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## 13 Dissolution and succession: The transmigration of the soul of international organizations

*Ramses A. Wessel*

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### SOUL SEARCHING

Perhaps the ultimate question to judge the autonomous existence of international organizations is whether member states can simply dissolve an international organization – or replace it by another one – once its services are no longer considered necessary. From the perspective of states creating international organizations to perform certain functions they cannot or do not wish to perform themselves, one would argue that organizations are primarily tools in the hands of their member states; and, once no longer needed or appropriate, tools obviously lose their relevance. In fact, it is this approach that would seem to have been dominant during most of the life and times of international organizations (Klabbers, Chapter 1 of this book, and 2005a: 151–181). After all, since the attribution of powers principle remains at the heart of our understanding of international organizations, the latter must wait for whatever table scraps national governments decide to leave them, if they do at all.

It would be too easy to contend that the alternative, constitutional, perspective would focus more on – what Germans would refer to as – the ‘Eigendynamik’ of international organizations and, hence, would draw our attention to their autonomy (Collins and White, 2011). In fact, as shown in the first chapter of this book, constitutionalism, albeit from a normative rather than a pragmatic angle, also purports to control the activities of international organizations. One could argue that, while functionalism keeps international organizations in the hands of their member states, constitutionalism places them under the control of values. On the other hand, one could equally contend that the ‘functional necessity’ approach provides more autonomy to international organizations since it allows for the organization to act once this is necessary to attain its objectives. And, to make things even more complicated, it would probably be acceptable to argue that ‘constitutionalism’ endows international organizations with more competences than they would have on the basis of attributed, or even implied, powers. The constitutional development of an international organization may be an ‘autonomous’ process and there

may very well be a ‘constitutional necessity’ for the creation of new (or the acceptance of ‘inherent’) competences.

Indeed, everything depends on definitions. It is often claimed that constitutional principles should be able to restrict existing or define new competences of international organizations. While the trend to approach international organizations from a constitutional perspective started in relation to the European Union (EU) (Frankenberg, 2000: 257–276; Schwartze, 2001; von Bogdandy and Bast, 2006; Weiler, 1999), other international organizations have become subject to academic constitutional scrutiny as well.<sup>1</sup> Important parts of the changing nature of the international legal order are studied in what is frequently referred to as ‘international constitutional law’.<sup>2</sup> Apart from drawing inspiration from international legal standards, constitutionalism may also focus on the competences and restraints offered by the constitutive document that forms the legal basis of the organization. In that sense the concept relates to the existence of a separate legal order that was created and takes the norms and principles within that order as a starting point. The discussion on a ‘European constitution’ or on the ‘constitution of the WTO’ form examples of this approach, in which both institutional and substantive rules of the organization are viewed and presented in (‘state-like’) constitutional terms. From this perspective if anything is a ‘constitutional question’, it would be the creation and the dissolution of an organization.

Irrespective of the ‘existential’ nature of the issue, complete dissolution of international organizations is a rare phenomenon. This may very well be the reason for the academic community to have neglected this phenomenon. This stands in contrast to the attention paid to state succession (Klabbers et al, 1999; Dumberry, 2007; Nogovitsyna, 2005: 175–186). Although an issue such as the membership of international organizations may be closely connected to questions of state succession,<sup>3</sup> it is left out in this chapter, which purports to focus on the organizations rather than on (the representation of) states. Apart from the standard text books, which usually devote a chapter to the topic,<sup>4</sup> only a handful of other publications (most of them of a not so recent date) explicitly deal with the issues of dissolution and succession of international organizations (Myers, 1993; Chiu, 1965: 83–120; Hahn, 1964: 167–239; Jenks, 1945: 11–72; Kiss, 1961: 463–491; Mochi-Onory, 1968: 33–48; Schermers, 1975: 103–119; Ribbelink, 1988). During the 1970s and 1980s even the International Law Commission chose not to deal with the topic as ‘the scope for codification and progressive development of the law with regard to this matter would appear to be limited’. In fact, as it argued later, ‘strictly speaking, there can never be a “succession” of organizations’.<sup>5</sup> Only few authors have embraced the topic and it will therefore come as no surprise that most publications refer to each other and basically restrict themselves to describing the different examples. As no case can be compared to another, the

emerging question is whether the law of international organizations contains general rules and principles on the dissolution and succession of its objects.

