

**Jersey & Guernsey Law Review – February 2013****JERSEY AND THE PUBLIC INTERNATIONAL  
LAW DIMENSIONS OF SOVEREIGNTY****Stefano Mariani**

*This article focuses on the public international law dimensions of a sovereign Jersey and considers the extent to which its relationship with the international community—including the UK and the EU—is likely to change as a result. The legal arguments for Jersey’s sovereignty are set out, together with an analysis of the experience of recently decolonised states in managing relations with the metropole and whether treaty-based systems governing post-independence relations provide useful guidance for the relationship between an independent Jersey and the UK. Finally, the question of how independence would affect treaties relating to Jersey is considered, including a discussion of how Jersey could redefine its relationship with the EU. It is concluded that the institutional foundations for Jersey’s sovereignty are already in place and that current practice suggests that there are no public international law obstacles to Jersey acceding to statehood, should its people will it.*

**Introduction**

1 In the wake of the conference hosted by this journal in September 2010 to consider options for the constitutional future of Jersey, and the more recent comments by Sir Philip Bailhache suggesting that Jersey “should be ready for independence”,<sup>1</sup> the debate on the legality and feasibility of sovereignty for Jersey has gathered momentum. Jersey’s lack of formal sovereignty has deprived it of a voice exclusively representing its own interests in international affairs, leaving it to the UK to adopt, especially in the multilateral ambit of the European Union (“EU”) and the Organisation for Economic Co-operation and Development (“OECD”), policy positions at times inconsistent with Jersey’s customary and constitutional autonomy and incompatible with its interests.<sup>2</sup> In this respect, formal sovereignty for Jersey would

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<sup>1</sup> <http://www.bbc.co.uk/news/world-europe-jersey-18608218>

<sup>2</sup> Bailhache, *One or two steps from sovereignty* (2009) 13 J&G Law Rev 252, paras 34–37.

functionally improve its bargaining position with third party states and international institutions, whilst restricting the scope of its diplomatic reliance on the UK.<sup>3</sup> Much has been written on the topic of the implications of Jersey's formal independence, with particular attention devoted to how a sovereign Jersey's constitutional order and relationship with both the UK and the other Channel Islands would require re-evaluation. The question of how Jersey would stand, either alone or in a confederation with Guernsey, Alderney and Sark, in the broader context of the global community and public international law has, however, yet to be discussed in depth. In particular, in plotting a hypothetical path to sovereignty, it is crucial to bear in mind that an independent Jersey would have implications not only for the internal constitutional order of Jersey and the UK as the entities directly concerned, but impact on the broader European and international community. How Jersey will adapt to external, as well as internal, challenges arising from formal sovereignty will characterise its relations with the UK and the European Union and, accordingly, determine the extent to which the objectives of fiscal and regulatory autonomy can be achieved, whilst preserving the most beneficial aspects of its current relationships both with the metropole and international institutions. The focus of this article will therefore be on the public international law dimension of a sovereign Jersey, with a view to identifying the normative basis in international law by which Jersey could seek formal independence and contemporary alternatives to strict, Westphalian<sup>4</sup> sovereignty that would enable the newly independent entity to address potentially costly and untested issues of defence and external relations.<sup>5</sup>

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<sup>3</sup> See Kelleher, *Jersey and the UK: A choice of destiny* (2) (2004) 8 J&G Law Rev 337, for an introductory discussion on this topic.

<sup>4</sup> The definition of "sovereignty" and, by extension, "independence" is, in the field of public international law, subject to much academic debate which is outside the scope of this article. For reasons of convenience, those terms are used herein to denote Jersey formally acceding as a "sovereign state" to the international community, in the sense of having the capacity both in principle and in practice to enter, in its own right, into treaties with third party states and join international organisations requiring sovereignty for membership. This broadly corresponds with the summary treatment of "sovereignty" in Brownlie, *Principles of Public International Law* (1979) OUP, 3rd ed, pp 287–297.

