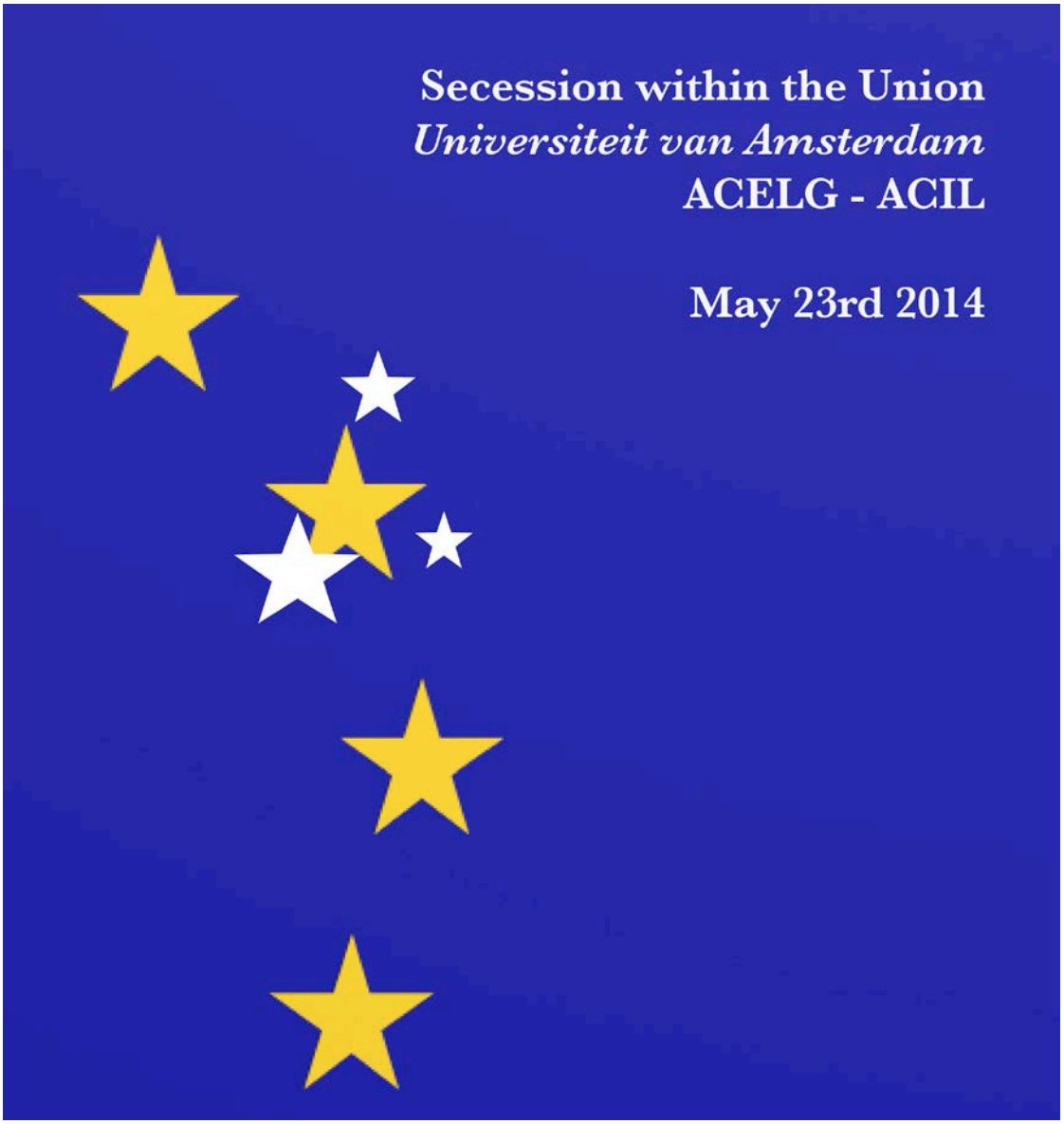

Collected Think Pieces

Member States, Aspiring States and the European Union

Pierre Schmitt

Secession within the Union

Intersection Points of International and European Law

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Member States, Aspiring States and the European Union

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In view of the referendum on independence of Scotland to be held on 18 September 2014, this paper examines the consequences of an eventual secession on the membership within international organizations. It is not the aim of this paper to enter into discussions as to the legality of referenda on independence. Hence, this paper will not refer to the referendum to be held in Catalonia on 9 November 2014 given that the Spanish Government has strongly opposed the *Declaration of Sovereignty and of the Right to Decide of the People of Catalonia* and that the Constitutional Court has rendered a decision on 25 March 2014 rejecting the declaration and considering the referendum as unconstitutional. However, references will be made to the Scottish referendum, which has been subject to an agreement between the Scottish Government and the United Kingdom Government, the Scottish Independence Referendum Bill.