Reasons to dissolve an international organization may be the completion of its tasks or the taking over of these tasks by another organization. Succession is usually defined as the transfer of functions from one organization to another, often accompanied by the transfer of ancillary rights and obligations (Myers, 1993: 12; Amerasinghe, 2005: 473). Dissolution is generally not defined in the text books, but relates to a cessation of the existence of an organization and in that sense is the counterpart of the creation or establishment of an organization. Complete dissolution – bringing the functions of an organization to a complete end – is rare. A text book example is the International Refugee Organization (IRO), which (almost) completed its task in the mid 1950s, but even there many functions returned after the establishment of the UN High Commissioner for Refugees and the Intergovernmental Committee for European Migration (Schermers and Blokker, 2003: 1033). Other examples include the termination of the Cold War institutions, the Council for Mutual Economic Assistance (CMEA) as well as of the Warsaw Pact in 1991. However, aspects of dissolution and succession are often combined. The EU offers some recent and even current examples in this respect. Whereas the European Coal and Steel Community (ECSC) on the basis of its own treaty had to be dissolved after 50 years in 2002 and its functions were taken over by the European Community (EC),<sup>6</sup> the 2007 Lisbon Treaty will – in turn – make an end to the EC and appoints the EU as its successor.<sup>7</sup> Historical examples include the dissolution of the League of Nations in 1946 and the (related) establishment of the United Nations (UN) in 1945, the succession of the Organization for European Economic Cooperation (OEEC) by the Organization for Economic Cooperation and Development (OECD) in 1961 and the integration of the institutional (and substantive) structure of the General Agreement on Tariffs and Trade (GATT) into the newly established World Trade Organization (WTO) in 1994.

But what exactly happens when international organizations are dissolved or being succeeded? And, what exactly is being transferred? Is there a difference between the ‘body’ and the ‘soul’ of an international organization? Is it possible for the soul to return to its ‘Creators’? Can it reincarnate in a new or already existing institutional body? Practice reveals that the rumour of the death of many international organizations is highly exaggerated as their soul simply pops up somewhere else. From a functional necessity perspective one would probably see the functions as the ‘soul’ of an international organization. In the case of dissolution or succession it either ‘transmigrates’ back to the states or to a new or already existing other organization.<sup>8</sup> Obviously, the process is different from that of state succession and the absence of territory and sovereignty makes comparison difficult. In fact, as once observed,

'instead of territory there is a function, and instead of a sovereignty, a competence' (Mochi-Onory: 1968: 37). Or, phrased otherwise: 'Whereas state succession gives rise to a body of doctrine designed to minimize the impact of a change of sovereignty on the human beings associated with a distinct territory, the most that can be derived from the notion of a succession or organizations is a functional substitution' (O'Connell, 1970: 396). In this perspective it does not really matter whether a function is exercised by one organization or by the other. And, related competences can easily be transferred to other organizations as well. The mere function of the body is to keep the soul alive.<sup>9</sup>

In contrast, at least one strand of the constitutionalism debate focuses on the institutional (or perhaps better 'constitutional') framework in which the functions are exercised. In this view, international organizations are not to be seen as empty entities that are only set in motion by the hands of their creators. Rather, they are individual legal entities with, indeed, 'a will of their own' (Schermers and Blokker, 2003: 26). From this perspective, the 'soul' of an international organization would have a chance to develop as a result of independent constitutional developments within an international organization. The rationale behind the emergence of international institutional constitutionalism is that states do *not* always control the functions of international organizations and that domestic constitutional checks and balances may therefore fall short in controlling the behaviour of international organizations. Obviously, this has an impact on the definition of 'dissolution' and 'succession'. In this approach it is not so much the function itself that is being transferred; it is the institutional set-up and the related legal order of an international organization, allowing functions to be exercised, that is being dissolved.

## SUCCESSION OF TREATIES OR LEGAL PERSONS?

One of the traditional criteria to establish whether or not an international entity could be regarded an international organization is that it should be established by international agreement (Schermers and Blokker, 2003: 27). Hence, one could argue that dissolution and succession of international agreements is a question to be settled by the general rules of treaty law. Indeed, the law of treaties may still play a role when conflicts between the contracting parties arise with regard to for instance the possibilities to terminate or suspend a treaty.<sup>10</sup> In practice, however, in almost all cases of dissolution and succession arguments are drawn from the constitutive document of the organization or from 'international institutional law', the body of rules and principles representing the 'unity in diversity'<sup>11</sup> of the law of international organizations. Thus, Amerasinghe, for instance, argues that 'there is a general principle of international institutional law that an organization may be dissolved by the

decision of its highest representative body (the general congress), when there are no provisions governing dissolution' (Amerasinghe, 2005: 468).

From a more conceptual point of view also, it makes sense to distinguish between the rules applying to relations between states and those governing the existence and functioning of an international organization. Elsewhere I contended that the constitutive agreements of international organizations are not merely to be seen as a contractual relationship between states, but as a 'treaty +', an agreement that at the same time created a new international legal entity.<sup>12</sup> This creation would then be the result of what Ruiter coined a 'legal operation of personification'.<sup>13</sup> It is well known that modern law systems allow 'will' to be imputed to 'incorporeal' things and, according to Ruiter, they do so through a legal act of personification. In fact, what we are dealing with is a modification of a contractual legal relation into an entity that is capable of entering into legal relationships with third parties. This would imply that whenever a treaty purports to establish a new entity under international law, this entity is to be regarded as a 'legal person'. A legal person is then conceived as an entity that is, in principle, capable of acting both *vis-à-vis* its own member states and *vis-à-vis* other international legal persons, such as third states.