<sup>5</sup> Throughout this article, the nomenclature "Jersey" is used as a label of convenience. However, the analysis contained herein and the conclusions reached on that basis would equally be applicable to an independent Guernsey or a Channel Islands federal or confederal entity.

### The legal basis for Jersey's independence

2 As a matter of international customary and treaty law, there are strong normative grounds for Jersey's capacity to seek independence. These principles can broadly be defined under the umbrella terms of "national self-determination" and "decolonisation" and are most prominently set out in art 73 of the Charter of the United Nations ("UN"), which contains the Declaration Regarding Non-Self-Governing Territories. This approach, aimed at acknowledging the substantive right of the peoples of non-self-governing territories ("NSGTs") to choose the manner in which they are governed, thus promoting progress towards self-determination, has subsequently been reflected in landmark statements, notably UN General Assembly resolution 1514 (XV)<sup>6</sup> and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.<sup>7</sup> Whereas the UN's efforts in this regard were centred on dismantling the post-World War II remnants of colonial empires formed by European powers in the 18th and 19th centuries,<sup>8</sup> this does not preclude the application of now-crystallised norms of public international law favouring self-determination for the peoples of NSGTs to the specific case of Jersey. Indeed, Jersey meets all the criteria for classification as a NSGT, notwithstanding that it is not currently included in the UN's official list of such territories.<sup>9</sup> It is a settled point that Jersey has historically been ethnically and linguistically distinct from the UK. Taking the long-term view, its native people are largely of Franco-Norman origins, as opposed to Anglo-Saxon descent, and French has been the language of law and government since Jersey began its existence as a distinct dependency of the English crown in the early 13th century. It is only relatively recently that mass immigration has tipped the linguistic balance. Jersey's law, customs and mode of government have received significant English influence, but remain fundamentally rooted in

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<sup>6</sup> 14 December 1960, Declaration on the granting of independence to colonial countries and peoples.

<sup>7</sup> 24 October 1970, adopted by General Assembly resolution 2625 (XXV).

<sup>8</sup> Thornberry, *Self-determination, minorities, human rights: a review of international instruments* 38(4) *International & Comparative Law Quarterly* 873 (1989).

<sup>9</sup> <http://www.un.org/en/decolonization/nonselvgovterritories.shtml>

Norman customary law.<sup>10</sup> Similarly, it would be difficult to argue that the people of Jersey are an extension of the French nation, as Jersey has not been under the continuous control of any authority based in mainland France for eight centuries and is now separate, by language, custom and religion, from contemporary Normandy, not having shared in the historical experiences, such as the French Revolution and the establishment of the Republic, which have come to define important elements of the French national identity. From a comparative historical perspective, it would therefore be uncontroversial to consider the inhabitants of Jersey a “people” in the sense of a distinct nation, or incipient nation. In this sense, Jersey is no more “English”, than San Marino is “Italian” or Monaco is “French”.

3 A cursory glance at the lengthy history of legal tensions and constitutional negotiation between the Bailiwick and centripetal pressure from the English, and subsequently British, state<sup>11</sup> evidences a sustained, longstanding pattern of self-identification with Jersey’s distinct cultural and legal structures and thus a widespread sentiment of separateness from the metropole. The relationship between the people of Jersey and the UK has accordingly been determined, over time, by a consensus based on customary practices, reflecting a constitutional balance of power and summarised, however, imperfectly, in the Kilbrandon Report.<sup>12</sup> In light of the normative repudiation of the principle of colonialism, conceived as the forcible extension of a state’s power over other territories or peoples by virtue of superior economic or military power, Jersey’s current status as Crown Dependency should be understood as a consensual arrangement. Those dependencies of the UK which are on the UN’s list of NSGT, such as the British Virgin Islands and the Cayman Islands, remain, as noted by Le Rendu, non-self-governing largely by virtue of the fact that there is no great popular sentiment in favour of independence.<sup>13</sup> However, if public opinion in Jersey were to turn in favour of formal sovereignty, the UK government might encounter significant diplomatic and legal difficulties in resisting this pressure. To the extent that dependence from London is unwelcome in Jersey,

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<sup>10</sup> Emblematically, in *Kwanza v Sogeo* (1981 JJ 59) the Royal Court of Jersey held the French jurist Robert Pothier to be a “surer guide to the discovery of the Law of Jersey than is the Law of England” (at 76).