The first part of this paper presents the international rules applicable to the issue of membership in international organizations in case of succession of States followed by examples in the United Nations (the UN), the Council of Europe (the CoE) and the European Convention on Human Rights (the ECHR). The second part analyzes the consequences of secession with regard to the membership of the European Union (the EU) with a focus on the legal source applicable to regulate such situation.

1. Secession and membership in international organizations

The rules organizing the succession of States in relation to treaties have been codified by the International Law Commission in a Vienna

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Convention of 1978.[1] The question of membership in international organizations is only briefly mentioned in its Article 4, which states that '[t]he present Convention applies to the effects of a succession of States in respect of: (a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization; (b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.' Hence, the membership of an international organization mainly depends on the relevant rules of the organization.

The United Kingdom is not a party to this Convention (only 22 States parties have ratified the Convention so far). However, it seems generally accepted that Article 4 corresponds to the prevailing view that the membership of international organizations mainly depends on the articles of agreement or rules of the organization.[2]

1.1. Membership at the UN

In 1947, following the debate about whether Pakistan could succeed to British India's membership, the Sixth Committee of the UN General Assembly adopted the principles embodying its views on the legal rules 'to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject':

> 'That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
>
> That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
>
> Beyond that, each case must be judged according to its merits.'[3]

[1] Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3.
[2] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 442-43.
[3] (1947–48) UNYB 39-40.

It follows from this statement that the continuity of the legal personality constitutes the core notion underlying the succession in UN membership. Pursuant to Michael P. Scharf, six factors may be identified in the India, USSR, Yugoslavia and Czechoslovakia cases to determine whether a State has been dissolved or whether a potential successor State has inherited its legal personality. These factors evaluate whether the potential successor has: '(a) a substantial majority of the former member's territory (including the historic territorial hub), (b) a majority of its population, (c) a majority of its resources, (d) a majority of its armed forces, (e) the seat of the government and control of most central government institutions, and (f) entered into a devolution agreement on U.N. membership with the other components of the former State.'[4] While the identification of the continuator State may be obvious as in the case of Singapore's separation from Malaysia, there are also more questionable situations, as illustrated hereafter.

After Singapore's separation from Malaysia in 1965, the latter retained both its international legal personality and UN membership while the former was admitted as a new State after application for membership with the UN.

Another example consists in the dissolution of the Union of Soviet Socialist Republics (the USSR) in 1990-91. Although part of the Soviet territory became newly independent States, the Russian Federation was regarded as continuing the legal personality of the USSR and the other States issued from the USSR accepted this position.

In the case of Czechoslovakia's dissolution, both the Czech Republic and the Slovak Republic agreed that neither would claim to continue the Czechoslovakia's identity. Hence, both applied for membership of international organizations and were admitted to the UN in January 1993.

As to the former Socialist Federal Republic of Yugoslavia (the SFRY), Slovenia declared its independence on 25 June 1991, Croatia on 26 June 1991, Macedonia on 25 September 1991 and Bosnia-Herzegovina on 3 March 1992. Serbia and Montenegro adopted a new Constitution under the name Federal Republic of Yugoslavia (the FRY) and declared on 27 April 1992 that the FRY, 'continuing the state, international, legal and political personality of the [Socialist Federal Republic] of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'[5]

[4] MP Scharf, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28 *Cornell ILJ* 29, 67.

