International Legal Implications of Scottish Independence
(Footnotes pending)

By

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I begin with a disclaimer, namely that I am delivering this address strictly in my capacity as a law professor and nothing I say or any opinion I express should be interpreted as reflecting the views of the U.N. Secretary-General or any part of the United Nations whatsoever, and certainly not of the United States Government. I speak strictly in my private capacity. I was instructed to deliver a 50-minute speech and that is what this is, so please accept my apologies in advance!

My late colleague at Northwestern School of Law, Professor Ian MacNeil, was the 46th Chief of the MacNeil Clan. His Kisimul Castle was granted to Historic Scotland in 2000 and his estate on the island of Barra was transferred to the Scottish Government in 2003. Professor MacNeil, whose clan’s motto is “Victory or Death,” was a persistent advocate of Scottish independence within our law school walls in Chicago and habitually referred to “William the usurper.” Though I only joined the faculty at Northwestern Law in 2005, I quickly found fierce Scottish blood flowing through the halls, and it reminded me of an earlier time in my life, one I have always treasured.

Thirty-nine years ago I wrote this in The Harvard Political Review: “To visit Scotland today is to witness a nation convulsed by the throes of modernization. Caught
between the lost prosperity of the industrial revolution and the sudden wealth of North Sea oil, Scotland is a land fixated upon change. Old industrial structures and dismal economic statistics are being surpassed by technological breakthroughs in oil exploration and falling unemployment rates. In the course of one year, 1974, Scottish politics has emerged from centuries of stagnation to become the most innovative regional phenomenon in Western Europe. Two British elections, in February and October, revolutionized not only the entire spectrum of politics in Scotland, but they laid the foundation for the possible re-emergence of a country subsumed since 1707. The possibility of independence from Great Britain is no longer a laughing matter. Pressure to disentangle politico-economic centralization from London has guaranteed the Scots certain political upheaval for years to come. In even the most remote areas of Scotland, the talk is of change. Scots who have been isolated all their lives in backward heather country now bicker over the siting of oil-platform construction sites. Never in its history has Scotland been in such 'civil' turmoil. By the close of this decade, the home of the kilt promises to be a significantly different nation from what it was only a year ago.”

I wrote those words at Harvard University, where I was a student writing my senior thesis on “Processes of Modernization in Scotland: The Political Economy of North Sea Oil.” I had spent September 1974 on buses and trains throughout Scotland, with the heather transforming gloriously before my eyes, including that extraordinary rail journey from Inverness to Kyle of Lochalsh, interviewing Members of Parliament, young SNP politicians, oil executives, and scholars about the rising tide of Scottish nationalism and the pull of North Sea oil. A year later, in late 1975, while at Oxford studying law I wrote in The Nation magazine that, “Devolution means that a single act of Parliament

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will restructure British democracy without constitutionally mandating what is basically a politically motivated hodgepodge of government by appeasement....The British have lost themselves in the devolution maze. Devolution poses so many hypothetical uncertainties and dangers that it seriously threatens the stability of the existing political system. Once the Scottish National Party gains a majority in the Scottish Assembly (a predictable certainty), it will not accept responsibility without power....Without a modern constitution that specifies the divisions of government, provides for a bill of rights, and establishes a legal alternative to the sovereignty of Parliament, the United Kingdom is embracing an ambiguous and unbalanced scheme of democracy that will fuel the fires of separatism.” And so it has.

By the way, shortly thereafter, during the summers of 1976 and 1977, I labored in London for the General Counsel of Phillips Petroleum Europe-Africa on tort liability and joint venture issues arising in its North Sea oil explorations, and witnessed up close the reality of North Sea oil. Aside from my abiding interest in self-determination, however, this is my first opportunity to return to a passion I once held and now reaffirm for the fate of Scotland.

I ask you, somewhat remarkably, will we, two years from now following the referendum, witness a significantly different nation from what it is today, one on a certain path towards restored sovereignty, independence, and economic prosperity? I am very aware that there are many different views about that question.

But let us recognize that a modern exercise of self-determination has advanced far beyond what most would have predicted decades ago. The Scotland Act of 1998 created the Scottish Executive and Scottish Parliament as central pillars of devolution. In 2011
the Scottish National Party won a majority of seats in the Scottish Parliament and First Minister Alex Salmond assumed greater power at the head of the Scottish Government and continued the Scottish National Party’s advocacy for independence. Last October, British Prime Minister David Cameron and First Minister Salmond signed the Edinburgh agreement setting up a referendum on Scottish independence that will be held in late 2014. For decades North Sea oil has generated significant financial resources for the British Government, of which Scotland receives a percentage that has been deemed inadequate by the Scottish Government.

I have read a great deal in recent months about the drive for Scottish independence and the views and assessments of many scholars, lawyers, and politicians about what the law may pronounce and what politics may dictate. I speak to you quite humbly today, as I know the real experts on this issue are in the audience. Your collective knowledge of the history, politics, culture, economics, and law of this magnificent corner of the world provide far more insight into some of these vexing questions than my limited capabilities as an American international lawyer and former diplomat can offer. I am certainly not here today to provide the definitive ruling on what international law requires if the Scottish people vote “yes” for independence in 2014. Frankly, anyone who pretends to know precisely what international law mandates under these fairly unique circumstances should be viewed skeptically in the halls of policymaking. Scotland’s past, present, and future are *sui generis* and that fact alone makes an enormous difference in how law and politics pragmatically join in coming months to chart a pathway either to a state of continued devolution of political and economic power.
within the United Kingdom or to a state of independence for Scotland apart from the
United Kingdom.