<sup>11</sup> For a summary account in the context of Jersey’s historic autonomy, see, for example, Le Rendu, *Jersey: Independent Dependency?* (2004) Cromwell Press, pp 28–52.

<sup>12</sup> Report of the Royal Commission on the Constitution 1969–73, Part XI of Vol I, London, HMSO, 1973.

<sup>13</sup> *Ibid*, p 93.

the non-consensual character of the denial of Jersey's sovereignty would constitute precisely the "alien subjugation, domination and exploitation" that the UN has defined as "colonialism",<sup>14</sup> which is, in turn, now proscribed by international customary law, as interpreted by the UN. Crucially, the inhabitants of Jersey are not a minority group within the UK, whose grievances could be addressed by greater political integration. Rather, Jersey is a separate territory and jurisdiction, lacking formal sovereignty, which, whilst enjoying considerable internal autonomy, does not send elected officials to Westminster and therefore has limited legislative influence in foreign policy and, by extension, international commercial policy.

4 Indeed, it is not difficult to envisage UK policy on fiscal and commercial matters which affect Jersey being drafted and enacted at the instance of partisan political groups which are, in some cases, actively hostile to Jersey's interests. In the absence of internationally recognised sovereignty, there would be little which the government of Jersey could do in this scenario to prevent the erosion of its position, not least because any constitutional safeguards, whether customary or written, could, as a matter of internal policy, be overridden or modified by UK domestic law. Negotiations undertaken by the UK on behalf of Jersey, albeit in consultation with the government of Jersey, with the EU and the OECD in relation to information exchange and transparency in fiscal matters have produced sub-optimal outcomes for Jersey in part as a result of Jersey's lack of formal sovereignty, and thus its inability to negotiate bilaterally with either organisation as from the position of a third party state.<sup>15</sup> The question of whether Jersey can represent its interests in the international arena as an equal partner of third party states and international organisations in the absence of the UK's assent is fundamentally a question of sovereignty. Jersey currently does possess a limited international personality, but it is evidently not a "state" as a matter of public international law and its diplomatic space is limited by this fact.<sup>16</sup> Conversely, once recognised, the sovereignty of an independent state is inviolable, to the extent that external intervention in the domestic affairs of a sovereign state is *prima facie* in contravention of international law.<sup>17</sup>

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<sup>14</sup> UN General Assembly resolution 1514 (XV) 14 December 1960, operative para 1.

<sup>15</sup> Bailhache, *op cit*, pp 1–2 and 7–9.

<sup>16</sup> Plender QC, *The Channel Islands' Position in International Law* 3 JL Rev 136, pp 137–138 (1999).

<sup>17</sup> See, for example, art 2 of the UN Charter.

5 Though not officially recognised as a NSGT by the UN's Special Committee on Decolonization, Jersey is, by any historical, sociological and institutional measure, a paradigmatic case of a dependent territory within the meaning of art 73 of the UN Charter. That UK sovereignty has thus far generally been benign and built on bilateral constitutional compromise does not undermine the validity of a latent claim Jersey would have, as a NSGT, to independence from the UK. Jersey has been a Crown Dependency for longer than the historical existence of any NSGT inscribed into the UN list. In international law, the question of whether the people of Jersey are content to acquiesce in the *status quo* or seek independence is a matter for them, rather than the UK to decide.

