

**WRITTEN SUBMISSION FROM DR ARMAN SARVARIAN, LECTURER IN  
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1. This is a submission of written evidence in response to the call published by the Scottish Parliament European and External Relations Committee ('the Committee') concerning its inquiry on 'The Scottish Government's proposals for an independent Scotland: membership of the European Union'. In this submission, I address the second of the three key themes of the inquiry: 'the road to membership and Scotland's representation in the EU'. In particular, I examine the legal aspects of the following issues: 1) the implications of the Scottish Government's proposal that it will approach EU membership negotiations on the principle of continuity of effect; 2) whether there are any potential obstacles to Scotland's membership that might arise during the negotiations; and 3) whether there might be potential for the Court of Justice to rule in relations to any aspects of the transition process.
2. In composing this submission, I make reference to the Legal Opinion of Professors James Crawford SC and Alan Boyle ('Crawford-Boyle Legal Opinion') and the White Paper of the Scottish Government. I submit this evidence in order to assist the inquiry in its examination of the problems of the law of State succession ('the replacement of one State by another in the responsibility for the international relations of territory'<sup>1</sup>) in relation to membership of international organisations (e.g. – the European Union) arising out of the putative secession of Scotland from the United Kingdom. Specifically, I focus upon the absence of a clear legal framework providing for an orderly process of succession to membership and the potential for the case of Scotland to fill this gap by setting a precedent for other regions that may aspire to secede from European Union Member States (in particular, Catalonia).
3. The submission is structured as follows: 1) State succession to membership of international organisations and continuity of effect; 2) obstacles to Scotland's membership of the European Union; and 3) the potential for the Court of Justice to rule upon succession issues. A summary of conclusions and recommendations is provided at the end of the submission.

**State succession to international organisations and continuity of effect**

*Lack of normativity in State succession to membership of international organisations*

4. Whilst the putative secession of Scotland raises a number of succession problems (e.g. – succession to assets and debts), the focus of this submission is upon the succession of Scotland as a seceding territory to

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<sup>1</sup> See, e.g. – Art. 2(1)(b) Vienna Convention on Succession of States in Respect of Treaties 1978.

membership of the European Union. Analysis of this issue falls under the category of succession to membership of international organisations in general. Thus, this evidence does not address succession to property and only addresses succession to treaties insofar as it touches and concerns succession to membership of international organisations.

5. International law governing succession to membership of international organisations is subject to considerable confusion and no small degree of politicisation: 'traditional critiques of the law of state succession, which posit it as an area dominated by politically-motivated bilateral agreements rather than generalizable rules, predicated upon the will of 'new' states rather than general principles of automaticity, and dependent upon recognition by other states parties, retain their salience.'<sup>2</sup> In spite of modern practice in the former Yugoslavia, the former USSR and elsewhere, there remains considerable demand for normativity in this area of law.
6. In 1963, the International Law Commission<sup>3</sup> devoted renewed attention to the topic of State succession amidst the ongoing phenomenon of imperial decolonisation.<sup>4</sup> It decided to split the topic into three categories: 1) succession in respect to treaties; 2) succession in respect of rights and duties resulting from sources other than treaties; and 3) succession in respect of membership of international organisations. In 1967, the Commission appointed Special Rapporteurs for the first two topics but decided to leave aside, for the time being, the third heading 'which it considered to be related both to succession in respect of treaties and to relations between States and inter-governmental organizations.'<sup>5</sup> In light of the problems arising out of decolonisation, the Commission gave priority to the topic of succession to treaties and appointed Sir Humphrey Waldock as Special Rapporteur for that topic.
7. The work of the Commission over the course of the succeeding decade culminated in the adoption, on 23 August 1978, of the Vienna Convention on Succession of States in Respect of Treaties 1978 ('VCSS').<sup>6</sup> Following the ratification of that treaty by fifteen States,<sup>7</sup> the VCSS entered into force on 6 November 1996. As of the date of this submission, there are twenty-two parties to the treaty and an additional nineteen signatories.<sup>8</sup> The decision to leave aside succession to membership of international organisations, though

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<sup>2</sup> Crawford, *Brownlie's Principles of Public International Law* (Eighth Edition, 2012), 444.

<sup>3</sup> The International Law Commission is a committee of experts created in 1947 by the UN General Assembly to work for 'the promotion of the progressive development of international law and its codification'. As a sub-organ of the Sixth (Legal) Committee, its reports and proposals are formally advisory but carry great persuasive weight. Its work has directly led to the adoption of, for example, the Vienna Convention on the Law of Treaties 1969, the United Nations Convention on the Law of the Sea 1982 and the Statute of the International Criminal Court 1998.