Note that if there were ever a more debatable area of law to examine publicly, this
is it. International law issues bear greatly upon any upheaval of State sovereignty, but in
the end political factors will shape the legal parameters of the quest for Scottish
independence. Politicians will do what they must to reflect the will of the people and
international law will be so instructed and influenced when they do.

The most important principle regarding the legal implications of Scottish
independence is that while nothing in international law prevents Scottish independence,
nothing in international law or European Union Law is certain about the consequences of
Scottish independence. This is not terra firma. It is an exercise that should draw upon
both the heritage of a distant sovereignty and the pragmatic realities of modernization.

The fate of Scotland under international law rests on the realities of
Scotland's unique history of union with the remainder of the United Kingdom since
1707, of the United Kingdom's membership and role in the European Union and the
Security Council of the United Nations—facts that deeply intertwine Scotland with
the fate of the United Kingdom before those organizations, and of the complex of
treaties in which the United Kingdom is a party—the number and character are such
that determining the role of Scotland in those treaties as independence unfolds will
be no easy formula.

But every one of these tough issues, and so many more, can be resolved
through a combination of smart diplomacy, particularly by Scotland, and political
negotiations between Holyrood and London and with the family of governments and
institutions comprising the European Union and, with singular importance, the U.N. Security Council. While law will have its role to play in the months and years ahead, Scottish independence, if that is indeed what emerges from the referendum vote, will be a high-stakes political endeavor of unprecedented risks and opportunities. International law will inform every step of the way, but political negotiations and diplomacy will dictate the outcome.

The uncertainties, indeed flexibility, of international law in the Scottish experiment with modern governance nonetheless will be grounded in at least seven areas of inquiry. By the way, I take the liberty of referring throughout this talk of a United Kingdom that one day may be without Scotland as a constituent part as the “remainder of the United Kingdom,” or “rUK.” I realize others, particularly south of the border, prefer other formulations, including the “United Kingdom.” But I have to distinguish between the United Kingdom today and what might result if Scotland achieves independence, so that we have clarity in our discussion.

I. Scotland’s Right of Self-Determination

First, the right of self-determination is a very powerful core principle in both human rights law and the broader field of international law; it is a right that must not be debilitated by dated presumptions of its true character in the modern world. The legal principle of self-determination has deeply influenced the devolution era of Scottish politics and it can have a profound impact on the quest for independence.

The right of self-determination has been long held to be a *jus cogens* principle under international law. Scotland is one of the most dynamic laboratories in the world for the modern expression of that principle and how it will be defined for the 21st
Century. Following decades of evolving theory and practice of devolution, which is one of the more pragmatic expressions of self-determination of our time, the democratic expression of the free will of the Scottish people in a referendum for independence held in 2014 should fulfill the most ideal formulation for self-determination in the post-colonial world. The Scottish experience has almost nothing to do with colonialism and the understanding of self-determination during the 20th century following either World War I and the Versailles Treaty or the post-World War II era of decolonization.

Scotland’s endeavor is a very modern form of self-determination with deep historical roots reaching back to its own sovereign nationhood and yet centered on what I have described elsewhere as sub-state self-determination, only in this unique case the “sub-state” was once the sovereign nation of Scotland prior to the Treaty of Union in 1707. The exercise of this right normally would need to fulfill certain standards that have rapidly emerged in the last two decades following the dissolution of the Soviet Union and the former Yugoslavia. These standards present no real difficulty for Scotland and will be examined more thoroughly later. So there should be little controversy over Scotland’s capabilities to exercise, successfully, the standards set for modern expressions of self-determination.

The right of self-determination, enshrined in the 1966 International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights (for each, see “Article I (1): All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”), as well as in numerous UN resolutions over the decades, creates the foundation upon which much else follows. But one should interpret this right
using a modern frame of reference and not the decolonization theories and practices of the past century. I would part ways with such legal scholars as the late Antonio Cassese, whom I knew well, worked with, and deeply respected, but who held a rather narrow and anachronistic view of self-determination, one that was grounded in the primacy of sustaining national cohesion following decolonization. Scotland is not a case of decolonization and certainly not one of simple "internal self-determination." That constitutes an entirely unsatisfactory description.

For Scotland represents an almost ideal manifestation of modern self-determination, evolving step-by-step through stages of sophisticated and politically dynamic devolution to the doorstep of a popular referendum. Whatever benefits accrue to Scotland from exercising the *jus cogens* right of self-determination, they should be realized. However, this also means that considerable power resides in the people and thus much rests upon the referendum and its result. This will have an impact on the prospects for recognition of an independent Scotland by foreign nations and international organizations as well.

As I have noted, Scotland, as a modern manifestation of the principle of self-determination, is an example of sub-state self-determination, which embraces devolution and yet is defined by a historical union of formerly independent nations now confronting separation that restores their original sovereignties. Twenty years ago, in my co-authored book, *Self-Determination in the New World Order*, my co-authors and I wrote that, "'Sub-state' self-determination describes the attempt of a group within an existing state to break off and form a new state or to achieve a greater degree of political or cultural autonomy within the existing state. (fn. 5: We avoid using more common terms such as
'secessionist' or 'separatist' self-determination to emphasize that a sub-state movement may not seek full independence and that self-determination claims can often be resolved with steps short of full independence.) Sub-state self-determination movements may be based on ethnic, geographic, historical, or economic factors. They include only claims by groups concentrated in a particular geographic area; claims of dispersed peoples are treated in a separate category.” (49) At the time—1992—with respect to the United Kingdom, we identified Northern Ireland, Scotland, and Wales as examples of sub-state self-determination movements within the United Kingdom, obviously of varied degrees of strength and practical relevance. (143-144)

My co-authors and I further wrote that, “Sub-state claims often have been reasonably met by federalism. Francophone movements in Canada, Tamil movements in India, and Ibo movements in Nigeria have been contained—albeit with occasional eruptions—within federal structural bargains. For many years, the same could have been said for Tamil claims in Sri Lanka or Albanian claims in the Serbian province of Kosovo in Yugoslavia. Once the federal bargains were broken...in the mid-1950s in the case of Sri Lanka and, more recently, by Serbian president Slobodan Milosevic in the case of Yugoslavia, the sub-state claims focused on demands for full independence.” (50) Although Tamil sub-nationalism has been strangled, Kosovo today stands as a *de facto* and perhaps by now *de jure* independent nation, recognized as such by 100 countries, including the United Kingdom and 21 other European Union states.