The focus in this chapter is therefore on the possibilities for dissolution and succession offered by the law of international organizations. This does not mean that the underlying treaties are not affected. Obviously, in most cases the dissolution of an international organization implies the future irrelevance of the constitutive document, which is – either explicitly or implicitly – brought to an end (*infra*). There are cases where not all member states (explicitly) agreed with the dissolution of their organization, but situations in which certain member states protested are difficult to find. In fact, it is interesting to note that in almost all cases dissolution took place on the basis of the (perceived) rules and principles of the organization, rather than on the basis of the law of treaties. It is indeed the 'rules of the organization', in the Vienna Convention on the Law of Treaties defined as '[...] the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization' that are used to make an end to that same organization.<sup>14</sup> Thus formulated, one could argue that treaty law does continue to form the basis. This would be confirmed by Art. 5 of both Vienna Conventions on the Law of Treaties, which provide that these apply 'to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization [...]'. The same holds true for the 1978 Vienna Convention on Succession of States in respect of Treaties, which applies to 'the effects of a succession of States in respect of: (a) any treaty which is the constituent instrument of an international organization

without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization [...]’ (Art. 4). Similar arguments not to isolate the issue of dissolution and succession in the law of international organization too much from the law of states may be found in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It is quite obvious that the issues dealt with in this Convention (the transfer of part of the territory of a state, newly independent states, the uniting of states, the separation of part or parts of the territory of a state and the dissolution of a state) may have an impact on the functioning of an international organization.

In the words of Schermers and Blokker ‘[...] constitutions of international organizations are Janus-faced. On the one hand, as for their form, they are treaties, covered by the general rules on treaties and the 1969 Vienna Convention. On the other hand, as for their substance, they contain the ground rules for a living body, the practical operation of which may increasingly go beyond the intention of its creators’.<sup>15</sup> Indeed, as we have seen the Vienna Conventions recognize the separate existence of international organizations and provide that treaty law applies ‘without prejudice to any relevant rules of the organization’ only and the default rule in Art. 39 of the Vienna Convention that a treaty may be amended by an agreement between the parties is often replaced by special amendment procedures. The most well-known example is the European Union Treaty, which in Article 48 not only requires the agreement of all parties, but also the involvement of the organizations’ institutions (de Witte, 1994: 99; de Witte, 2004: 51–84). Indeed, EU members do not enjoy a ‘freedom of form’ and are dependent on the organization itself for any amendment, including – allegedly – the dissolution of the organization. The term ‘constitutional change’ seems to be well chosen by de Witte (2004) in his description of the amendment procedures in the EU; the procedure is subject to the rules in the ‘constitution’ of the organization. This notion is further strengthened by the debate on the possibility for member states to leave the Union. The uncertainty surrounding this issue caused the recent negotiations to introduce a special provision to allow for the possibility,<sup>16</sup> thereby underlining the distinction between the organization and its creators (see *supra*).

## FORMS OF SUCCESSION AND DISSOLUTION: THE QUEST FOR CONTINUITY

Usually a distinction is made between ‘conventional’ and ‘automatic’ succession. In the first case succession is based on an agreement between the predecessor and the successor; the second situation refers to an operation of the law when certain conditions are fulfilled (Myers, 1993: 40). Succession is relatively

easy when the membership of the predecessor and the successor are the same. Examples<sup>17</sup> include the succession of the Caribbean Commission (1946) by the Caribbean Organization (1960) or the replacement of both the European Space Research Organization (ESRO) and the European Organization for the Development of Space Vehicle Launchers (ELDO) by the 1975 European Space Agency. In both cases constitutional provisions in the new constitutive instrument provided for their successor status. A similar situation occurred with the succession of the EC by the EU. Whereas the legal basis in these cases could quite easily be discovered in the constitutions of the (new) organizations, other cases reveal the possibility of informal succession, that is: without an explicit agreement being present in the constitutive documents. Thus, in 1966 the African and Malagasy Organization for Economic Cooperation (OAMCE) and the Union of African and Malagasy States (UAM) were replaced by the African and Malagasy Common Organization (OCAM) without any references in the new or old treaties. In the latter case, one could argue that succession is based on general international law, rather than on the constitutional law of the organization.<sup>18</sup> In most cases – including for instance the adoption of the International Telecommunications Union (ITU), the Universal Postal Union (UPU) and the International Labour Organization (ILO) by the UN family – there is a change in either the objectives or the way of cooperation which triggers the establishment of a new organization and, obviously, a mere treaty amendment is not considered to be sufficient to reach these goals.

