



The Succession of States

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What will happen after the referendum?

When states divide or disintegrate it is normal that a whole network of issues have to be settled regarding what international commitments of the previous state the new one can or must take over. This is a question that will become acute if and when Scotland decides to leave the UK.

It is completely certain that the United Kingdom will continue to exist legally without Scotland, so that nothing will change in its case. Scotland, on the other hand, as a brand new state for legal purposes (although actually a reborn one), will have to start with a clean sheet and build up its network of international relations from the start.

This document starts with a concise summary of the relevant international law on state succession in respect of treaties and other agreements, including membership of international organisations. It then discusses the likely course of developments in the particular case of an independent Scotland, and the procedures that will have to be followed in order to establish Scotland's external relations – not simply with other sovereign states, presently around 200 in number, but also with the even more numerous international organisations that constitute the new and strongly emerging global political system. That will be the framework within which Scotland will have to exist and work for all of the foreseeable future.

What does international law say?

The rules of international law concerning cases of state succession were codified within the framework of the United Nations in the 1978 **Vienna Convention on Succession of States in Respect of Treaties** and the 1978 **Vienna Convention on Succession of States in Respect of State Property, Archives and Debts**. Despite the modest number of 15 ratifications that are required, only the 1978 treaty has yet entered into force with around two dozen ratifications, mostly by developing countries. The United Kingdom has not acceded to them.

Neither of these two treaties applies to Scotland in any context. As far as Scotland is concerned, the succession of states remains governed by **customary international law**.

The question of state succession seemed to have become a purely theoretical matter after the end of the decolonisation process, but it has been reactivated by the events of recent years. The unification of Germany and Yemen raised specific legal questions, but the dissolution of the Soviet Union, Yugoslavia and Czechoslovakia brought the entire issue of state succession into the foreground once again.

As regards **bilateral treaties** under international law, i.e. treaties between two individual states, the so-called “clean slate” principle applies. According to this principle, a newly-emerging state is not as a rule automatically bound by treaties entered into by its territorial predecessor. The only exceptions are bilateral treaties applying to specific geographical areas (“localised treaties”), for example on border regulation, transit rights, trans-border river management, etc., which would automatically be taken over by the successor state(s) on the same territory. Any such issues arising out of Scotland’s independence would almost certainly need to be freshly negotiated, since few such agreements, if any, would exist in legal form.

In the case of **multilateral treaties** under international law it is customary that a new state presents a so-called “declaration of continuity” to the depository of the treaty, to which it thereby becomes a party. The depository of a global treaty (e.g. on disarmament) is usually the United Nations Organisation, at regional level the Council of Europe (CoE), the UN Economic Commission for Europe (UNECE) or the Organisation for Security and Cooperation in Europe (OSCE). The European Union (EU) does not function as a depository in this manner, since only EU-internal agreements are concluded under its auspices.

Such a right does not, however, apply to the so-called **plurilateral treaties** that are limited to certain states for geographical or functional reasons. In such cases, succession to a treaty is possible only with the consent of the other States Parties, and even then only if it would be consistent with the object and purpose of the treaty. This means that an independent Scotland would have to make a fresh application for membership of the Council of Europe, the European Union and similar organisations where membership is dependent on meeting certain conditions.

In order to avoid a legal vacuum after the emergence of a new state, it is customary, providing there is mutual agreement, to apply the provisions of existing treaties pragmatically to the successor state for a limited transitional period. This can last until such time as the treaties in question are formally adopted by the new States Parties, are materially replaced by fresh agreements, or the new state decides to make other arrangements. Such **pragmatic application** substantially reduces the practical differences between the “clean slate” principle and the principle of the continuity of treaty obligations. It is in any event always necessary to examine bilateral treaties entered into with a state that has disappeared in order to determine whether the contents shall be applicable to its successor(s).

What usually happens is that talks with successor states are followed by an exchange of diplomatic notes by which certain treaties concluded with the predecessor states can be put into force, with any necessary modifications, in relations with the new states. The “localised treaties” will be formally declared in force with the territorial successor states in such exchanges of notes. Insofar as such exchanges of notes cover treaties originally concluded with parliamentary approval, these will require to be brought before the legislature once again.

What will happen in Scotland’s case?

The answer to this question is already clear, despite all the confusion and conflicting opinions based on nothing more than supposition and garbled information. In the first place, it should be made clear that the status of Scotland and the rest-UK will be decided within the United Nations, and certainly NOT in Brussels by the European Union or any other organisation.

The EU, which represents only half of Europe, has absolutely no power of decision on such matters. It has no option but to accept the recognition of independent Scotland by the rest of the international community, nor could there be any question of the EU deciding the status of the United Kingdom minus Scotland. That, too, is beyond its legal authority, as would be any form of political or economic discrimination with the objective of forcing Scotland into membership or any other particular form of relationship. Such actions would be immediately cognisable by the United Nations or the World Trade Organisation (WTO).