Scotland has experienced both the classical formula of internal self-determination and is moving relatively quickly now towards a modern expression of external self-determination, but it is doing so based upon its somewhat *sui generis* character. The
devolution movement has been the internal self-determination moment for Scotland. This embodies the concept that the people have the right to meaningful participation in the political process. Only through such participation could people choose their own social order and form of government—thus fully exercising a right to "internal self-determination." The Scotland Act of 1998 and the creation and operation of the Scottish Executive and Parliament are signal indicators of such internal self-determination.

"External self-determination" means that people have the right to choose their own sovereignty—that is, to be free from external coercion or alien domination. President Woodrow Wilson embraced this notion when, in identifying American war aims in 1917, he spoke of upholding "the liberty, the self-government, and the undictated development of all peoples....No people must be forced under sovereignty under which it does not wish to live. No territory must change hands except for the purpose of securing those who inhabit it a fair chance of life and liberty." (16-17)

But Scotland is greatly distinguished from the decolonization concept of self-determination that dominated primarily the post-World War II landscape for several decades. You have moved far beyond that, which is why I have long identified Scotland with "sub-state self-determination" as it moved through devolution and now stands at the precipice of full-scale independence. The novel feature of the Scottish experience is that one is dealing primarily with a dual-state historical phenomenon, of two states joined in 1707 and now on the verge of potentially splitting apart. The sub-state of Scotland actually is the former independent state of Scotland, of 306 years ago, reasserting its full sovereignty. There is no rule of international law preventing that restoration of
sovereignty through peaceful means and within the context of modern self-determination theory. Thus the basis for and legitimacy of the referendum of 2014 is well established.

II. **Recognition of an Independent Scotland**

The time has arrived to begin planning a strategy for ultimate recognition of an independent Scotland by foreign governments. That strategy should include Scottish pledges on a number of good governance factors expected of new governments and states. In my view, prior consultation with foreign governments about Scottish commitments to core principles of good governance should facilitate rapid recognition of an independent Scotland if and when it is formally achieved, perhaps in 2016.

Scottish emissaries should be laying the ground work through a coordinated plan to ensure that once independence is on the horizon following an affirmative referendum vote, if that indeed occurs, key foreign governments recognize both the state and government of Scotland as a sovereign unity in one step. One could embrace, for pragmatic reasons, periods of *de facto* recognition of Scottish independence similar to Kosovo prior to *de jure* recognition, and there are certainly historical examples of this tactic. But Holyrood should strive for obtaining *de jure* recognition with the fewest complications following independence. The recognition formula should be manageable to negotiate, with the Scottish envoy pledging that an independent Scotland is going the extra kilometer to meet modern conditions for recognition that have emerged during the last two decades.

Again, I take the liberty here to draw upon some of the conditionality that my co-authors and I proposed 20 years ago in connection with the break-up of the Soviet Union and of Yugoslavia, which of course are two very different scenarios. But they provide a
useful back-drop to what Scotland can easily satisfy, thus facilitating rapid recognition of its independence and thus timely admission to the United Nations. These criteria for transition to independent statehood are as follows:

a) **U.N. Standards of Admission.** Pursuant to Article 4(1) of the U.N. Charter, the standards for admission of a state to the United Nations require that the state be “peace-loving,” accept the obligations in the U.N. Charter, and be “able and willing to carry out these obligations.” Scotland so qualifies and could not be plausibly challenged on those criteria at the United Nations.

b) **Adherence to International Law.** I will have more to say about this shortly when discussing the law of succession of states, but under this condition Scotland would pledge to adhere to the general principles of international law. In addition, Scotland could commit to upholding the specific international legal obligations of the predecessor United Kingdom that logically carry over with Scotland’s independence. International law consists of both a large body of customary norms that in the view of many scholars would automatically bind any newly emerging state and of numerous treaties and conventions, some of which may have complicated outcomes with two successor States. Therefore, the Scottish pledge will need to be specific with respect to what codified international law will be endorsed and comprehensive enough to guarantee the rights and obligations found in customary international law.

c) **Inviolability of Borders.** Scotland should explicitly recognize and respect existing international boundaries and internal borders dividing Scotland and England, both on land and at sea, and of course the territorial sea demarcations with Norway and both Northern Ireland and England of the remainder of the United Kingdom. The
territorial sea boundary in the North Sea between Scotland and England will be subject to
negotiation, which I examine later, but as long as there is a peaceful negotiation or
adjudication process underway, that should suffice for recognition purposes.

