state of Flanders, to be considered as the continuator state of the former state of Belgium following the independence of Flanders. Ultimately, however, the objective factors relevant to the establishment of a continuator state may fail to provide a clear cut answer to the question of continuity.

This brings one back to the classical problem of identifying a continuator state in situations where it is not entirely clear from the extent of the territorial mutation involved if one exists. The answer to this problem – as the different approaches

167 *Malenovsky*, Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie, AFDI 39 (1993), p. 317.

168 Ibid.

169 Ibid.

170 *Crawford*, The Creation of States in International Law, 1979, p. 400.

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adopted by the international community in response to the former USSR, the former Yugoslavia and the former Czechoslovakia demonstrate – will depend upon subjective factors. Firstly, it will depend upon any claims to continuity made by either of the parties involved – something which, in light of the desirability of continued EU membership, would likely be done by both Flanders and any remaining Belgian entities. Secondly, and more importantly, the existence of a continuator state following the independence of Flanders, or any comparable movement in another member state, will depend on the willingness of the international community to accept and recognize such a claim.

On this point it has been suggested that there is growing doctrinal support, especially in light of the Russian case, for the view that recognition and acceptance of a state's claim to continuity by the international community will be of decisive importance.[171] Accordingly, any determination as to the existence of a continuator state in such a scenario will be an entirely political choice and in the case of Belgium it is unclear whether Flanders or the remainder of Belgium would be the preferred candidate for continuator state status by the international community.[172]

On the other hand, although international law does not contain any objective criteria for determining when a state has ceased to exist, it would not be unreasonable to suggest that Flemish independence would result in a territorial change to such a degree as to be considered as "quantitatively very considerable" and thus lead to the extinction of the state of Belgium.[173]

Indeed, the *Badinter* Commission on Yugoslavia, set up by the EC, found that in the case of a "federal-type state" the existence of that state implies that "the federal organs represent the components of the federation and wield effective power."[174] Since four out of the six former republics had expressed their desire for independence, the Socialist Federal Republic of Yugoslavia was "in the process of dissolution" and seven months later had ceased to exist.[175] Admittedly, the violence which engulfed the former Yugoslavia certainly influenced the manner in which the question of dissolution was dealt with by the international community. Nevertheless, precedent on the dissolution of states, and the subsequent coming into being of new states, exists by virtue of the *Badinter* Commission which may influence any approach to a future independence movement in Flanders.

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171 See *Bühler*, (fn. 13), p. 166 citing *Kolodkin*, Russia and International Law: New Approaches, RBDI 26 (1993), p. 554 as one of many examples.

172 On the issue of political choice see *Stern*, (fn. 8), p. 180.

173 *Bühler*, (fn. 13), p. 15 quoting *Guggenheim*, Lehrbuch des Völkerrechts, 1948, p. 406.

174 Badinter Commission, Opinion No. 1, (fn. 84). Also see *Wood*, Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, Max Planck Yearbook of United Nations Law, vol. 1, 1997, pp. 231-257.

175 Badinter Commission, Opinion No. 8, Completion of the process of the dissolution of the SFRY, International Law Reports 92 (1993), p. 199.

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If such a state of affairs were to come about then there would appear to be little choice for the EU but to require the resulting new states of Flanders and the remaining portion of Belgium to re-apply for EU membership.[176] This would be due to the general position under international law that there can be no succession to membership in international organisations and the abovementioned official view that the treaties only apply to the current EU member states as signatories. The great problem posed by Belgium though is that the European Union is headquartered there and one would therefore be faced with the politically undesirable, if not downright absurd, circumstance by which the member state hosting the majority of EU institutions had ceased to exist and its former constituent parts forced to re-apply for EU membership as new states. Paradoxically, therefore, the EU, by insisting upon the need for new states to apply for membership when referring to Scotland or any comparable secessionist movement may in fact set a precedent which, if applied to the specific case of Flemish independence, could result in the "capital of the European Union" being located in a state that was not a member of the EU.

It would of course be far beyond the scope of this study to attempt to predict how the international community would react should the region of Flanders achieve independence from Belgium in the future. However, it is submitted that the case of the former USSR may prove to be particularly pertinent to any future question of Flemish separation from Belgium. As was noted above, the international community was determined for a variety of political reasons to ensure that Russia be treated as the continuator state of the former USSR and maintain the former's international rights and obligations despite its apparent dissolution and extinction. If events in Belgium were to unfold in the same manner, the political would almost certainly be required to once again override the legal in order to produce a suitable outcome for both the entities involved and the EU more generally.

With specific regard to the Belgian predicament, one possible solution might be for the newly constituted states – following dissolution – to conclude an agreement with all the EU member states to the effect that they could continue to be EU member states. This would, like USSR situation discussed above, disregard all former principles of international law on non-succession to membership in international organisations and would provide a perfect example of political necessity overriding purely legal considerations. In the event that an agreement of this nature was reached at the political level, an amendment to Article 52 TEU – which lists the current member states of the EU – would be required. In order for this to take place, the procedure for amending the treaties under Article 48 TEU would have to be adhered to – thus requiring the unanimous approval of all 28 current EU Member States. Accordingly, although not impossible, an agreement allowing for all new states emerging from the dissolution of the Belgian state to continue as EU Member States

176 It would of course be possible for the remainder of Belgium to fragment even further; something which is beyond even the most speculative aspects of the present paper.