<sup>4</sup> *Yearbook of the International Law Commission* (1968), Vol. II, 213-215.

<sup>5</sup> *Ibidem*, 215 (para. 40).

<sup>6</sup> *United Nations Treaty Series*, Vol. 1946, 3.

<sup>7</sup> VCSS, Art. 49.

<sup>8</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-2&chapter=23&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en).

understandable from a practical perspective in light of the priorities of the day, has arguably had the unintended consequence of creating confusion concerning the degree to which it is subsumed within the VCSS (i.e. – membership is implicitly addressed by resolving the question of succession to treaties) or simply left to be addressed on a case-by-case basis without generality.

#### *The inapplicability of the VCSS*

8. The United Kingdom has neither signed nor ratified the VCSS. In the absence of ratification by the UK, the VCSS is not applicable as a whole to the case of Scotland. However, specific provisions of the treaty may be applicable through customary international law.<sup>9</sup> The compulsoriness of a particular rule requires an evaluation of the practice of States as well as States' views of its legal authoritativeness. Sources for these criteria include, but are not limited to: decisions by national and international courts and tribunals, the conduct of States towards seceding territories (e.g. – the extension or withholding of recognition) and the practice of international organisations regarding the admission of succeeding States.
9. Article 4(a) VCSS provides that the 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'. This provision, which is identical to the text proposed in the ILC draft,<sup>10</sup> envisages that the Convention acts as a gap-filler where the rules of the organisation do not address succession to membership. As the commentary to the article observes: 'This is all the more necessary in that succession in respect of constituent instruments necessarily encroaches upon the question of admission to membership which in many organizations is subject to particular conditions'.<sup>11</sup>
10. The relevant provisions of the VCSS are Articles 34 and 35:

#### *Article 34*

#### *Succession of States in cases of separation of parts of a State*

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<sup>9</sup> In addition to treaties, custom is the second main source of international law - Art.38(1) Statute of the International Court of Justice 1945. The two well-known criteria for the formation of customary law are: 1) the practice of States; and 2) the legal opinions or positions of States (*opinio iuris sive necessitatis*). Crudely put, the former criterion entails 'what States have done' whereas the latter concerns 'why (legally) States have done it'. The formation of a customary rule is necessarily a retrospective exercise: to determine whether a customary rule exists, international courts, scholars and others examine the precedents of State practice to distil whether the rule commands sufficient support amongst States.

<sup>10</sup> ILC Draft articles on Succession of States in respect of Treaties with commentaries 1974, *Yearbook of the International Law Commission* (1974), Vol. II, Part One.

<sup>11</sup> *Ibidem*, 177.

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

#### Article 35

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

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

(a) the States concerned otherwise agree;

(b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

(c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

11. The rules under Article 34(1) and 35 entail automatic succession to treaty participation for both the 'parent State' and the seceding territory. This has been juxtaposed to the co-called *tabula rasa* or 'clean slate' principle, whereby a newly independent State is deemed not to be bound by the obligations entered into by its predecessor save insofar as it expressly or implicitly accepts them. Articles 16 and 24(1) VCSS support this view. Although on its face this provides for a conflict between two rules, they are reconcilable on the basis that either: 1) that successor States are not bound to accept preceding treaties but have the right or facility to do so unless the Article 34(2) exceptions apply; or 2) a distinction applies between decolonised States, to which the clean slate principle applies, and other seceding States to which a general rule of continuity of treaty rights and obligations applies.<sup>12</sup>
12. A survey of decisions by both international and national courts and tribunals suggests that there is considerable inconsistency and confusion concerning the authoritativeness of Articles 34 and 35. For example, whilst parties have

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<sup>12</sup> Shaw, *International Law* (2008), 975-981.

invoked Article 34 VCSS as customary international law before the International Court of Justice<sup>13</sup> the Court has hitherto declined to pronounce upon its customary status.

13. Croatia was held to be a successor to the SFRY in respect of an extradition treaty by a US court,<sup>14</sup> which made no reference to the VCSS or international law but relied upon Croatia's invocation of the treaty and US precedent. The succession of Kosovo to participation in an extradition treaty was examined but not decided by a Kosovar court,<sup>15</sup> which held that the VCSS was not in force in Kosovo but some of its provisions reflected customary international law.
14. The continuation by Russia of the participation of the USSR in treaties was accepted by national courts in Cyprus<sup>16</sup> and Russia<sup>17</sup> referring not to the VCSS but rather to bilateral practice and academic scholarship. Its continuation or succession to the USSR with respect to personal rights and obligations arising out of the Austrian State Treaty was accepted by an Austrian court<sup>18</sup> solely on the basis of the express declaration, as an exception to the general rule. The succession of Armenia to the participation of the USSR in a bilateral treaty on social security was accepted by a Czech court,<sup>19</sup> applying Article 34 VCSS as customary international law.
15. The succession of the Ukraine to the participation of the USSR in the Hague Convention on Civil Procedure 1954 was rejected by a Belgian court with a very brief analysis of international law, in which it omitted to examine the applicability of Articles 34-35 VCSS.<sup>20</sup> The succession of the Ukraine as a successor to the USSR in respect of a commercial treaty was left open by a Swiss court,<sup>21</sup> which recognised Articles 24 and 34 VCSS as customary