d)  **Non-Use of Force.** The "peace-loving" condition of Article 4(1) of the
U.N. Charter is easily embraced by an independent Scotland. But there could be some
utility, in laying the groundwork for rapid recognition by major governments, to go a bit
further with Scotland's pledge. The Scottish National Party already has staked its foreign
policy on a non-nuclear weapons future and that could be freshly articulated, although it
may require a pragmatic caveat regarding the immediate future of British nuclear
submarines at Faslane. Beyond that, however, Scotland could pledge that, 1) it will not
seek to use force to settle any boundary dispute or to resolve an irredentist claim, and it
will resolve such disputes by peaceful means including, if necessary, submitting the
matter to mediation, conciliation, arbitration, or the International Court of Justice; b) to
adhere to the Nuclear Non-Proliferation Treaty as a non-nuclear weapons state once the
situation with Faslane and British nuclear-armed submarines is satisfactorily resolved,
and that could take time; and c) accept limits on the size of conventional military forces
that are consistent both with self-defense and NATO membership if indeed Scotland
wishes to remain part of NATO, and d) a commitment to resolve disputes by peaceful
means, to use force only in self-defense or as part of an action of collective security
(including NATO and U.N. peacekeeping operations), and to comply with the procedural
requirements of the U.N. Charter and Article 5 of the NATO Treaty to confront
aggression by other states.
e) **Peaceful Settlement of Disputes.** Scotland should commit to peaceful settlement of international disputes. It should consider joining, at the appropriate time, relevant arbitration conventions and submitting to the compulsory jurisdiction of the International Court of Justice.

f) **Constitutional Democracy.** The Scottish Government is well on the way to demonstrating its adherence to fundamental tenets of a modern constitutional democracy. The Scottish National Party introduced basic principles for a Constitution in 2002. I hesitate to suggest to such a well-informed audience basic constitutional elements, but let me just checklist several which Scottish law and European Union law obviously address in one form or another, but not within a Scottish or, for that matter, United Kingdom constitutional framework.

In its totality, the constitution of Scotland must provide protection for the rights of individuals and of minority groups and protect them from arbitrary governmental and police action. Periodic free elections, of course, are a cornerstone of constitutional democracy. So too is guaranteeing the right of political dissent. People must have the right, free from the fear of arrest, to express their opposition to the government and its policies and actions. They must have the ability to communicate these views to others through such means as freedom of the press and assembly. In order to ensure rights for all peoples, the government should enact limits on the right of the police to arrest people and to hold them without public charges or a trial. I imagine such rights and limitations already are well recognized in Scottish law. The real challenge for constitution-drafting in Scotland is to envisage what might be required beyond what you will naturally
determine is reflective of and thus should be incorporated from existing rights under Scottish law and European Union law.

First Minister Salmond recently articulated the need to consider, in the context of Scotland's Constitution, "fundamental human concerns, the key economic, social and environmental needs of every citizen and the responsibilities of state and citizen towards each other." He referenced the right to education, the rights of the homeless, a constitutional ban on the possession of nuclear weapons, and the use of Scottish armed forces and what constitutional safeguards should be established for the use of Scottish troops.

Although the First Minister's proposal has provoked responses from some who view the proposed rights and duties as too constraining on the Scottish Government following independence, I do not consider them particularly provocative. From a comparative point of view, economic, social, environmental, and indeed security concerns are reflected in constitutions around the world in modern times. For example, and I am only scratching the surface here, environmental rights and duties provisions appear in many constitutions, such as those for India, Poland, Spain, and Uganda. The South African Constitution guarantees everyone the "right to have access to adequate housing." It also provides the right to have access to health care services, sufficient food and water, and social security.

In India, the constitutional nod to "directive principles of state policy" (Part IV) at first was interpreted as it reads, namely, "The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply
these principles in making laws.” Article 39 elaborates this concept by stating that, “The State shall, in particular, direct its policy towards securing” adequate means of livelihood, equal pay for equal work for both men and women, the health and strength of workers, both men and women, and that children are protected against exploitation and moral and material abandonment. Article 41 of the Indian Constitution provides that, “The State shall, within the limits of its economic capacity and development [important qualifiers, no doubt], make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

The Supreme Court of India, in an important line of cases (Olga Tellis (right to life and to livelihood), People’s Union for Civil Liberties (hunger), State of Karnataka (water), Aquaculture case: S. Jagannath (livelihood), Samatha (livelihood)), has begun to transform some of these so-called “directive principles” into constitutionally protected rights and duties. But just the concept of India’s “directive principles” is one that should not be ignored in the drafting of the Scottish Constitution as they can provide a political bridge to the incorporation of these additional categories of rights and duties into a constitution.

Further, an independent Scotland’s presumed continued participation in the European Convention on Human Rights and the International Covenant on Economic, Social, and Cultural Rights, where a broad range of rights are well-known and increasingly established now, would provide added momentum and legitimacy to the proposals tabled by First Minister Salmond. Such concepts as “progressive realization” and “appropriate steps” can be applied to national constitutional law as well, so that the
skeptical view fearful of automaticity of state obligations for such rights and duties is addressed realistically within the constitutional text.

It likely will not be possible to finalize the Scottish Constitution prior to independence, as I assume we will see a constitutional convention for that purpose convened immediately after independence. But Scotland would want to entice diplomatic recognition as quickly as possible upon achieving independence. So the sooner the text of a plausible concept for the draft constitution is tabled in anticipation of the constitutional convention, and that tabling is well communicated to foreign governments, they may feel more comfortable recognizing the newly independent Scotland as soon as possible upon independence. Of course, some foreign governments may not care, but others may care or use the absence of a constitution as the basis, however credible, for delaying recognition, perhaps in deference to their long-held loyalty to London. Thus the prospect for constitutional democracy in Scotland should be a powerful tool in the nation’s recognition strategy.

III. State and Treaty Succession

International law is, in its essence, both a journey through history and a leap towards a vision for the future. Scotland and its quest for independence is Exhibit A.