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would likely take an extraordinary amount of political will to both override established legal doctrine and reach unanimity amongst all existing EU Member States to amend the treaties.

In summary, therefore, essentially three outcomes would be possible in the case of Flemish independence/Belgian dissolution:

1. Recognize Flanders or the remainder of Belgium as the continuator state and thus allow at least one section of a previous EU member state to continue EU membership. Owing to the incredibly complex system of governance in Belgium the issue of whether Brussels – as the capital of the EU – belongs to Flanders, the rest of Belgium or neither would have to be decided. It is to be expected that political considerations would dictate that the entity being recognized as the continuator state – and thus retaining EU membership – would necessarily have to include Brussels; something which in itself would likely cause all manner of controversy.

2. Continue to advocate the Commission position that the EU treaties apply only to the member states and as a result when a part of the territory of a member state ceases to be a part of that state, the treaties will no longer apply to that territory. The consequence would therefore be that the newly independent state would have to re-apply for EU membership. This would be in accordance with the general position under international law that there can be no succession to membership in international organisations but would, of course, result in all new state entities having to apply anew for EU membership should events unfold in Belgium in such a manner as to bring about its dissolution as a state.

3. More dramatically, completely discard all international legal doctrine which would prevent succession to membership in international organisations and allow both the new state of Flanders and the remaining portions of Belgium to take up the former Belgian state's position in the EU via state succession. This would take the form of an amendment to Article 52 TEU through the ordinary treaty amendment procedure as set out in Article 48 TEU. If this process were followed, however, there would unquestionably be a need for negotiations with both Flanders and the remaining part(s) of Belgium during the transitional period between the vote for secession/dissolution and such an event coming into effect.

As a solution, it is submitted that negotiations prior to any concrete outcome would be most desirable on accounts of its inclusiveness of all parties concerned and its potential for reaching a suitable compromise prior to Belgium, or any comparable state, being fundamentally altered in some way. To not even attempt to enter into negotiations prior to the date upon which secession/dissolution is effected – which is unequivocally the current position of senior EU officials in relation to secessionist movements – strikes one as being counterproductive in the extreme. Whether trying

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to reach an agreement on which entity may legally constitute the continuator state; or in attempting to ensure that all states concerned enjoy a seamless transition to membership following secession or dissolution, one can be in no doubt that the default position of re-application and the refusal to negotiate until after the fact is simply absurd.

VII. Conclusion

The above analysis has attempted to demonstrate the intricacies involved in resolving the question of EU membership following a fundamental alteration to an existing EU member state's constitutional make-up. With specific reference to the impending question of Scottish independence, it has been demonstrated that the diametrically opposed default positions of automatically in or automatically out – as promulgated by the overwhelming majority of those engaged in this debate – are both open to objections. On the one hand, there exists a vast body of authority from the perspective of public international law to support the view that a state created by virtue of secession from an existing EU member state could not automatically retain or attain EU membership. On the other hand, contrary to the view espoused by senior EU officials and some prominent legal scholars, this need not lead to the automatic exclusion of that new state from the EU and thus necessitate a re-application for membership. From a legal perspective, the general scheme and spirit of the EU treaties may in fact place the Union and its member states under a positive obligation to negotiate the prospect of continued membership in good faith prior to a secessionist entity like Scotland obtaining the status of a fully independent state. Of course, this in and of itself would provide no guarantees that such negotiations would result in an outcome that would be satisfactory to all parties concerned. Indeed, it would be perfectly possible for an entity like Scotland to begin life as an independent state out with the EU. The crucial point, however, is that this scenario should not be allowed to come about in an arbitrary manner upon a particular date in time without any form of negotiations taking place with regards to the unravelling of a vast array of relationships, rights and obligations.

From a political point of view, one must question the wisdom of declaring that each and every situation in which a part of an existing EU member breaks away will result in a need to re-apply for EU membership. Whilst the prospect of Scotland being forced to re-apply for EU membership will certainly please some governments in Europe, the precedent that such a move could set may ultimately prove incredibly problematic in the future. One must pay due regard to the law of unintended

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consequences here and it is hoped that reference to the current political situation in Belgium, and the rather speculative analysis of how this may culminate in the future, has been illustrative of the kind of Catch-22 situation that the EU may be faced with in future should they stick to their current position vis-à-vis Scotland. The upward surge in support for separatist movements across the continent seems set to continue and one cannot therefore simply dismiss the prospect of independence referenda taking place out with the UK context.

The global financial crisis has brought with it a plethora of problems for both EU member states and the Union itself; with the general consensus now being that radical changes are needed at the European level in order to adequately address these problems. In light of this realization, it is to be hoped that a degree of common sense will prevail when embarking on the monumental task of steering the Union through its current difficulties and into a more optimistic and successful future. In so doing, the ability of Europe to rediscover a sense of unity and recognize their mutual interdependence will be of paramount importance in preventing a full scale break down in relations and an unravelling of the EU experiment as a whole. In light of these considerations, it would appear to be utterly inconsistent with the imperatives of pulling together and putting up a united European front to insist upon drawing in the EU's external borders with the consequence of stripping millions of people of their EU citizenship for simply expressing their will to be governed differently through democratic means. At a time when support for the Union is at an all-time low it is blatantly obvious to anyone with the capacity for reason that simply revoking an entity like Scotland's membership without discussion or any attempt at accommodating such an entity within the Union would be counterproductive in the extreme and could potentially lay down a disastrous precedent.

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