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<sup>13</sup> *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, [1996] ICJ Rep.595, 611-612; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep. 7, 71.

<sup>14</sup> *Arambasic (Mitar) v. Ashcroft (John) and others*, South Dakota (18 November 2005), Oxford Reports on International Law, ILDC 709 (US 2005).

<sup>15</sup> *BA, Final ruling upon request for extradition*, Supreme Court of Kosovo (disputed), ILDC 1964 (KO 2010).

<sup>16</sup> *Article 155(4) of the Constitution and Articles 3 and 9 of the 1964 Administration of Justice (Miscellaneous Provisions) Act, Re, Botrov (Alexander Valentinovich) v. Cyprus*, Supreme Court of Cyprus (9 August 1996), Oxford Reports on International Law, ILDC 919 (CY 1996)(on succession to a bilateral extradition treaty).

<sup>17</sup> *CJSC 'LUCH' v. Ministry of Transportation and others*, Supreme Court of the Russian Federation (18 September 2009), Oxford Reports on International Law, ILDC 721 (RU 2009)(on succession to the Customs Convention on International Transport of Goods under Cover of TIR Carnets 1975, 1079 UNTS 89).

<sup>18</sup> *S v. Austria*, Supreme Court of Justice (30 September 2002), Oxford Reports on International Law, ILDC 1618 (AT 2002).

<sup>19</sup> *VJ v. Czech Social Security Administration*, Supreme Administrative Court (28 November 2008), Oxford Reports on International Law, ILDC 1405 (CZ 2008).

<sup>20</sup> *Azov Shipping Company v. Werf-en Vlasnatie NV*, Court of Appeal (19 March 2001), Oxford Reports on International Law, ILDC 43 (BE 2001).

<sup>21</sup> *X and Y v. Government of the Canton of Zurich and Administrative Tribunal of the Canton of Zurich*, Federal Supreme Court of Switzerland (22 November 2005), Oxford Reports on International Law, ILDC 340 (Ch 2005).

international law but left the applicability of Article 34 to the case at hand open due to the vagueness of the Ukraine's commitment to succeed to USSR treaties in 1991. Subsequent to the decision, Switzerland and the Ukraine agreed to treat the Ukraine as a successor to bilateral Soviet-Swiss treaties.

16. Thus, the law of State succession to treaties is regrettably in a state of considerable confusion and inconsistency. In particular, the status of Article 34 VCSS as customary international law has yet to become a settled and consistent body of practice and in most situations succession matters have been addressed in a sporadic and *ad hoc* manner. I respectfully agree with the conclusion of the Crawford-Boyle Opinion at para. 119: 'insofar as any claim by the SNP or Scottish Government that Scotland would remain a member of international organisations is based on the *Vienna Convention on Succession of States in Respect of Treaties* of 1978, it can be dismissed as, at best, inconclusive.'

#### *Membership of the United Nations*

17. Since its decision in 1967 to leave aside the matter of succession to membership of international organisations, the ILC has yet to return to the topic. In the absence of efforts to codify the law, it must be discerned from the practice of States and international organisations. According to one classical treatise:

*'Whether succession occurs to membership of international organizations is less a question of principles of State succession than of construction of the relevant constitutional provisions of the organizations' charters. In most instances the membership clauses exclude the possibility of succession; in a few instances succession could be implied by these clauses; in a remaining few instances no guidance is to be gained from the membership clauses and it is only in these instances that resort to customary international law is necessary. Generally speaking, rights and obligations of voting, with specific quotas of votes, and obligations of contributing to the organizations' expenses, with fixed quotas of contributions, make it impossible to accept a successor State as a successor in membership.'*<sup>22</sup>

This suggests that the traditional presumption has been that successor States apply *de novo* for membership rather than automatically succeeding to it.<sup>23</sup>

18. The practice of the UN has been both influential and consistent on this issue: all new States are required to apply *de novo* for membership. In 1947, Pakistan was required to apply for membership whereas India was accepted as the continuation of the existing membership of pre-partition India.<sup>24</sup> Whilst

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<sup>22</sup> O'Connell, *State Succession in Municipal Law and International Law* (1967), 183.