Whereas replacement of an international organization may be relatively easy in the case of coinciding memberships between the old and the new organization, the situation is different in case of diverging memberships. Usually a new agreement is used to overcome the problem of different membership. Indeed, as Klabbers contends: ‘Where the successor organization does not have membership identical to the predecessor organization, anything other than agreement would be difficult to reconcile with the basic idea of consent: why should a member of the successor but not the predecessor be obliged to take on (part of debts or functions or even staff of the predecessor)?’ (Klabbers, 2002: 327). In these cases the old organization is usually dissolved to allow for a fresh start of the successor organization. However, on many occasions dissolution and succession do not take place at the same time and organizations may co-exist for a while. The example of the co-existence of the League of Nations and the UN between 24 October 1945 and 18 April 1946 has already been mentioned, but proves far from exceptional. In fact, it is quite exceptional for organizations to be dissolved at the exact moment of the creation of their successor (Chiu, 1965: 89–91). Thus, the 1997 Eurocontrol Revised Convention provides: ‘If [...] the Organization is dissolved, its legal personality and capacity [...] shall continue to exist for the purpose of wind-

ing up the Organization' (art. 38.5). One may wonder what this tells us about the soul of the international organization. While it is tempting to push the metaphor in the direction of an existence 'in limbo', or to make a comparison with the 'Two Souls' in Goethe's *Faust*,<sup>19</sup> the most obvious conclusion would be that the process of transmigration allows for a 'bi-location' in different institutional frameworks, albeit for a limited period of time. For practical reasons, functions, assets and liabilities can often not be transferred at the same time. Yet practice does offer examples of international organizations that are simply denied nutrition in the form of any functions. The result is as expected: their disuse results in ultimate starvation. Thus in 1936 the International Commissions of the Elbe and the Oder were abandoned because of German withdrawal and the establishment of the Organization of African Unity in 1963 resulted in the disuse of the Conference of Independent African States and the Inter-African and Malagasy Organization (Schermers and Blokker, 2003: 1045–1046). And in 2010 it was decided to pull the plug on the Weste in 2011 now that all its functions have gradually been taken over by the EU. At the same time, a division of remaining functions among several other international organizations proves possible. Thus, the United Nations Relief and Rehabilitation Administration transferred its functions to the UN, the World Health Organization (WHO), the Food and Agriculture Organization (FAO) and United Nations Children's Fund (UNICEF) (*Ibid.*: 1948). These examples certainly add complexity to the transmigration issue.

In one of the few specialized books on the topic, Myers lists five situations where succession takes place: (a) an organization is replaced by another organization which is created to fulfil the same general purposes and functions (*replacement*); (b) a limited function organization is absorbed by a broader based organization and becomes one of its organs (*absorption*); (c) two or more organizations are combined to form a single new entity (*merger*); (d) a subsidiary organ is separated from its parent institution and becomes a new organization (*separation*); and (e) specific functions of an organization are transferred to another organization without otherwise affecting its existence (*transfer of specific functions*) (Myers, 1993: 15). In all cases the legal basis for the change may differ. In fact, the extent to which the organization is allowed to decide on its own future may tell us something about its 'functional' or 'constitutional' nature. There are obviously different views on the rules and principles in the law of international organizations on the matter (Klabbers, 2002: 322–323). It can be argued that an international organization has the inherent power to terminate its own existence or to transfer functions to another organization, by making use of the regular decision-making procedures. Theoretically, this option is not without difficulties as the constitutive document normally does not provide for a legal basis to end the organization's existence.<sup>20</sup> And even when one would argue that the absence of an explicit

legal basis is not relevant in case of an inherent power, problems do emerge in relation to the choice of the correct procedure or the blocking of the decision by one member state. How far does the inherent power reach? Is it allowed for the organization to dissolve itself even when one or more member states resist the termination? A second view lays more emphasis on the member states' role as the original creators of the organization. In this view member states can decide on the termination of an organization, (but only) by way of concluding a subsequent agreement. The reasoning is that when member states can create an international organization by concluding an agreement, they can equally terminate their creation by concluding another agreement.