It is already certain that newly independent Scotland and the continuing remainder of the United Kingdom will not have equal and identical status during the process of separation. It is nonsensical to suggest that a state of 50 million people would have to draw a line under its previous existence and start afresh from scratch in every respect after losing 8.4 per cent of its population. Every relevant precedent demonstrates that that is not how international law views such a development. This was most recently confirmed when the Soviet Union broke up into its component parts. The breakaway states (Kazakhstan, Georgia, etc.) had to make fresh starts, whereas the international status of the Soviet Union, including permanent membership of the UN Security Council, was taken over by its largest component, the Russian Federation.

The same thing will happen with the UK. It will continue after the 8.4 per cent reduction in its size, with the same status and functions in international affairs – including two permanent seats in the United Nations (General Assembly and Security Council) – and all its treaties and other international commitments will remain in force. It is likely that its title will change (e.g. to The United Kingdom of England, Wales and Northern Ireland), but otherwise it will continue as the same constitutional entity that has been recognised by the international community for several centuries.

This leaves Scotland in the position of starting afresh with a clean sheet – and it is vital that this unique and unrepeatable advantage, the opportunity of centuries, is not squandered by over-hasty decisions based on inadequate or garbled information, or manipulation by vested interests. Every step that Scotland takes on the international stage thereafter must be subjected to minute scrutiny in terms of its necessity, its utility and its desirability.

The necessity of membership is self-evident in the case of the United Nations. No state is truly independent until it has international recognition and a seat in the UN General Assembly. Much the same degree of necessity applies to several other major institutions like the World Trade Organisation as well as those specialised institutions like the IMO, ICAO, ITU and many others that regulate international economic, transport, health and other relations on a global basis.

Scotland should apply for membership of the major all-European organisations as a matter of utility during the present transitional phase of the continent's development. It is unfortunate that the European scene has been bedevilled by the 27-member European Union, representing just over half of the continent in terms of member states, geographical area and overall population, but with ambitions to hijack the identity of political Europe as a whole.

There is, of course, no question of independent Scotland "remaining" a member of the EU, or for that matter any other international organisation of which the UK is presently a member. A formal application for admission will have to be submitted in every case, and the qualifications for membership will have to be met. The EU must be treated strictly on the same basis as every other one of the dozens of international organisations that independent Scotland will have to join, with a stringent examination of its suitability or otherwise for Scottish membership.

In the case of the EU there is a perfectly viable alternative available that would not endanger Scotland's sovereignty to the same degree. Scotland can obtain whatever economic advantages of the EU there may be by joining the EFTA side of the European Economic Area, like Norway and (de facto) Switzerland. If there are any non-economic advantages of EU membership, then these must be explained in detail, and weighed against the disadvantages.

It ought not to have been necessary to single out this one organisation for special mention, because many of the dozens of international institutions that Scotland will have to join are of considerably greater importance than the EU. One of the most disturbing features of the present Scottish political scene is the existence of a powerful lobby that clearly intends to railroad Scotland into the EU for unexplained reasons that are not necessarily connected with the welfare of the Scottish people. The almost fanatical insistence that it is necessary to join this single, dangerously undemocratic organisation that has been nothing but an economic disaster for Scotland, reveals the degree of ignorance of those who expound it. While giving the impression that the EU is simply all they know about international relations, the motivation behind the campaign is probably much more sinister, and connected with maintaining post-independence power over Scotland and its resources.

Finally, there is the question of Scotland's post-independence relationships with the other autonomous states of the so-called British Isles. Constitutional independence essentially means that the ultimate power of decision making over Scottish affairs will revert to Scotland. This is as it should be, but it is undeniable that many issues will remain that will have to be decided on a joint basis. Immigration is the most obvious one – we just cannot have different policies if we are to avoid having border controls. Scotland as an entry door for foreign influence was the primary reason for the Union in the first place, from the English standpoint, and it would be essential to avoid having this problem rear its head once more in respect of population movement.

Homeland security generally is an obvious issue for joint decision making, as are many others like transport links and infrastructure, fisheries management, coordination of policies on some foreign policy issues, and many others. These confederal-type arrangements need not involve

the creation of bureaucratic institutions, since regular conferences should suffice to cover the details, which would have to be approved by the various parliaments.

It would be highly desirable for the Republic of Ireland to be included in this system of cooperation between friends and neighbours, and who knows – when the last vestiges of colonialism and imperialism have finally been expunged from our islands, a new age of much healthier relationships may dawn, and old wrongs put right. Friends and Neighbours is indeed the goal of all our endeavours, and with constitutional independence for Scotland it will be brought that much nearer.