6 This approach, favouring a voluntary basis for the continuation of dependency status, has implicitly been accepted by Westminster in relation to two referendums<sup>18</sup> called by the government of Gibraltar, which put to its inhabitants the question of that overseas dependency's constitutional status.<sup>19</sup> The key difference when compared with the prospect of a move in Jersey towards independence is that the Gibraltar government was, with reference to each referendum, essentially assured of a favourable outcome in that they were seeking to maintain a dependent relationship with the UK. However, even overwhelming popular support in Jersey for independence could run into institutional resistance in the UK. It is likewise probable that third party states would, in the interests of maintaining good diplomatic relations with London, be slow to recognise Jersey's independence until the UK itself gave official recognition.<sup>20</sup> An inflexible stance in the face of calls for independence would nevertheless be difficult for any UK government to maintain, especially in light of the UK's sustained political and diplomatic support for movements of national self-determination elsewhere in the world.<sup>21</sup> For the same reason, the

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<sup>18</sup> In 1967 and 2002. It should be noted that the 1967 referendum was the culmination of a series of bilateral negotiations between Spain and the UK, which began in response to UN General Assembly resolution 2070 (XX), 16 December 1965, inviting both states to begin talks over the future status of Gibraltar.

<sup>19</sup> The 1967 referendum offered the option of reunification with Spain or continuing status as a British overseas dependency, whereas the 2002 referendum offered the option of joint sovereignty between Spain and the UK.

<sup>20</sup> Bailhache (ed.), *Dependency or sovereignty? Time to take stock* (2012) Jersey and Guernsey Law Review, p 40.

<sup>21</sup> Notably, the UK recognised Kosovo on 18 February 2008, following the unilateral declaration of independence of the government in Pristina.

annexation of Jersey to the UK as a new county or constituent country is unlikely to be a viable option in the absence of the express consent of the people of Jersey.<sup>22</sup>

### **Managing separation from the UK**

7 In abstract, Jersey comfortably meets the four criteria for sovereign statehood as set out in art 1 of the Montevideo Convention:<sup>23</sup> it has a permanent population, a defined territory, a government, and the (albeit latent) capacity to enter into relations with other states. More so than most recently independent states, Jersey would be able to draw upon a long and distinguished history of effective and representative self-government and relatively mature and sophisticated regulatory and judicial institutions. The sovereignty of economically fragile states in the Caribbean and the Pacific that are smaller than Jersey both in terms of land area and population is not in dispute. It is safe to assume that to the extent that a “critical mass” is required for statehood, Jersey, whether alone or together with the other Channel Islands, comfortably meets this threshold.<sup>24</sup> In practice, though, when it comes to the costs arising by virtue of assuming the trappings of sovereignty, such as an independent foreign and defence policy, size certainly does matter. The projected financial outlays for the institution of a foreign service and a modest defence force may even threaten Jersey’s existence as a low-tax jurisdiction by significantly increasing government budget requirements.

8 In addressing the issue of the costs of independence, the question of defence can be solved relatively easily. Notwithstanding a history occasionally punctuated by invasion from overseas,<sup>25</sup> Jersey currently faces no material risk of foreign aggression and is highly unlikely to do so in any foreseeable timeframe. It could therefore dispense with armed forces entirely, relying instead on its current police force for the maintenance of internal order. This is by no means unusual. Costa Rica, for example, is constitutionally barred from having a standing

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<sup>22</sup> By way of comparison, Portugal proclaimed the colony of Cape Verde an overseas province in 1951, constitutionally incorporating it into Portugal proper, in an attempt to defuse nationalist agitation; however, Cape Verde was only considered fully decolonised by the UN when it officially became independent in 1975.

<sup>23</sup> Convention on rights and duties of states, signed at Montevideo on 26 December 1933.

<sup>24</sup> Kelleher, *op cit*, paras 3–4.