Yet in practice 'continuity' seems to be the starting point and it seems that the legal problems surrounding dissolution and succession are often by-passed by building a new organization on the remains of a predecessor or by simply replacing a predecessor (Klabbers, 2002: 323; Petersmann, 1997). Indeed, as Hahn argued, 'to the extent that [...] functions are to meet lasting needs of the member states, their continuity must be ensured beyond changes in the objectives, jurisdiction, institutional structure or even extinction of the organization originally entrusted with those tasks' (Hahn, 1964: 168). As we have seen, dissolution is often part of a succession procedure, in particular when the membership between the old and the new organization does not coincide. Occasionally dissolution provisions exist in the constitution of organizations. Sometimes the constitutive document is concluded for a limited period of time (compare the ECSC referred to above). In other cases the organization is to be dissolved when its membership falls below a certain number (as was the case with the ESRO).<sup>21</sup> Obviously there is also not much left of an organization when all members have withdrawn. Some constitutions (including the World Intellectual Property Organization (WIPO) and the ILO) allow for the withdrawal of their members, with notification periods ranging from six weeks (WIPO) to two years (ILO). It is interesting to note that the 'soul' of an international organization may continue to be present and active even when the members are no longer there. It may take some time to complete the liquidation of an organization (the League of Nations was only dissolved completely on 31 July 1947) and notifications of withdrawal may be sent to an organization that has already been dissolved (the 1919 Convention Relating to the Regulation of Aerial Navigation, succeeded by the 1944 Chicago Convention) (Myers, 1993: 44). At the same time practice shows that international organizations are sometimes kept alive artificially. Thus, in the case of the Western European Union (WEU), one may rightfully wonder whether its 'soul' has not already left the body at the time of the transfer of its major functions to the EU (Wessel, 2001: 405–434).

Continuity may thus be ensured in different ways, which all have proved possible in practice, albeit that in many cases a combination is used.<sup>22</sup>

Conventional succession – on the basis of subsequent agreements – is frequently seen in most forms of *substitution* (e.g. the substitution of the International Wine and Vine Office by the International Organization of Vine and Wine in 2004), *merger* (e.g. of the Conference of the Food and Agricultural Organization, FAO, and the International Institute of Agriculture, IIA, in 1945), or *transfer* (e.g. of some functions of the WEU to the EU in 2001). Automatic succession refers to those instances where no additional agreements are concluded, but member states accept the transfer of functions from one organization to the other (e.g. the assumption by the UN of certain activities of the League of Nations). Whereas it may be argued that in these cases the fate of the organization is clearly in the hands of the member states, as the original ‘Herren der Verträge’, two other forms place more emphasis on the law of the institution itself. In the case of constitutional adaptation, the constitutive instrument of the organization is amended as to allow for a transformation of the organization. Thus, the original Brussels Treaty of 1948 was modified to allow for a transformation of the existing institutional arrangements into the WEU in 1954. Similarly, the Union of American Republics was transformed into the Organization of American States (OAS) in 1948 and in 1994 the Conference on Security and Cooperation in Europe (CSCE) became the Organization for Security and Cooperation in Europe (OSCE). An even more obvious role of the institutional rules is apparent in the case of administrative adaptation. Hahn reserves this term for situations where ‘the practice of an organization adapts its functions to changing conditions and thus, by a suitable interpretation of the existing law of the organization, makes conventional and automatic succession as well as the use of the amendment process, unnecessary’ (Hahn, 1964: 172). One example is the transformation of the UPU into a specialized agency of the UN after the Second World War. A more recent example could be the transformation in the beginning of the 1990s of the North Atlantic Treaty Organization (NATO) from a collective defence organization into a collective security organization, with tasks (including ‘out-of-area’ peace enforcement) that go beyond the (original) objectives of the organization. In fact, this example shows that administrative adaptation may result in completely new functions which not only shamelessly disregard the attribution of powers principle, but even use the *absence* of powers as a legal basis for new activities. Thus, in addition to its core function on the basis of Article 5 of the North Atlantic Treaty (collective self-defence), in a 1999 Strategic Concept the organization declared that ‘NATO forces must maintain the ability to provide for collective defence while conducting effective non-Article 5 crisis response operations’ (NATO Press Release 24 April 1999, para. 47; cf. White, 2005: 19; Rynning, 2005). Obviously, ‘non-Article 5’ can hardly be seen as a legitimate legal basis for new actions by the organization.

## CONSEQUENCES OF DISSOLUTION AND SUCCESSION

One of the most difficult questions the law of international organizations faces concerns the consequences of dissolution. As international organizations tend to create and further develop their own legal order, consisting of both primary and secondary rules, legal principles and – in some cases – case law, the question is what happens with this legal order once the organization is no longer there? It is difficult to conceive of legal orders without a rule-maker. Does this imply that everything that forms part of the legal order of an international organization becomes null and void once the organization is dissolved?

This question is particularly relevant in relation to the legal acts of international organizations. The starting point seems to be that a decision is needed to either annul the acts or to allow for them to be taken over by a successor organization (Schermers and Blokker, 2003: 1049). This implies that states that do not become a member of the successor organization are no longer bound by these acts, although there is no reason to assume that they cannot continue their application, in particular when the rule has become part of their national legal system. But international organizations are increasingly seen as law-makers.<sup>23</sup> The interactions between national and international legal spheres, including the European legal sphere for EU member states, have intensified and gained increased visibility over the last few years. International norms do not always reach states' domestic legal orders directly: they may have followed a route through other international bodies. In the EU the relation between EU decisions and decisions taken by other international bodies is indeed quite obvious (Hoffmeister, 2007: 41–68; Lavranos, 2004; Wouterse et al., 2007), but the interplay between regulatory powers of international organizations seems to have become more general (Follesdal et al., 2008; Wouters and De Meester, 2005).