[5] Declaration of the Assemblies of Serbia, Montenegro and the FRY, 27 April 1992, S/23877, annex, 2 (1992), cited in *Application of the Convention on the Prevention and*

Yet, UN organs considered – with slight nuances in their respective positions – that the SFRY had ceased to exist and that FRY had not automatically taken over the SFRY's seat.[6] In 2000, the FRY was admitted to UN membership and it entered into an agreement on succession issues on 29 June 2001 through which it abandoned its claims for continuity. In 2006, a referendum on independence was held in Montenegro and on 3 June 2006, the National Assembly of Montenegro made a formal declaration of independence. On the same day, the President of the Republic of Serbia informed the UN Secretary-General that the membership of the State union Serbia-Montenegro in the UN would be continued by the Republic of Serbia.[7] On 28 June 2006, Montenegro was admitted as a new Member State to the United Nations.[8]

In view of the referendum on independence of Scotland, Professors James Crawford and Alan Boyle were requested to identify international law aspects of an eventual secession by Scotland following the 2014 referendum. Pursuant to their views, 'there may be no general rule in international law governing succession to membership of international organisations. But at least in the case of the UN, Scotland would be required to join as a new state whereas [the remainder of the United Kingdom] the rUK would retain the UK's membership – including its permanent seat on the Security Council.'[9]

1.2. Membership at the Council of Europe and the European Convention on Human Rights

Membership of the CoE and of the ECHR are closely linked, as recalled by the Parliamentary Assembly of the CoE in 1994, stating that 'accession to the Council of Europe must go together with becoming a

Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures: Order) [1993] ICJ Rep 3, 15.

[6] UN SC Res 757 (1992); Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, UN Doc A/47/485, Annex; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections: Judgment) [2004] ICJ Rep 279, 310.

[7] Letter of 3 June 2006 from the President of the Republic of Serbia to the UN Secretary-General, referred to in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 73.

[8] UN GA Res A/60/264.

[9] J Crawford SC and A Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects* (2013) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf, 95.

party to the European Convention on Human Rights. It therefore considers that the ratification procedure should normally be completed within one year after accession to the Statute and signature of the Convention.'[10]

There are no provisions on State succession in the Statute of the CoE, but there are interesting precedents, as the independence of Montenegro. Serbia-Montenegro was both a member of the CoE and a party to the ECHR. After Montenegro's independence, Serbia's membership continued and Montenegro joined the CoE as a new State in accordance with Article 4 of the CoE Statute. Interestingly, the European Court of Human Rights had been previously seized by an application against Serbia-Montenegro and after Montenegro's declaration of independence, the applicants indicated that they wished to proceed against both States. In its judgment, the Court held that the ECHR had been 'continuously in force' in Montenegro, despite its independence.[11]

Pursuant to Professors Crawford and Boyle, 'the consequences of Scottish independence are likely to be the same: the rUK will simply continue the UK's membership of the Council of Europe and continue to be a state party to the *ECHR*. Scotland will probably have to accede to the Council of Europe as a new member, but the application of the *ECHR* to Scotland will continue uninterrupted. As the reference to the earlier precedent of Czechoslovakia indicates, even if both the rUK and Scotland were considered new states, the *ECHR* would similarly still continue to apply uninterrupted.'[12]

2. Secession and EU membership

There is no clear precedent for a part of a EU Member State becoming independent and claiming automatic membership or seeking in its own right to join the EU. There is currently an intense debate as to the legal source and the corresponding procedure applicable to such cases. The two possible sources invoked are Article 48 TEU, which deals with the procedures for amendments to the EU Treaties and Article 49 TEU, which governs the accession of new Member States to the EU.

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[10] Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe.

[11] *Bijelić v Montenegro and Serbia,* App no 11890/05 (ECHR, 28 April 2009).

[12] J Crawford SC and A Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects* (2013) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf, 98.

The official position articulated by the President of the European Commission in his letter dated 10 December 2012 consists in the following: 'The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that State because it were to become a new independent State, the Treaties would no longer apply to that territory. In other words, a new independent State would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.'[13]

Hence, upon independence, Scotland would cease to be a part of the EU and would have to apply for membership under the Article 49 TEU process. This position was almost *verbatim* identical to that of Romani Prodi delivered in 2004 during his tenure as President of the European Commission[14] and it has been reiterated by Herman van Rompuy, the President of the European Council[15] and Viviane Reding, the Vice-President of the European Commission, in a letter of 20 March 2014.[16]

Article 49 has been applied over the years as the basis for accession procedures for candidate Member States provided that certain conditions – the accession criteria also named the Copenhagen criteria[17] – were fulfilled. Although Scotland has been part of the EU through the United Kingdom since 1973, these criteria are not automatically met by Scotland. There are for instance economic criteria that have to be assessed in the specific case of an independent Scotland (viable market economy, ability to respond to the pressure of competition and market forces within the EU, etc.). Moreover, the EU has to assess whether it is capable of welcoming a new Member State (additional EU Commissioner, judges, etc.) – the absorption capacity is

[13] Letter from José Manuel Barroso, President, European Commission, to Lord Tugendhat, Acting Chairman, U.K. House of Lords Econ. Affairs Comm., 12 October 2012.