<sup>25</sup> Second Interim Report of the Constitution Review Group, 27 June 2008, para 10.

army, instead relying on the regional hegemony of the United States and the force of customary international law in Latin America as the guarantors of its independence. Jersey benefits from one of the safest possible geographic locations for a newly independent state and the prospect that the UK and France, as permanent members of the UN Security Council with a vested interest in the preservation of the existing international legal order, would fail to act as guarantors, whether formally or informally, of Jersey's security thus verges on the fanciful.<sup>26</sup> Accordingly, the most effective solution to the national self-defence question is likely to be a bilateral agreement making the UK responsible for Jersey's external security in a manner essentially analogous to arrangements currently in place between France and the Principality of Monaco, and Italy and San Marino.<sup>27</sup>

9 From the perspective of treaty law, Jersey's interests may be better served by relying on bilateral security guarantees, rather than joining a multilateral military alliance such as NATO. In particular, art 5 of the North Atlantic Treaty (1949) compels each member of the Alliance to treat an attack on the territory of any other member of the Alliance as an attack against itself. This automatic collective defence mechanism could draw Jersey into confrontations over geo-strategic issues which do not, fundamentally, concern it and which might, in fact, be detrimental to its financial interests. A position of official neutrality, perhaps guaranteed by treaty with the UK, may better suit Jersey's diplomatic priorities and mirror the generally successful efforts of other major financial centres such as Switzerland and Liechtenstein.

10 The question of how an independent Jersey would conduct its foreign policy is more complicated. Perhaps the greatest benefit Jersey would stand to gain from transitioning to sovereign status is the capacity to conduct its own, independent foreign policy in a manner which fully reflects the Island's best interests. It would, accordingly, appear counter-intuitive to settle for anything less than a fully-formed, professional body of foreign relations specialists, which would, however, likely incur significant new costs on the Bailiwick's budget. Part of the solution to this problem lies in the fact that Jersey already has considerable expertise in conducting international negotiations on specific matters. For example, the UK entrusted Jersey to represent itself in the context of the OECD Harmful Tax Practices initiative.<sup>28</sup> As a major international financial centre, Jersey could draw from a considerably wider talent pool of legal and financial experts than could

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<sup>26</sup> *Ibid*, para 28.

<sup>27</sup> *Ibid*, at paras 15–16.

<sup>28</sup> *Ibid*.



other states of comparable size. In light of the close institutional links between the government of Jersey and the principal Jersey-based financial institutions and law firms, an arrangement whereby employees of affiliated private sector organisations would serve Jersey's interests abroad on a secondment basis could be instituted, thereby limiting costs by ensuring that the bulk of foreign service personnel are recruited for *ad hoc* rather than permanent assignments. This approach to staffing a foreign service may be unorthodox but, bearing in mind that a sovereign Jersey's diplomatic priorities are likely to be highly specialist and focused in the financial and regulatory sectors, rather than more broadly tied to the traditional fields of "high" diplomacy, it would appear to be resource efficient to call upon individuals who already have such expertise by virtue of their experience in the private sector.

11 The need for permanent diplomatic missions would in any event be relatively modest:<sup>29</sup> at a minimum, an Embassy or High Commission (assuming, as Kelleher does, that Jersey would as a matter of course join the Commonwealth)<sup>30</sup> in London, Brussels (to take charge of institutional relations with the EU), and New York (on the strong assumption that an independent Jersey would seek to join the UN). As noted further below, the closer the diplomatic relationship of Jersey with the UK after independence, the likelier it is that the costs of diplomatic functions which could be managed more effectively by UK missions overseas being inefficiently duplicated by an under-resourced Jersey foreign office would be avoided.<sup>31</sup>

12 There is nonetheless a balance to be struck between the need for an independent Jersey to articulate its own foreign policy and the potential benefits of remaining associated with the extensive expertise and global coverage of the UK Foreign and Commonwealth Office ("FCO"). If Jersey were to become independent, it would from time to time need to address foreign policy matters, such as consular relations or transnational security, with which its government has no substantial prior expertise and which it would not, in any event, have the resources to manage effectively. In this regard, the assistance and, possibly, tutelage of the UK's foreign policy establishment may play

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<sup>29</sup> Second Interim Report of the Constitutional Review Group, 27 June 2008, para 47.