While it is tempting to discover customary international law that would confirm immutable rules, there is not enough content to that customary law to address the peculiarities of Scotland. So one must proceed very cautiously when speaking of customary international law, particularly when scholars are not uniformly in agreement about it to begin with. In that context, the law of state succession is hardly settled and involves modern evolutionary trends that will be greatly informed by the Scottish
example. Particularly in the realm of treaty law, both bilateral and multilateral, the fate of Scotland's ties to the treaties currently binding the United Kingdom is uncertain but also susceptible to a great deal of pragmatic reformulation in the years ahead.

The two legal procedures of state succession and treaty succession will be perhaps the most complex endeavor of any serious bid for Scottish independence. In my view, the modern application of legal principles in both fields of succession points to the following conclusions: While the remainder of the United Kingdom of 57.4 million citizens would be larger than a Scotland of 5.2 million citizens, the fundamental premise of Scottish independence is to regain the sovereignty of pre-1707. Thus the break-up should be viewed as two successor States of equal legitimacy—not size, wealth, or power, but legitimacy—and in that circumstance both successor States should lay equal claim to the continuation of treaty relations established in the past by the United Kingdom. This means a continuation for both states, and not some static notion of United Kingdom treaty relations unaltered while Scotland has to start fresh, either under a flawed clean slate theory or alone in the world of unilateral declarations. Continuation of two states, separated once again, albeit more than three centuries later, could be the operative presumption; modern international law can absorb, indeed encourage, that concept because it rests upon the rich heritage of the origins of these isles, and that is something that international jurists can comfortably grasp.

Most examples of self-determination and of the law of state succession and treaty law do not exhibit the simplicity of the historical fact of Scottish sovereignty three centuries ago. There were sharp demarcations of sovereignty, albeit ruled under a single crown for many years, between Scotland from the remainder of the United Kingdom
before 1707 and there is no basis in international law to ignore that reality today. We have seen unfold in Scotland since the 1970s a distinctly modern adaptation to that historical reality, one fueled with the economic prospects of North Sea oil and the political forces of devolution. If one were to plot a natural progression from a kingdom of unity, namely the United Kingdom, to the separation of Scotland and rUK into two sovereign nations once again, then a rational pathway through devolution to independence demonstrates a logical trajectory. The 2014 referendum is the next reasonable step. In short, under international law there are no insurmountable obstacles to achieving independence. There is however a political process that must address the presumptive requirements of international law.

Article 34(1) of the 1978 Vienna Convention on Succession of States in Respect of Treaties, which confirms the continuation of treaty obligations by a successor state in a modern context outside of decolonization efforts, falls, in the views of some scholars, short of customary international law. The Convention came into force in 1996, and only 22 nations have joined it, but there remains an oddly static view held by some scholars that what they believe to be customary international law trumps the 1978 Convention, thus sustaining what is now an utterly antiquated allegiance to the clean slate theory, which itself was grounded in the long-passed decolonization era.

Welcome to 2013, for it is finally time to challenge that presumption. Modernity and surely the will of the international community suggest that Scotland embrace the continuation of treaty obligations but within a pragmatic political framework, carefully considered and deftly negotiated, of what should and should not be continued in force for an independent Scotland. London and foreign governments will have key roles to play in
politically endorsing or acquiescing in Scotland's continuation of a large number of British treaty obligations, but that should be a natural feature of negotiated strategies with London and governments and international organizations in the future. Scottish officials would be mistaken, however, to believe that they would negotiate from weakness. They would negotiate within the realm of modern international law, even if they may have to be pioneers in its implementation.

Bear in mind that customary international law, particularly as it is interpreted by scholars schooled in the decolonization era, really has very little to do with Scotland's sui generis and thoroughly modern situation. Every aspect of Scottish independence will be largely sui generis and the legal formulas applied to it will evolve accordingly. The Scottish situation does invite a simpler formula, though. Each of the two states, Scotland and the remainder of the United Kingdom, would declare what they intend to continue to enforce and which treaties they would withdraw from where withdrawal is permitted. Scotland probably more than the United Kingdom will have to take its chances with other nations and whether or not they accept the new treaty arrangements (bilateral or multilateral). This is where advance diplomacy, seeking essentially acquiescence, will need to be employed. If London rejects this notion, and insists on viewing Scotland as a successor state alone while rUK remains the predecessor and continuing or "continuator" state, that posture may prove needlessly disruptive of a transition to Scottish independence. But if that is the rUK position, then Scotland could issue a unilateral declaration of interpretation of its treaty relations and wait for any objections from other governments. I doubt, provided the diplomatic work is carefully undertaken in advance, that such objections would be delivered.
From this exercise a new precedent for international law may emerge: Where a state resurrects its former nationhood and sovereignty through peaceful referendum in accordance with democratic principles, the restored nation may sustain existing treaty relations where practical and provided there are no explicit objections from relevant state parties that cannot be overcome.

Scottish independence would not be an exercise in "clean slate" independence, as enabled under international law for the era of decolonization. There will be British treaties that Scotland may not wish to continue to adhere to as an independent nation, but that decision should not be based upon a broad "clean slate" theory of treaty law on the heels of state succession. Rather, there should be a thoughtfully negotiated parsing of treaties to determine which should continue in force for Scotland and which ones should be abandoned.