<sup>23</sup> See further, e.g. – Zimmerman, 'State succession', *Max Planck Encyclopaedia of Public International Law* (November 2006), para. 16; Shaw, *supra* note 11, 985-986; Crawford, *supra* note 2, 442-443.

<sup>24</sup> O'Connell, *supra* note 22, 184-187.

Pakistan appended a declaration to its instrument of acceptance that it considered itself to be a co-successor with India to pre-partition India rather than a new member, its view was not accepted.

19. As a reaction to this case, the Sixth Committee (Legal) of the UN General Assembly examined the question: 'What are 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?' The Committee adopted the following principles:

*'1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.*

*2. That when a new State is created, whatever may be the Territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.*

*3. Beyond that, each case must be judged according to its merits.'*

This approach has been consistently applied to seceding States in subsequent cases, e.g. – Montenegro (2006) and South Sudan (2011). In 1974, the ILC in its commentary to Article 4 VCSS noted:

*'International organizations take various forms and differ considerably in their treatment of membership. In many organizations, membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization...New States have, therefore, been regarded as entitled to become Members of the United Nations only by admission and not by succession. The same practice has been followed in regard to membership of the specialized agencies and of numerous other organizations.'*<sup>25</sup>

As the Commission commented, the practice has been that where formal admission rules exist in the constituent treaty of an organisation, those rules apply to successor States, but in the absence of those rules Article 34 VCSS

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<sup>25</sup> ILC Draft Articles, *supra* note 10, 177-178 (para. 2).

applies to enable that State to automatically succeed to membership by notification.<sup>26</sup>

20. Important modern precedents have been the former Socialist Federal Republic of Yugoslavia ('SFRY') and the former Union of Soviet Socialist Republics ('USSR'). In the latter case, the Russian Federation was accepted by the UN as the continuation of the USSR whereas the remaining fourteen successor States to the USSR were required to apply for UN membership. However, the status of the Federal Republic of Yugoslavia as the continuation of the SFRY was controversially rejected by the UN and gave rise to difficult legal issues before the International Court of Justice.<sup>27</sup> Eventually, the FRY discontinued its claim and was admitted to the UN as a new Member State in 2000. In general, the practice of other international organisations has followed the UN model with the notable exceptions of the International Monetary Fund and the World Bank which have applied an automatic succession approach.
21. Against this background, I respectfully concur with the conclusion of the Crawford-Boyle Legal Opinion at para. 132: 'So there may be no general rule in international law governing succession to membership of international organisations. But at least in the case of the UN, Scotland would be required to join as a new state whereas the [rump UK] would retain the UK's membership – including its permanent seat on the Security Council.'
22. An important exception to this approach may be membership of the Council of Europe. Practice of that organisation with respect to Czech Republic, Slovak Republic and Montenegro has been to treat the Convention as being 'continuously in force' in those States in spite of their non-membership pending applications for accession to the organisation.<sup>28</sup> This practice is pursuant to a policy of ensuring continuity of application of the European Convention on Human Rights 1950 to preclude prejudice to applicants during the interregnum.<sup>29</sup> In this respect, it is desirable that the Scottish Government and UK Government agree in negotiations upon a transitional date concerning responsibility for human rights claims emanating from Scotland to ensure a smooth handover before the European Court of Human Rights. Although the conclusion of Professors Crawford and Boyle that the rump UK would likely continue the UK membership whereas Scotland would have to apply *de novo* is probable, another possibility is that Scotland will be treated as having automatically succeeded. It would be logical and efficient to fix the handover date for respondent status to be contemporaneous with Scotland's accession to the Council of Europe, so as to ensure that Scotland would enjoy institutional benefits at the same time as it would bear institutional responsibility.

### *The White Paper*

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<sup>26</sup> *Ibidem*, 178 (paras 3-4).

<sup>27</sup> See further Shaw, *supra* note 12, 962-963.

<sup>28</sup> Crawford-Boyle Legal Opinion, paras 136-139.

<sup>29</sup> See further Shaw, *supra* note 11, 981-984.