<sup>30</sup> Kelleher, *op cit*, paras 5–6.

<sup>31</sup> The Second Interim Report of the Constitution Review Group, 27 June 2008, estimates, at Appendix 2, a cost of approximately £10 million for international relations alone, including membership of crucial international organisations.

an important role in defending Jersey's interests. A constitutional and diplomatic model of "free association" could therefore be considered as an alternative to full sovereignty in the classic, Westphalian sense. Arrangements of this nature are currently in place between the United States and the Federated States of Micronesia,<sup>32</sup> the Marshall Islands,<sup>33</sup> and Palau<sup>34</sup> and between New Zealand and the Cook Islands<sup>35</sup> and Niue.<sup>36</sup> Free association may be established by treaty or quasi-treaty, termed Compacts of Free Association by the United States and its associated states, or separately constituted and referenced in the domestic legislation of the states concerned, as is the case between New Zealand and its associates. Although the exact terms of each relationship may vary, a state in free association with its former administrator will generally proclaim itself, and be recognised as, a fully sovereign state, but delegate certain functions relating to defence and foreign relations to its patron. With reference to the United States' Compact of Free Association with the Marshall Islands, for example, the United States assumes full authority and responsibility for the defence of the islands,<sup>37</sup> but at the same time recognises that the Marshall Islands are to have control over the full spectrum of their foreign affairs,<sup>38</sup> subject to a requirement that the United States government be consulted<sup>39</sup> and with the added proviso that the United States may be called upon to assist or act on behalf of the Marshall Islands in the area of foreign affairs as may be requested and mutually agreed from time to time.<sup>40</sup> Such a consultation and assistance

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<sup>32</sup> Compact of Free Association Amendments Act of 2003. (<http://www.rmiembassyus.org/Compact/Compact%20Public%20Law%2010108-188.pdf>).

<sup>33</sup> *Ibid.*

<sup>34</sup> Compact of Free Association ([http://palau.usembassy.gov/rop\\_cofa.pdf](http://palau.usembassy.gov/rop_cofa.pdf)).

<sup>35</sup> The Cook Islands Constitution Act 1964 (New Zealand).

<sup>36</sup> Niue Constitution Act 1974 (New Zealand).

<sup>37</sup> Title 3, art I, s 311 of the Compact of Free Association between the United States of America and the Federated States of Micronesia and the Marshall Islands.

<sup>38</sup> Title 1, art II, s 121 of the Compact of Free Association between the United States of America and the Federated States of Micronesia and the Marshall Islands.

<sup>39</sup> Title 1, art II, s 123 of the Compact of Free Association between the United States of America and the Federated States of Micronesia and the Marshall Islands.

<sup>40</sup> Title 1, art II, s 124 of the Compact of Free Association between the United States of America and the Federated States of Micronesia and the Marshall Islands.

mechanism enables states in free association to access internationally recognised sovereignty (the Marshall Islands and the Federated States of Micronesia are both members of the United Nations), but, when necessary, also to draw upon the surer guidance of the former metropole in the areas of defence and foreign affairs.

13 Applying a similar system to Jersey, *mutatis mutandis* to take into account the Bailiwick's greater degree of institutional sophistication and historical autonomy, could thus provide concrete solutions to the issues of cost and lack of foreign policy expertise in the transition to independence. It would, likewise, not prevent Jersey from joining international organisations that require sovereignty for participation, or from entering into treaties with other states as an equal counterparty.<sup>41</sup>

14 Ultimately, the choice of Jersey's international status need not be reduced to a dichotomy with continued existence as a Crown Dependency at one pole and full independence at the other. The adoption of formal sovereignty within the ambit of a legally binding and constitutionally enshrined special relationship with the United Kingdom would provide Jersey with most of the advantages of sovereignty and a freer hand in its negotiations with third party states and international organisations, whilst minimising the costs. A compromise of this nature would have the added benefit of being more palatable to the UK than full independence. Whereas, on the one hand, the UK would continue to bear the costs of defending the Island and providing, for example, consular assistance to Jersey citizens abroad, it would retain a degree of international prestige and diplomatic leverage by formally acting as the protecting power. Ideally, a compromise based on free association would be mutually beneficial, serving as a face-saving measure for the UK, which should not, in practice, see its strategic or diplomatic position eroded, and a diplomatic buttress for Jersey, which, whilst gaining formal sovereignty, would preserve its close institutional and cultural links with the metropole.