The conventional "clean slate" approach ignores the deeply intertwined and complex character of treaty commitments by the United Kingdom and its sub-state entity, Scotland, and the needs of independence. In short, this is not an exercise of rUK continuing as the sole treaty party, for either bilateral or multilateral treaties, and Scotland somehow being cast adrift into a vacuum shorn of all treaty relations. In fact, Scotland would abdicate its responsibility as a member of the international community if it were to walk away from the obligations of, to mention only a few categories, international human rights, territorial, law of the sea, and trade treaties, and thus into some duty-free zone of blissful but reckless independence. Legal obligations will flow to an independent Scotland because of its long engagement with United Kingdom treaties and its status as a co-equal successor state. In my
view, this is what recognition principles will require of Scotland as a responsible member of the international community committed to the rule of law.

Perhaps the ideal formula for succession would be for the British and Scottish Governments to issue a "declaration of continuity" or "notification of succession" to the depositary of each treaty declaring that Scotland and the rUK will continue to perform designated treaty obligations, followed by the comprehensive consent of the British and Scottish Parliaments to such declarations or notifications, thus establishing a highly credible political decision that will influence the determination of what international law requires under the circumstances. Another path would be a unilateral declaration by the Scottish Parliament declaring continued adherence to those treaties that the Scottish Government desires to continue.

IV. European Union

I am deeply respectful of the European Union and the European Commission, including its president, and know how important is the future relationship between a possibly independent Scotland and the European Union. The fate of Scotland within the European Union, however, is not going to be determined with a one-page pronouncement by the President of the European Commission on a cold December morning in Brussels. President José Manuel Barroso basically delivered the mirror image of the late President Gerald Ford's so-called "Drop Dead" message to New York City during its financial crisis in 1975. President Barroso claimed that Scotland would have to go cold turkey and apply for European Union membership, as if it were a newly-introduced State to the halls of Brussels following independence.
Let's step back for a moment and examine his December 10th letter. President Barroso wrote, “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 face of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.” There is nothing previously written anywhere in EU treaties or jurisprudence that I am aware of that actually stipulates this point of view.

I could just as easily write the following, which is a viable option under the law but would be almost contrary in argument and outcome to Barroso’s statement: “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 that wished to continue the membership of its territory and citizens, who are EU citizens, in the European Union and continue its participation in the Treaties, talks with appropriate authorities would be arranged to confirm the modalities for achieving that objective. In other words, such a new independent state would, by virtue of its membership in the European Union as part of the predecessor member state, be entitled to continued membership and continued application of the Treaties on its territory.” There is an alternative framing with the same outcome, particularly if one accepts the prospect of two co-equal successor states arising in the aftermath of a vote for Scottish independence. The second sentence might read: “In other words, such a new independent state would, by virtue of sharing successor status with the predecessor state, retain its membership in the European Union and remain party to the Treaties following talks with appropriate authorities to confirm the modalities for the transition to two member states where formerly there was one member state.”
Writing these words, either on my laptop or from within the Brussels bureaucracy, is not such a big leap because there is no clear guidance in European Union law. Brussels' real objective should be to face this challenge without being intimidated by the prospect of an independent Scotland and without a strategy that clearly would alienate the Scottish Government and people from the European Union itself and the European Commission bureaucracy.

I certainly acknowledge that there are requirements for state accessions under the EU treaty that some might claim constitute *lex specialis* to any claimed relevant international rules and standards. According to Article 49 of the Treaty on the European Union, the Council of Ministers decides unanimously whether to accept a new applicant state after consulting the Commission and receiving the consent of the European Parliament. The European Council may set the “conditions of eligibility” according to the treaty. The Council of Ministers and the European Council usually act, as noted, on the basis of a Commission opinion that assesses the eligibility of a candidate state for membership. Thus, President Barroso may have framed his, and his advisers’ thinking in accordance with the usual accession procedure that guided the admission of Eastern European states into the European Union. But that overlooks the reality that the Scottish issue is not a clear-cut accession situation, but rather a matter of *succession*. Of course, if the Scottish Government advocates a succession strategy with the European Union, then Holyrood essentially has chosen to retain membership in the European Union as a successor State, so that would be an important initial position to hold firm on.

The economic nature of the European Community and now Union tends to be over-accounted for at times, while the traditional or historical premise of the European
Community is sometimes forgotten or at least neglected. The focus on economic issues within the European Union and how they influence membership should not eclipse the fundamental issues that created the European Community in the first place after World War II, namely the search for peace and stability in Europe and the protection of democratic values, of which Scottish self-determination has been expressing itself for decades through the devolution process and more recently the work of the Scottish Executive and Scottish Parliament. That too is part of the European Union story, as reflected in part by the fact that the European Union received the Nobel Peace Prize last year, and that was not for strictly economic achievements.

The best outcome for Scotland, assuming it wants to confirm EU membership following a vote for independence, surely will be one that has been arrived at through cooperative negotiations with London and Brussels and not through issuance of legally-framed diktats to the endless frustration and probable detriment of Scottish citizens and EU citizens resident in Scotland.

Assuming that an independent Scotland wishes to remain within the European Union, two factors should strengthen the assumption of continued EU citizenship considerably. First, the fact that two successor states emerge from this process, rather than a predecessor state of the remainder of the United Kingdom and the successor state of Scotland, should enhance Scotland’s future with the European Union unless Brussels requires both States, rUK and Scotland, to start from scratch with EU membership, and that is not going to happen. Scotland should be a successor state on co-equal terms, at least technically, with rUK. Thus, Brussels would be under considerable political
pressure to negotiate a smooth transition of \textit{sustained} membership for both successor states and obviously continuation of EU citizenship throughout the isles.

Let me focus on EU citizenship for a moment: Unless European Union and EU member state leaders are determined to alienate and punish Scotland and its people for seeking independence, and indeed achieving it, what political advantage is to be gained by extinguishing EU citizenship if the aim is to maintain or entice Scotland's EU membership? The rights of EU citizenship should follow the successor state, particularly if two successor states emerge from the break-up of the United Kingdom.