These developments caused for many international organizations to be entangled in a web of 'global governance' which may complicate their dissolution or succession. The bottom-line is that one needs to be able to find a legal basis for the (continued existence) of a rule. This can be the legal order of the new organization,<sup>24</sup> the legal order of another organization which has adopted the rule as a basis for its own decisions, the national legal order of (former) member states, or – in case of for instance declarations – customary law. This also explains why the problem does not emerge in relation to the many recommendations of international organizations as the legal basis for this type of instruments is less controversial and member states will be allowed to follow recommendations even when the organization no longer exists. In addition, in many cases international organizations are not the actual law-makers, but act as facilitators for their member states in concluding conventions. One could argue that, as the legal basis of these conventions is to be found in interna-

tional treaty law rather than in the legal order of the international organizations, their validity is not dependent on the existence of the organization. Whereas as a matter of principle this is true, many international organizations play a role in the application of these conventions, usually as a secretariat but occasionally with autonomous tasks. Thus, the Council of the League of Nations was authorized to invite additional states to become parties to many conventions concluded under the auspices of the League (Schermers and Blokker, 2003: 1053). Yet it is the distinct legal basis of conventions that causes most authors to opt for continuity. As Schermers and Blokker pragmatically argue:

[...] obligations in conventions are meant to be permanent and should certainly not depend on the existence of the organizations which administer the conventions. Even in the case of an amendment to a convention, the original text remains in force for those states which do not accept the amendment. Parties to the convention should not be permitted to renounce their obligations without fulfilling the normal conditions for withdrawal on the pretext that the treaty has been changed by the replacement of one organization with another. The harm done by the discontinuation of a convention far outweighs the damaging consequences of the latter event (Schermers and Blokker, 2003: 1052–1053).

Be that as it may, the validity of this more or less pragmatic argument seems to depend on the actual role of the organization in relation to the convention. In any event subsequent changes to the convention seem to be in need of approval of the parties. In case of a succession the status of previously concluded conventions is usually being dealt with alongside the legal status of other instruments. Thus the constitution of the OECD not only allowed for some former OEEC acts to become OECD acts, but it also empowered the new organization to take over the functions related to existing conventions (Hahn, 1964: 222–223).

Even more difficult is the status of agreements concluded between the dissolved organization and other organizations or third states. In these cases the organization itself is a party to the agreement and it is even more obvious that something needs to be regulated once the organization ceases to exist. Usually international organizations have concluded headquarters agreements with their host state, agreements on cooperation or exchange of information with other international organizations and agreements with non-member states or private parties. Successor states do not generally assume responsibility for private claims and these are usually dealt with on the basis of some left-over capacities of the old organization (compare the phasing out of the League of Nations in 1946–47). For agreements concluded under international public law the situation is similar. On the basis of the Vienna Convention on the Law of Treaties both the impossibility of performance and a fundamental change of

circumstances may be invoked for terminating or withdrawing from a treaty (Arts 61 and 62). Whenever it is decided that successor organization continues existing agreements approval by the other parties is necessary. Thus with the dissolution of the ECSC in 2002 the EC succeeded to all its international rights and obligations. The parties to agreements concluded by the ECSC were merely informed by the European Commission, but one may assume that any unwillingness on their part to accept their new partner would have provided them with a legitimate basis for withdrawal from the agreement.<sup>25</sup> In general, the EU may be a special case as by now it is exclusively competent to conclude international agreements in some areas, including trade. With the merger of the EC and the EU the latter has become the successor to the hundreds of agreements concluded with (almost all) states and other international organizations. But as a unilateral replacement of one party by another may not be acceptable to other parties, there seems to be a need of an, at least implicit, consent on the other side. It could be contended that this is even the case in the (unlikely) event that the EU would be dissolved. Automatic succession to existing agreements by the (then former) EU member states is not obvious because of their distinct legal personalities and the consequences of the new situation need to be discussed with the third parties.<sup>26</sup>

The legal order of an international organization also forms the basis for the appointment of most personnel. Usually appointments are regulated by a Statute of personnel and termination of a contract depends on the rules therein. In case of the dissolution of an international organization specific provisions related to the termination of permanent positions will have to be invoked. The general rule (in practice) is that the successor organization has no obligation to take over personnel of a dissolving organization. After all, there may be political (functional) reasons, to start with a clean slate. Yet for reasons of continuity organizations may decide to take over even the Secretary-General and/or most of the staff. Examples include a considerable transfer of the staff from the International Meteorological Organization to the World Meteorological Organization in 1950–51, from the OEEC to the OECD in 1961 and from the GATT Secretariat to the WTO in 1994. A transfer of personnel may include a transfer of (pension) funds and other obligations the organization has towards its personnel (Schermers and Blokker, 2003: 1060). The latter may in particular be important to guarantee existing rights, as legal protection obviously may be difficult when there is not much left to invoke or address. In practice international organizations are aware of these problems and a variety of settlements usually aim at protecting the staff of dissolving organizations. Yet there are no fixed rules and apart from some possible financial compensation, personnel run the risk of having to accept the disappearance of their employer.