23. Concerning ‘membership of international organisations and international obligations’, the White Paper states at paragraph 268:

*‘Following a vote for independence the Scottish Government will formally declare Scotland’s intention to become a member of NATO following normal procedures. Similarly we will also signal our intention to be a member of the United Nations at that time. Given that Scotland, as part of the UK, already meets membership requirements, we do not expect any barriers to Scotland’s timely membership of international organisations.’<sup>30</sup>*

Whilst this statement seemingly makes no claim to automatic succession, it may be criticised for incorrectly conflating the status of Scotland as a region within the United Kingdom with its status as a new State. The one does not have any direct bearing upon the other. Nevertheless, the statement is correct insofar as an independent Scotland would be unlikely to encounter significant obstacles in its application for admission to the UN as a new Member State – particularly in light of the express disclaiming of the UK seat on the Security Council.<sup>31</sup>

24. The White Paper could be improved by greater specificity concerning the timeline for admission to the UN. In this respect, it should be emphasised that, in the event of a ‘Yes’ vote in the Referendum on Independence for Scotland, the process of secession from the United Kingdom would not necessarily (and, indeed, would be unlikely to) entail a comprehensive, single incision by which Scotland would dissolve its legal status as a region of the United Kingdom and apply for admission to international organisations all in a day. In this respect, the proposed ‘independence date’ of 24 March 2016<sup>32</sup> may not reflect the reality of a gradual process of secession.
25. To the contrary, in light of the nuanced and complex issues entailed in the particular case of Scotland, it is plausible that a gradual process of secession would be envisaged in the negotiations between the Scottish Government and the Government of the United Kingdom to follow a ‘Yes’ outcome in the referendum. On this approach, following the conclusion of these negotiations but prior to the formal date of secession, Scotland could apply for admission to the UN and other international organisations and thus synchronise its date of secession so as to coincide with its admission to the UN. Although, in an analogous case, Montenegro submitted its UN application on 5 June 2006 (the day after its declaration of independence and two weeks after its referendum on independence) and was admitted to the UN on 28 June, there is no UN rule prohibiting seceding States from tendering an application for admission prior to a formal declaration of independence.<sup>33</sup> Consequently, the

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<sup>30</sup> See also White Paper, 226-227.

<sup>31</sup> White Paper, 462 (para. 271).

<sup>32</sup> *Ibidem*, 51.

<sup>33</sup> For example, the Belarussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic were admitted to membership despite not being ‘States’ for Article 4 of the UN Charter.

White Paper could have benefited from greater precision in the planning of the transitional arrangements whereby an orderly process of secession and admission to membership could be achieved.

26. In addition, the White Paper asserts: 'Following a vote for independence Scotland will declare and notify our intention to assume responsibility for the UK's multilateral and bilateral treaties, where it is in Scotland's interest to do so. The Scottish Government expects that other parties to these treaties will welcome Scotland's intention to sign up to, and continue, these obligations.'<sup>34</sup> This suggests that the Scottish Government intends to assert a claim to automatic succession to membership and treaty participation in at least certain cases. If this be the case, in light of the problems analysed above, the statement wants explanation and substantiation.

### **Obstacles to Scotland's membership of the European Union**

#### *Membership of the European Union*

27. Unlike the UN and the Council of Europe, the EU raises significant obstacles to a smooth and seamless membership transition for Scotland. The fundamental problem is the need for unanimous agreement by the EU institutions and Member States. Political problems include: 1) the requirement that acceding States adopt the euro; 2) the UK budget rebate; and 3) UK opt-outs from areas such as the Schengen Agreement. In light these substantive issues, the practice of international organisations, the existence of a formal EU accession procedure and the need therein for unanimity of EU Member States for the admission to membership of an independent Scotland,<sup>35</sup> it is improbable that Scotland would be able to automatically succeed to EU membership. I respectfully concur with Professors Crawford and Boyle, who advise: 'In practice, to an even greater extent than questions of state continuity or membership of the UN, the consequences of Scottish independence within the EU will depend on the attitude of other EU Member States and organs, and on negotiations.'<sup>36</sup>
28. There is no express provision addressing the legal consequences of the secession of a territorial unit of a Member State either in the Treaty on European Union ('TEU') or in the Treaty on the Functioning of the European Union.<sup>37</sup> Nor is there precedent in the history of the organisation establishing a mechanism for the orderly management of State succession. Whilst Article 3(5) TEU refers to the Union contributing to 'the strict observance and the development of international law', which provides scope for general international law acting as a gap-filler in the EU legal order, the approach of the VCSS and customary international law has been to defer to the rules of the international organisation concerned – particularly where, as in the case

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<sup>34</sup> White Paper, 226.

<sup>35</sup> Treaty on European Union, C 83/13 *Official Journal of the European Union* (30 March 2010), Art. 49.

<sup>36</sup> Crawford-Boyle Legal Opinion, para. 144.

<sup>37</sup> C 83/47 *Official Journal of the European Union* (30 March 2010).

of the EU, there exists a procedure for the admission of new members. Thus, as opined by Professors Crawford and Boyle,<sup>38</sup> there exists no requirement to extend automatic succession to Scotland either in the EU treaties or in general international law.