The Scottish are EU citizens with individual rights under Scottish law and EU law, rights obviously relevant for an independent Scotland. If an independent Scotland were not to achieve membership in the European Union, would those rights be automatically extinguished, or is there a residual body of rights with the European Union that individual Scots would be entitled to enjoy and enforce for at least some period of time? And if there are residual rights, then will not an independent Scotland be tied to the European Union in a \textit{sui generis} way? The easy answer would be that those rights flow with the State of Scotland itself, and if Scotland is excluded from the EU, then so too are the Scottish people and anyone resident on Scottish soil claiming EU citizenship. But I believe there is more to this issue than some observers have recognized and what Brussels probably wishes to focus on, for we are all on uncharted territory here.

I would suggest that, given such an unprecedented event not contemplated by any EU treaty, one should be extremely cautious to dictate any sudden loss of EU citizenship and the rights associated therewith. Indeed, if an aggrieved party were to bring this issue...
before the European Court of Justice, it would not be surprising if judges, on equitable grounds alone, would find that EU citizens in Scotland are entitled, at a minimum, to a reasonable transition period during which their rights as voters and to seek redress before the European Court of Justice are protected and enforced before whatever successor regime is established, including a Scotland that completely separates from the European Union in all respects.

V. International Organizations

One of the great unknowns is how the major international organizations, among which the United Kingdom is typically a major member state, will accommodate sustained membership for an independent Scotland. There are commonly no codified rules in the charters of international organizations envisaging this procedure whereby an existing member state of the organization either separates into two free-standing new states or a part of a member state breaks off to claim independent sovereignty as a successor state while the predecessor state remains party to the international organization under its original national identity with continuing rights and obligations. In the latter example, the successor state presumably must apply *de novo* for membership in the international organization while the predecessor state enjoys sustained membership.

Here we might look for guidance, or at least clarity, to our colleagues in the academy. C.F. Amerasinghe writes, "A more difficult question arises when states break up, as when in 1947 India was divided [to] form Pakistan and India, when in 1991 the Soviet Union disintegrated, when in 1992 the Czechoslovak Republic was dissolved or when in 1992 Yugoslavia broke up. While each case has been treated on its merits and each institution must technically decide the issues itself to the
extent that the solutions are not dependent on solutions in other organizations, the basic principle applied has been that, if a continuator state to the previous member can be identified, then that state continues the membership of the previous member. The identification of a continuator could depend on the agreement or vote of the other members of the organization....It would seem that, while these questions [of continuation] may usually be decided by agreement among the involved states themselves, ultimately there are no obvious principles upon which the issues have been decided. There has always been some element of pragmatism in the solution reached.” (Principles of the Institutional Law of International Organizations, 111-112)

Jan Klabbers counsels that, “[T]he rules of each international organization will prevail. The problem, however, is that few organizations have their own rules on the topic, perhaps for two reasons. One is that issues of succession are relatively rare (or, more accurately, were thought to be rare when most constituent documents were drafted) and tend to come in waves. Thus, decolonization took place largely in the early 1960s; the map of Europe was seriously shaken in the early 1990s. Second, it is notoriously difficult to make rules on succession because the modalities of succession may differ greatly from case to case.” (An Introduction to International Institutional Law, 115)

In my view the issue of Scotland’s membership in the United Nations and in other international organizations such as the World Bank, the International Monetary Fund, and the International Labour Organization, need not be a legally-impaired exercise, but each organization and the fate of Scotland’s membership in it will require much advance work
to facilitate. If the groundwork is properly laid, and there is clearly time to do that, Scotland’s membership in the United Nations, for example, should not be that difficult to accomplish. The formula for U.N. membership will be almost entirely a political one and in the end the exercise will stand as yet one more example of uniquely crafted membership exercises dictated by the circumstances, big power interests, and the good will cultivated by Scottish diplomats between now and that important day when the Scottish flag flies among nearly 200 others at Turtle Bay.

One critical challenge, as well as one of Scotland’s greatest leverage points on London, is the United Kingdom’s status as a permanent member of the U.N. Security Council and how that singular seat of power could be affected by Scottish independence. The example always raised, of course, is the break up of the Soviet Union and the survival of Russia not only as the predecessor state that consumed the former USSR membership at the United Nations, but also as the state, among all that broke out of the Soviet orbit, that continued with the full power of the former Soviet permanent seat on the U.N. Security Council.

Regardless of the outcome of the independence referendum, the United Kingdom will want to retain its full power and authority as a permanent member of the U.N. Security Council, either as the reaffirmed United Kingdom following a “no” vote in the referendum or as rUK following Scotland’s independence. But the latter will not come without a price. No one should assume that certain European Union members (consider Germany, Italy, Spain) or major nations long seeking a permanent seat on the Council (consider Japan, Brazil, India, Nigeria, South Africa) will easily accept a continuation of a British permanent seat when an important part of the United Kingdom casts off into
independence. I doubt this will be a simple re-play of Russia’s charmed continuation of the Soviet seat on the Security Council more than 20 years ago.

The negotiated acquiescence of an independent Scotland in the rUK retention of the permanent seat in the Security Council is no small matter. London will look to Holyrood following a “yes” vote for the referendum to engage in active diplomacy with major governments to support the continuation of the United Kingdom permanent seat, controlled by London. That will be a key opportunity actually to retain Scottish influence in the Security Council, but the strategy for using reasonable leverage on London must be carefully plotted. The long-term gain for Scotland’s role in world politics could be substantial.