[14] Romani Prodi, 'Answer given by Mr. Prodi on behalf of the Commission', 2004 O.J. C84 E/422, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0422:0425:en:pdf.

[15] S Johnson, 'Herman Van Rompuy deals EU blow to Alex Salmond's independence plans', The Telegraph, 14 December 2013.

[16] Letter from Viviane Reding, Vice President of the European Commission, to Ms McKelvie, Convener, European and External Relations Committee, Scottish Parliament (20 March 2014), available at http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Inquiries/Letter_from_Viviane_Reding_Vice_President_of_the_European_Commission_dated_20_March_2014__pdf.

[17] For further information on the accession criteria or the Copenhagen criteria, see http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm.

another key element in any new enlargement. This requires public opinion support both in the Member States and in the applicant States. Finally, a number of additional decisions have to be taken as to Scotland's participation to the Schengen Area, to the Eurozone, etc.

Yet, there is something problematic in this view following which the new State will lose all its rights because of independence. Even if Scotland votes yes, it will not become independent immediately; the independence will only be effective in March 2016 according to the Scottish Government's timetable. Nevertheless, it will not be able to negotiate with the EU since it has no *locus standi* in the EU.

Hence, it seems that a more pragmatic view should be advocated so that Scotland could be able to negotiate before its independence in order to organize its relations with the EU and EU Member States as long as it is still part of the EU. The United Kingdom could grant the right of Scotland to start external negotiations.

An additional argument in favor of the application of Article 49 to this specific case is that this provision constitutes a *lex specialis* as mentioned by Professor Armstrong, 'in respect of an entity voluntarily taking on the obligations arising from the EU treaties and the law made under the treaties.'[18] Consequently, it would be difficult to avoid this procedure of Article 49.

The Scottish Government rejects these arguments, claiming that Scotland would not become a new State and that this case consists in the separation of an existing State into two States. It requests the establishment of a specific procedure for starting negotiations for adhesion to the EU within the period between the referendum and the effective independence. Article 48 could be used in this way to amend the EU Treaties and to start negotiations during Scotland's transition to independence – thus during a period where Scotland remains within the EU by virtue of being within the United Kingdom.

Yet, such view encounters a number of obstacles. First, nothing obliges any other EU State to enter into such revision process and the negotiations may face a veto by other Member States and their domestic ratification requirements. Second, Article 48 is only applicable to Member States and the Scottish Government only has competence over devolved areas and no mandate to negotiate with other EU Member States. Consequently, the United Kingdom would have to negotiate the modification of EU Treaties. Pursuant to the Scottish Government, this duty to engage into negotiations could be based upon the obligation of sincere cooperation in relation to EU institutions.

[18] K Armstrong, *Scottish Membership of the European Union*, CESL Working Paper (2014) 3.

Third, opening up a treaty revision process could lead to a congestion of the procedure caused by disparate attempts to revise the Treaties.

As demonstrated by these opposing views, the issue is and remains very much debated.

Concluding observations

In my view, it seems that Article 49 would be the correct legal basis in case of Scottish secession to apply for EU membership since it organizes the process of accession for candidate Member States. The only terms on which to discuss and obtain accession to the EU are those of Article 49. Although Scotland has already been part of the EU through the United Kingdom, its membership of the EU without the rUK is a different issue that requires negotiations through an accession procedure. However, this procedure should be approached pragmatically. For instance, in relation to the notion of 'State' contained in Article 49, perhaps could Scotland start discussing the process earlier than at the moment of its independence – provided that it would obtain the United Kingdom's agreement. If Scotland would become independent before the end of the ratification process, interim measures could be set up in order to guarantee a continuity notably in relation to the internal market and to the rights of citizens.