29. However, as explained above with reference to UN membership, the need for Scotland to accede to the EU as a new Member State does not preclude the possibility of a smooth transitional process whereby the EU *acquis communautaire* would continue to apply in Scotland in an interregnum period pending the admission of Scotland. According to this approach, it is conceivable – and, indeed, desirable – for the European Communities Act 1972 to remain in force in Scotland until a date for the admission of Scotland to the EU, to be agreed upon in accession negotiations. This is the approach that the White Paper envisages.<sup>39</sup>

*Political problems*

30. Although the proposed accession date of 24 March 2016 may be criticised as premature, as it is dependent upon a process of negotiation that is necessarily incapable of timetabling, the general process foreseen of transitional arrangements is realistic and rational. However, whilst it is possible that the Article 48 TEU ordinary revision procedure would be applied to Scotland as proposed in paragraph 256 of the White Paper, in my view it is more likely that the normal accession procedure set out in Article 49 TEU would be followed as that is the purpose for which it was expressly designed. Even if the Article 48 were used, its practical effect upon the timeline would be unlikely to be as significant as that of the speedy resolution of the substantive issues to be addressed in the negotiations themselves.
31. Moreover, the assertion in paragraph 263 of the White Paper that ‘Scotland will not be an accession state’ is predicated upon the agreement of the EU Member States and institutions. Even if the Article 48 ordinary revision procedure were to be employed instead of the usual Article 49 route, it would require: 1) a proposal of amendments by a Member State, the European Commission or the European Parliament; 2) the approval of a simple majority of the European Council, in consultation with the Parliament and Commission, to examine the proposed amendments; 3) the unanimous recommendation by a convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission; 4) the unanimous adoption by the Member States in a conference of the proposed amendments; and 5) the ratification by all of the Member States of the amendments in accordance with their constitutional procedures. Consequently, it is disingenuous to flatly assert that Scotland will not be treated by the EU as an accession State when the decision to do so is taken by the institutions and Member States. It is also inconsistent with the acknowledgement at page 221 of the White Paper: ‘The Scottish Government recognises [that] it will be for the EU member states,

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<sup>38</sup> Crawford-Boyle Legal Opinion, para. 164.

<sup>39</sup> White Paper, para. 457 (para. 256).

meeting under the auspices of the [European] Council, to take forward the most appropriate procedure under which an independent Scotland will become a signatory to the EU Treaties at the point at which it become independent, taking into account Scotland's status as an EU jurisdiction of 40 [years'] standing.<sup>40</sup>

32. Similarly, I take issue with the premise of the White Paper<sup>41</sup> that Scotland 'will not be forced to join the Euro' in response to the question posed: 'Will Scotland be forced to join the Euro?' Although it is in narrow terms accurate that 'no country can be forced to join the Euro against its will', the question posed is nevertheless imprecise. The real question is whether a condition for admission will be set by the EU requiring Scotland to join the Eurozone and the Schengen Area or it would be afforded an opt-out from either or both regimes. Were such a condition to be imposed, it would be open to Scotland to decline to pursue EU membership and make alternative arrangements whether as a member of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) or, in a more extreme case, through *ad hoc* bilateral arrangements with the EU (Vatican City, Andorra, Monaco and San Marino).
33. This is necessarily a political question that would be addressed in accession negotiations between the Scottish Government, the UK Government and the European Commission. It is consequently not the prerogative of the Scottish Government to unilaterally insist upon opt-outs when it would have the status of a candidate country during such negotiations. The White Paper glosses over the distinct possibility that the Commission would insist that a condition for Scotland's accession to the Union will be its entry into the Eurozone and the Schengen Agreement – as indeed has been the practice for all candidate countries in the last two waves of enlargement. The White Paper thus fails to acknowledge the existence of a real possibility that ought to be submitted for public debate in order to inform the electorate for the referendum.
34. The analysis put forward in the White Paper<sup>42</sup> essentially argues that, whereas the EU Treaties provide for a right, not a duty, to join the Eurozone: 'If a national government decides not to join the ERM, as it is entitled to do so, then by definition it cannot become eligible for membership of the Eurozone.'<sup>43</sup> This is inconsistent both with the power of the Union institutions to set admission conditions for membership<sup>44</sup> and with the power of the European Council to determine that a Member State does not fulfil the necessary conditions for the adoption of the euro.<sup>45</sup> Such a Member State is thereafter termed a 'Member State with a derogation', to which transitional provisions apply until its eventual qualification for admission to the Eurozone.