So, rather than simply sacrifice its current participation in a permanent seat on the Security Council, an imminently independent Scotland could negotiate a continuing de facto role in Security Council deliberations through the United Kingdom permanent seat. Holyrood could condition its acquiescence to a continuation of London’s control over the permanent Security Council seat with the requirement, first, that the Scottish permanent representative to the United Nations would have a permanent chair among the British seats behind the British permanent representative in the U.N. Security Council chamber. Second, the Scottish permanent representative would have the right to address the Security Council following full consultation with the British permanent representative and with credentials facilitated by the British Government, and only for the purpose of amplifying and supporting the British position. If the Scottish Government disputes a British position being advocated before the Security Council, such as might have the been the case in 2003 when the Blair Government pushed and voted for military intervention
into Iraq alongside the American forces, the Scottish permanent representative would vacate his or her seat in the Security Council chamber during consideration of the relevant matter. That would send a visual signal of disagreement but not entitle the Scottish ambassador to openly disagree in the chamber with the rUK ambassador.

There is another feature of international organizations that should be advantageous for both Scotland and rUK if independence is achieved. There can be effectively two seats occupied where only one seat can now be occupied by the United Kingdom in many institutions. At the International Court of Justice, instead of there being only a British judge, there could be some day both British and Scottish judges sitting. At the International Criminal Court, there could be both British and Scottish judges sitting, assuming Scotland assumes state party status under the Rome Statute of the International Criminal Court. At other tribunals and commissions, where typically politics or constitutional documents stipulate only one slot for the United Kingdom, there could emerge two positions filled by citizens of the isles reflecting the intellectual strength and values of both nations.

Even in the Security Council, Scotland could be elected occasionally in the future to a non-permanent seat on the Council. Of course, during any such period my formula for the Scottish seat behind the British seat probably should be modified to exclude that seat during the non-permanent membership of Scotland. A dicey formula to negotiate, no doubt, but do not underestimate how much leverage Scotland has with respect to the future membership of rUK as a permanent member.
VI. NATO

Scotland's possible participation as a NATO member state following independence should be sustainable if that is the continued will of the SNP and the Scottish people, but it also should be seen as a point of considerable leverage that should be utilized to sustain that treaty relationship. The fate of the British nuclear submarine fleet docked at Faslane, of course, hangs in the balance and could be a bridge of cooperation or great tension with London and NATO headquarters during the transition to independence.

A negotiated continued membership in NATO, as a collective security alliance, would enable Scotland to influence the decisions reached among NATO member states to strengthen military capabilities on the European continent and to project NATO outside of NATO territory, particularly when such operations are performed under U.N. Security Council authorization. One can be confident there will be many such challenges in the years ahead. If Scotland wants to be part of that collective security system, then the obligations of membership will be considerable and so will be the projection of Scotland into NATO objectives bearing on defense of borders, anti-terrorism, humanitarian relief operations, and the ending of atrocity crimes against civilian populations.

There is no legal impediment to a NATO role for Scotland, but membership should be tactfully negotiated as Edinburgh has considerable leverage if it wants to pay the cost in defense budget investments and the risks of warfare. NATO member state leaders presumably would want to encourage Scotland's full-scale participation in NATO, so I would envisage a very lively and rich discussion of what constitutes Scottish membership in NATO.
VII. Law of the Sea

Finally, nothing in the law of the sea requires that the median line be the only method of demarcation of the North Sea between Scottish and rUK jurisdictions, an exercise that has an important impact, of course, on jurisdiction over North Sea oil reserves. Other formulations can be considered and probably should be negotiated. I know this is a well-considered subject and I will not pretend to offer advice on it, other than to stress that Scotland is under no obligation to roll over and embrace the median line demarcation in the North Sea. International law, including the Law of the Sea Convention, invites negotiated solutions to territorial sea disputes and the situation in the North Sea may qualify depending on the opening positions of the two governments.

There are risks associated with seeking an alternative to the median line, as London could seek to draw the line even further north based upon historical exploration rights in the North Sea or leverage a line that is more advantageous for Scotland by demanding a sizable slice of North Sea revenue in exchange for a concession on the median line. So Holyrood and London will have to plot their opening positions well, recognizing that there are points of leverage held by each party.

Let me summarize. It is fairly easy to view international law as a historically-driven constraint on innovative political solutions to tough inter-state issues. I prefer to recognize in the principles and treaties of international law opportunities to apply them to modern realities and determine what works and what might have outlived its utility in an increasingly complex and dynamic world. Self-determination has entered a new and very modern phase of implementation, and Scotland is at the forefront of that experience.
Principles of state succession must adjust to the unique historical and contemporary realities of Scotland's quest for independence, which points to succession on co-equal terms with negotiated adjustments in treaty relations and participation in international organizations. What may be expected by other governments to earn rapid diplomatic recognition of Scotland's independence could include a uniquely modern formula of constitutional democracy and will expect adherence to human rights and U.N. Charter norms.

Scotland's membership in the European Union and the rights of Scottish citizens as EU citizens are not divorced from the organizational mandates of the European Union, but those rules should not be manipulated to deny Scotland what is rightfully its to claim in the European Union as a long-standing part of the United Kingdom and future independent member of the European Union. That is a unique status and no arbitrary thinking about international or European Union law and precedents arising from different circumstances eviscerate that reality. The challenge of NATO membership reaches far beyond legal principles to the political will of the Scottish people to assume the responsibilities of collective security in the NATO alliance. Scotland's jurisdiction over North Sea oil reserves need not be determined only by a median line, but drawing another line will be a negotiating challenge that international law actually invites and that politicians must ponder deeply.

These are interesting times, and I wish you the best of luck. Thanks for listening to this very long speech!