### Issues of state succession

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<sup>41</sup> By way of comparison, Niue is more closely dependent on New Zealand than either the Marshall Islands or the Federated States of Micronesia are on the United States, but is nevertheless recognised by the United Nations as a "non-member state", which suggests that it is recognised as having full international legal sovereignty and capacity. See <http://www.un.org/Depts/Cartographic/map/profile/world00.pdf>.

15 As the Bailiwick of Jersey is already constituted as a distinct administrative unit, with its own borders which are both internal – that is, the delimitation between the Bailiwick and the United Kingdom proper – and external – the current international frontier between the Island and France – the agreed territorial scope of an independent Jersey should be uncontroversial. The doctrine of *uti possidetis juris* would apply to provide that where a newly independent country becomes sovereign, its borders should, as a general rule, correspond with the frontiers of the pre-independence administrative unit comprised by that country. This approach has applied as a matter of custom in international law since the declaration of independence of Latin American states from Spain in the early 19th century and is recognised as best practice for a state's transition to independence by the International Court of Justice.<sup>42</sup>

16 Similarly, treaties which are localisable and thereby have a defined, territorial scope with an effect on a newly independent Jersey would likewise be inherited from the UK, together with all their attendant duties and obligations,<sup>43</sup> unless each party concerned decides otherwise. As for non-localisable treaties and, in particular, those of a fundamentally political character, international customary law and practice suggests that the *tabula rasa* approach is to be taken. On this basis, an independent Jersey would begin its life as a sovereign state unbound by the UK's current treaty obligations in respect of, for example, the UN, the EU or NATO.<sup>44</sup>

17 The object of this provision of customary international law is to enable the newly independent state to determine its own geo-political alignment: it would thus be for the people of Jersey to define the extent to which they wish to follow the UK's approach to foreign policy. Admission to the UN should be uncontroversial, as the impact of membership would be nominal on the financial services industry which drives Jersey's economy, but renegotiation of the Island's relationship with the EU may present institutional difficulties. Protocol 3 of the UK's Treaty of Accession to the European Community would fall away, thereby affording Jersey the opportunity to redefine on its

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<sup>42</sup> See, for example, *Frontier Dispute – Burkina Faso v Mali* [1986] I.C.J. 554, at para 20.

<sup>43</sup> See, for example, *Frontier Dispute – Libya v Chad* [1994] I.C.J. 6, at para 73.

<sup>44</sup> When Slovenia declared independence from Yugoslavia on 25 June 1991, it had to apply for membership of the UN (being admitted by virtue of UN General Assembly resolution 46/236 (XLVI), 20 July 1992), notwithstanding that Yugoslavia was a member of the United Nations at the time.

own terms its institutional relationship with the EU and ensure that this reflects Jersey's current priorities, especially in the fields of fiscal autonomy and financial regulation.<sup>45</sup> A sudden break from the EU single market or, worse, the imposition of a punitive regulatory regime by the EU on financial services based in Jersey, would have profound economic implications on the Island, potentially driving the costs of independence to unacceptable levels. A good, and uninterrupted, working relationship with the EU would therefore be essential for Jersey's future. The normative infrastructure for a smooth transition from a relationship based on Protocol 3 to one based on a bilateral treaty between Jersey and the EU is, however, already in place. Jersey's economy is closely integrated with the UK's and, by extension, with the EU common market, and the Island has, since 1973, adopted a large portion of the EU's *acquis communautaire*.<sup>46</sup> The principal source of uncertainty in Jersey–EU negotiations would, however, likely be the political willingness of EU member states to enter into agreements extending commercial or financial benefits to Jersey without first securing concessions from the Island in the area of fiscal information-sharing. The current membership and political climate of the EU are after all quite different when compared with 1973. It is in this context that Jersey would especially stand to benefit from the UK's goodwill.