Practice is equally inconsistent with regard to the distribution of assets and

debts of dissolving organizations, although in most cases these are again transferred to the successor organization.<sup>27</sup> Only few constitutive documents provide for the liquidation of assets and liabilities (exceptions being the International Bank for Reconstruction and Development (IBRD) and other financial institutions). This means that the issue needs to be part of the set of agreements that forms the basis for the dissolution process. Only occasionally the property is distributed among the member states, which underlines an autonomous power of international organizations to settle this issue. In the case of the ECSC funds flowed back to the member states, which in turn transferred them to the EC in order to be spent on research in the coal and steel area (Decision of the Representatives of the Governments of the Member States, meeting within the Council, 21 June 1999). Often successor organizations not only accept the property (including possible claims), but also the debts and responsibilities. Thus the WHO, UNESCO, the OECD and the WTO, to name just a few examples, have all accepted the assets and debts of their predecessors (Schermers and Blokker, 2003: 1062–1064).

## CONCLUSIONS

The main question posed in this chapter is whether the law of international organizations contains general rules and principles on the dissolution and succession of its objects. The analyses reveals that the variety of forms, processes and solutions calls for a denial of the existence of such general rules. With regard to the legal basis for dissolution, the decision-making procedure, the form of a succession as well as the consequences, practice has not been able to contribute to the formation of customary rules which should apply in the absence of written rules. Yet if there is one word that would emerge from practice it would be 'continuity'. The creation of an international organization is not something that can easily be undone. Indeed, most organizations that have been dissolved have found a new life in a successor. Their 'soul' lives on, albeit subject to a new institutional framework, new rules and possibly at the service of new masters.

From a functional necessity perspective it could be argued that continued existence of an organization is obviously in the interest of the member states that are willing to transfer the functions to a new international body, albeit under modified conditions. The main point raised by functionalism, however, is not only that organizations can perform functions on behalf of states, but also that this performance is strictly instrumental and subject to the principle of the attribution of powers.<sup>28</sup> The ultimate consequence of this view is that the life of an international organization remains in the hands of its creators. Or, in the words of Chinkin:

Member States create an organization with defined and limited functions; they intend the organization to operate within these restraints, and their acceptance of the duties of membership rests upon this assumption. Membership of an organization necessitates voluntary restrictions upon the sovereign powers of States which can only be to the extent accepted by the members through the express or implied terms of the treaty. The corollary is that the organization has no existence except through the will of its members; member States can amend the treaty creating an organization and even terminate its existence (Chinkin, 1993: 95–96).

While the practice of the dissolution and succession of international organizations can to some extent be explained along these lines (in particular with regard to the conclusion of new constitutive documents), functionalism falls short in explaining some other developments. The practice of dissolution reveals quite a large role for the institutional rules of the organization itself. Over the years of its existence an international organization usually develops new rules and habits, acquires property, appoints personnel and it is in particular this institutionalisation process that takes place in relative autonomy. Even international cooperation that was intended to stay ‘intergovernmental’ may have taken its own course.<sup>29</sup> The examples in the present contribution provide a picture in which international organizations may also be dissolved without the explicit consent of all member states, on the basis of their own rules of procedure and by taking care of the partition of the estate. The fact that personnel and even institutions are frequently transferred to the successor organization adds to the continuity of established practices.

The role of international organizations in what is usually referred to as ‘global governance’, forms another reason for the emphasis on continuity. No longer are international organizations merely tools in the hands of their member states, their functions are often exercised in relation to global normative processes in which decisions of one organization are often related to decisions taken somewhere else. Together with the permeability of the border between national and international law,<sup>30</sup> it is this interplay that may very well lead to less flexibility with regard to the dissolution of international organizations. This is not to say that international organizations are now to be compared to Frankenstein’s monster that can no longer be controlled by its creators. It does, however, point to a permanent presence of international functions and – indeed why not – a ‘soul’ of international organizations that proves to be able to survive in the global legal order in relative independence from its creators. The question of whether the emphasis on continuity leads to eternal life for some organizations is still difficult to answer,<sup>31</sup> but it seems fair to conclude that they are increasingly in control of their own existence.