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<sup>40</sup> See also White Paper, page 460 (para. 264).

<sup>41</sup> *Ibidem*, 459 (para. 260).

<sup>42</sup> *Ibidem*, 222-223.

<sup>43</sup> *Ibidem*, 223.

<sup>44</sup> TEU, Art. 49.

<sup>45</sup> TFEU, Art. 139.

- The architecture of the Treaties is premised upon all EU Member States, except for those that have already secured an opt-out, joining the Eurozone.
35. In light of the public comment made by the President of the European Commission,<sup>46</sup> it is likely that the European Commission would set admission conditions requiring Scotland to join the euro, Justice and Home Affairs and Schengen Area and not receive a budget rebate. The White Paper does not candidly acknowledge this possibility in that it asserts that ‘there are no circumstances in which the Scottish Government would countenance any measure being taken that jeopardized [Scotland’s participation in the Common Travel Area],’<sup>47</sup> ‘there are absolutely no grounds to believe that the EU would challenge Scotland remaining part of the CTA rather than joining the Schengen Area’<sup>48</sup> and ‘prior to 2020, the division of the share of the UK rebate will be a matter for agreement between the Scottish and Westminster Governments and the Scottish Government will argue for an equitable share.’<sup>49</sup>
36. In summary, the fundamental flaw in the programme set out in the White Paper is that it fails to acknowledge that the EU membership of an independent Scotland would require the agreement of the EU institutions and Member States, which may well decide not to offer Scotland opt-outs comparable to those that the UK would continue to enjoy from the Eurozone, Schengen Area, Justice and Home Affairs as well as the budget rebate. This does not provide a realistic assessment of a probable and foreseeable outcome of the accession negotiations. It would be more efficacious to expressly recognise this prospect in order to enrich the pre-referendum public debate and thus enhance the value of the referendum itself as a decision on a clear choice between the certainty of the existing position within the UK and the probability of a different position without the UK vis-à-vis the EU.

### **The potential for a ruling by the Court of Justice**

37. The Court of Justice of the European Union (‘CJEU’) does not have an express procedure to act as a constitutional court in the manner of constitutional courts of Romano-Germanic countries, namely, by receiving an application to adjudicate a constitutional question and then deciding on the meaning and effect of the constitution.<sup>50</sup> Although there are broader questions as to whether such a constitutional jurisdiction would be desirable, in the present context the existence of such a jurisdiction would potentially simplify the independence debate by clarifying the legal framework for EU

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<sup>46</sup> [http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68\\_Scotland\\_and\\_the\\_EU\\_Barroso%27s\\_reply\\_to\\_Lord\\_Tugendhat\\_1012\\_12.pdf](http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso%27s_reply_to_Lord_Tugendhat_1012_12.pdf).

<sup>47</sup> White Paper, 223.

<sup>48</sup> *Ibidem*, 224.

<sup>49</sup> *Ibidem*, 460 (para. 265).

<sup>50</sup> The CJEU does have jurisdiction to interpret the meaning of the Treaties but its jurisdiction is triggered in a manner different to national constitutional courts – TFEU, Art. 267.

membership. A direct action between two Member States for failure to perform a treaty obligation (an unlikely prospect in relation to the Scottish case) may be brought directly before the CJEU.<sup>51</sup>

38. Professors Crawford and Boyle opine that the CJEU would in practice be unlikely to have the opportunity to adjudicate the matter.<sup>52</sup> Whilst they recognise the possibility of a preliminary reference from a UK court in response to an action taken by an individual, they doubt that it would happen in time to influence the process of Scottish independence and EU accession.<sup>53</sup> In their view: 'In any event, there is virtually no chance that the ECJ would be called on to consider the question on the basis solely of existing EU law. More likely, the UK, Scotland and the EU will negotiate and agree on arrangements for Scottish independence that would form the actual subject matter of any consideration by the ECJ. This view is strengthened by the fact that there is no express provision on the point in the EU treaties: it will probably be treated as a *sui generis* matter to be dealt with by the member states, at least initially, rather than the ECJ.'<sup>54</sup>
39. Whilst these conclusions are considerably strengthened by the scant time available for potential adjudication before the CJEU until the referendum, the consequent lack of opportunity for judicial clarification of essentially legal matters is regrettable. Consequently, I recommend that the Committee consider a recommendation to the Scottish Government to consider the possibility of bringing legal action before the CJEU to seek clarification<sup>55</sup> concerning, in particular: 1) whether an independent Scotland would be required to accede to the EU under Article 49 or whether the ordinary revision procedure under Article 48 may be employed; and 2) whether it would be in accordance with the EU Treaties for Scotland to be afforded opt-outs in the areas identified above. Whilst the avenue for the bringing of such a claim is not clear, as a violation of EU law would have to be identified and a Scottish court would need to make a preliminary reference to Luxembourg, it is possible that the agreement of the EU Commission and/or the UK Government could be solicited in order to bring the claim for the purpose of seeking declaratory relief.<sup>56</sup>
40. The utility of judicial input is strengthened by the distinct possibility that the political mandate of a 'Yes' vote in the referendum would be obviated by the outcome of the negotiations. To wit, were the 'Yes' campaign to successfully fight and win the referendum *on the basis of an independent Scotland obtaining the key opt-outs* in negotiations with the EU as set out in the White Paper, and were the EU to reject Scottish demands for all or even one of those opt-outs, and were litigation before the CJEU to subsequently agree