18 As noted above, if Jersey were to structure its transition to sovereignty by way of free association with the metropole on mutually attractive terms, it should have the option to draw upon considerable FCO expertise in negotiating with Brussels. More to the point, it is likely to be in the UK's best interests to ensure that a new set of treaties regulating Jersey's relationship with the EU are successful in preserving the Island's status as a major offshore financial centre, especially in light of the City of London's extensive investment interests<sup>47</sup> in the Channel Islands. A modest diplomatic weight has not, however, prevented states such as San Marino from negotiating a treaty-based relationship with the EU, providing, for example, the benefits of the common market, whilst stopping short of full membership.<sup>48</sup> Further, Jersey's history of juridical and internal autonomy suggests that the practical difficulties normally encountered by newly independent states attaining independence from centralised regimes would be kept to a minimum. For example, there would be no

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<sup>45</sup> Kelleher, *op cit*, paras 10–12.

<sup>46</sup> Le Rendu, *op cit*, pp 118–199.

<sup>47</sup> Le Rendu, *op cit*, pp 88–89.

<sup>48</sup> Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino (2002) L 84/43.

need to distribute the national debt, state archives or other forms of state property and obligations between the UK and Jersey. Similarly, the question of the citizenship of the people of Jersey could be addressed by official recognition of the *status quo*. Channel Islanders are currently British citizens and this relationship may be maintained by mutual agreement, in recognition of the indissoluble social links between Jersey and the metropole. An accommodation on this basis is currently in place between New Zealand and the associated state of Niue,<sup>49</sup> and would moreover fully resolve the issue of securing consular protection for inhabitants of Jersey abroad. This would not, however, necessarily preclude the introduction of a separate Jersey citizenship, which could, for example, be a precondition for voting in national elections in the Island.

### Conclusions

19 The most important questions in the debate on Jersey's constitutional future are essentially questions of fact, which turn on the political willingness of the people of Jersey radically to change the Island's relationship with the UK and, likewise, on the political willingness in Westminster to provide Jersey with an adequate diplomatic and constitutional space in which it can best represent its interests. These questions have yet to be answered and would, in any event, be beyond the scope of this discussion. Rather, those responsible for posing and answering the question of whether Jersey's future lies with the acquisition of formal sovereignty should consider that the normative and legal bases for Jersey's independence are fully in place. Sovereignty could be achieved with relatively little difficulty on the basis of public international customary and treaty law, as currently practised and interpreted both by the UK and by the UN. Jersey's legal *claim* to sovereignty is as strong as that of any newly independent state in the post-1945 period.

20 Sovereignty does not, however, necessarily mean "going it alone". Free association offers an attractive model for Jersey and would enable it to represent its interests in certain domains of international relations, whilst relying on the UK in others where the cost of discharging its sovereign duties autonomously would far exceed any gains arising from independence. Symbolically, free association would also affirm the profound historical ties between Jersey and the UK, which would, unambiguously, be the senior partner in the relationship, thereby limiting the risk of bilateral tension in a process which, if not handled sensitively, could be perceived in Westminster as an affront to national

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<sup>49</sup> Section 5 of the Niue Constitution Act 1974 (New Zealand).

dignity. Finally, whether sovereignty can be followed by “business as usual” for Jersey will depend on its ability successfully to re-negotiate its relationship with the EU upon Protocol 3 becoming a dead letter. Again, UK support would be both welcome and desirable in this process, though the terms and character of this assistance would ultimately be a matter for negotiation. Where public international law is of assistance is in providing near certainty that a sovereign Jersey would be able to preserve its distinct geographic and institutional character with no material discontinuity.

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