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<sup>51</sup> TFEU, Art. 259.

<sup>52</sup> Crawford-Boyle Legal Opinion, para. 172.

<sup>53</sup> *Ibidem*, para. 172.1.

<sup>54</sup> *Ibidem*, para. 172.2.

<sup>55</sup> E.g. – an opinion pursuant to TFEU, Art. 218(11).

<sup>56</sup> TFEU, Art. 267.

with the EU position, then the political mandate of the Scottish Government for independence would arguably be invalidated as a 'Yes' result from the referendum would have been predicated upon conditions for independence that would not be obtainable. In this scenario, even if the 'Yes' campaign to win the referendum, it would lose its campaign for independence.

41. Consequently, it is more desirable to seek judicial clarification of these key legal questions prior to the referendum (if practicable) in order to facilitate an informed public debate concerning the implications for Scottish EU membership and thus provide the Scottish Government with a political mandate for conducting negotiations. In this respect, the realistic scenario of the Scottish Government failing to obtain all of its demands for opt-outs should be clarified with an alternative plan of EFTA membership with sterling, the CFA, etc. examined and debated.

### **Conclusions and recommendations**

42. This submission offers the following conclusions:

- 1) the law of State succession is regrettably underdeveloped and confused so that the Scotland secession case has exposed a need for normativity and standardisation;
- 2) automatic succession to membership of international organisations through Article 34 VCSS does not apply to Scottish succession to membership in key international organisations such as the UN and EU through customary international law due to the inconsistent and confused practice;
- 3) automatic succession to participation in bilateral or multilateral treaties would depend upon the notification of the Scottish Government and the acceptance of such notification by the other parties to those treaties;
- 4) Scotland would be required to accede to the UN as a new Member State but would be unlikely to encounter difficulties in doing so;
- 5) Negotiation of Scottish membership of the EU could be accomplished 'from within' whereby EU law would seamlessly apply in Scotland as part of the UK pending its accession to the EU as a transitional arrangement;
- 6) The 'independence date' of 24 March 2016 is unlikely to entail a comprehensive and incisive transition to independence with respect to membership in international organisations, in that a phased transition may occur depending upon the progress of negotiations;
- 7) It is likelier that Scotland would be required by the EU to accede to the Union as a new Member State in accordance with Article 49 TEU rather than the proposed ordinary amendment procedure under Article 48 TEU;
- 8) The fundamental failure in the White Paper is to acknowledge that the conditions for EU membership of an independent Scotland would be set by the EU institutions and Member States (even if the Article 48 procedure envisaged in the White Paper were employed) and consequently the Scottish Government cannot guarantee to the Scottish electorate, as it

- suggests in the White Paper, that its preferred conditions of accession will be achieved by negotiations;
- 9) Although the absence of a constitutional reference jurisdiction for the Court of Justice is regrettable, judicial clarification of these legal questions is nevertheless desirable in order to facilitate an informed referendum and thus provide a clear political mandate for subsequent negotiations in the event of a 'yes' vote.

43. This submission offers the following recommendations:

- 1) the Committee should criticise the failure by the Scottish Government in the White Paper to acknowledge that the conditions of EU membership for Scotland may realistically entail requirements to join the Eurozone, Schengen Area, Justice and Home Affairs and/or no budget rebate;
- 2) the Committee should recommend that the possibility be explored by the Scottish Government of legal action before the General Court or CJEU in order to seek judicial clarification of succession or accession to EU membership;
- 3) the Committee should specifically seek clarification of alternative plans by the Scottish Government for Scottish membership of EFTA in the event that the membership conditions laid down by the EU prove to be politically unacceptable;
- 4) the Committee should seek clarification of the position of the Scottish Government concerning transitional arrangements as between it and the UK Government for responsibility for human rights claims pending Scottish accession to the Council of Europe.

24 January 2014