## NOTES

1. See for instance E.-U. Petersmann (1996: 398, 2006: 633–667); D.Z. Cass (2005) claiming, however, that the WTO is not and should not be constitutionalized, B. Fassbender (1998: 529, 2005: 837).
2. E. de Wet (2006: 51–76); R. St. MacDonald and D.M. Johnston (2005); N. Tsagourias (2007); B. Ackerman (1997: 771). See earlier already A. Verdross (1926). For a US critique: E.A. Young (2003: 527). Cf. also J. Klabbers (2004): pointing to some of the inherent paradoxes of constitutionalism.
3. See on this topic K.G. Bühler (2001) and to some extent H.G. Schermers (1975: 103–119).
4. C.F. Amerasinghe (2005: Chapter 15); H.G. Schermers and N.M. Blokker (2003: paras 1617–1680); J. Klabbers (2002: Chapter 15); P. Sands and P. Klein (2001: Chapter 15, C).
5. See ‘Review of the Commission’s Long-Term Programme of Work’ (1971: 79–80) and ‘Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations’ (1982: 69) respectively. Referred to in Myers (1993: 1).
6. See Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, 21 June 1999 (OJ 1999, C 190/1); and Decision of the Representatives of the Governments of the Member States, meeting within the Council, 29 February 2002 (OJ 2002, L 79/42); cf. also Council Decision of 19 July 2002 on the consequences of the expiry of the Treaty establishing the European Coal and Steel Community (ECSC) on the international agreements concluded by the ECSC (2002/596/EC, OJ L 194, 23.07.2002).
7. See the new post-Lisbon Treaty on European Union, Art. 1: ‘The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. It shall replace and succeed the European Community’.
8. Transmigration of souls (or ‘metempsychosis’) is a philosophy of reincarnation incorporating the specific belief that after death, the soul of a living being is then transferred (or transmigrates) into another living form and thus takes birth again. The philosophy of transmigration is often connected with a belief that the karma (or, *the actions*) of the soul in one life (or, more generally, a series of past lives) determines the future existence (source: Wikipedia).
9. Or, as concluded by Hahn: ‘[...] the legal personality of international organization is only accessory to the substantive tasks which alone justify their corporate existence in international law apart from States’. H.J. Hahn (1964: 239). And, Klabbers, *Introduction* (2002: 325): ‘[...] the rationale behind an organization will usually continue to exist; it is merely the institutional arrangements which are deemed unsuitable’.
10. Cf. for instance Art. 59 (1) of the Vienna Convention on the Law of Treaties on the ‘Termination and suspension of a treaty implied by conclusion of a later treaty’; or the possible application of the ‘*clausula rebus sic stantibus*’ (Art. 62).
11. See the subtitle of Schermers and Blokker (2003).
12. See R.A. Wessel (2007a: 160–206), as well as R.A. Wessel (2000: 507–537). Cf. also N.D. White (2005: 14–23) (‘Contract or constitution?’).
13. D.W.P. Ruiter (2004: 214–216). See also Ruiter (2001). Ruiter (2004: 216) claims that what we do is in fact ‘personify’ the contractual relation by making four adjustments: 1. Contractual consensus is abandoned in favour of collective decision-making by a general meeting of members, the outcome of which are no longer conceived of as resulting from concordant expressions of their individual wills; 2. The abandonment of the idea of decisions as founded on contractual agreement is accompanied by the construction of a *generalised* will imputed to the alliance itself, which is thus accorded legal personality and thereby transformed into an association; 3. The idea of an original multilateral contractual personal legal relation between participants is replaced by that of a bundle of personal legal relations between the association and its members, entitling them to vote in the general meeting; 4. An association is treated on a par with physical persons (capacity for rights), is capable of performing legal acts (legal capacity), and is responsible for behaviour flowing

from the will imputed to it (legal liability). This means that: '[...] the idea of an original multilateral contractual personal legal relation between participants is replaced by that of a bundle of personal legal relations between the association and its members. [...] The *raison d'être* of an association is the collective will of its members as expressed by their general meeting, which substitutes for the original contractual agreement.'

14. See Art. 2, 1 (j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
15. Schermers and Blokker (2003: 725). This distinction should not be confused with the distinction between a *managerial* and an *agora* perspective on international organization made by Klabbers, as in both perspectives the (member) state remains the key-actor. See J. Klabbers (2005b).
16. See Art. 50 of the post-Lisbon EU Treaty.
17. Most examples in this section and the subsequent one are borrowed from the text books by C.F. Amerasinghe (2005), H.G. Schermers and N.M. Blokker (2003), J. Klabbers (2002), P. Sands and P. Klein (2001), as well as from Myers (2003).
18. After all, Article 59 of the Vienna Convention on the Law of Treaties provides: 'A treaty shall be considered as terminated if all parties conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.'
19. See also the well-known full citation: 'Zwei Seelen wohnen, ach! in meiner Brust, Die eine will sich von der andern trennen; Die eine hält, in derber Liebeslust, Sich an die Welt mit klammernden Organen; Die andere hebt gewaltsam sich vom Dust Zu den Gefilden hoher Ahnen.' (*Faust I*, Vers 1112–1117).
20. Exceptions include Art. VI, para. 5 of the Article of Agreement of the World Bank and Art. XXVII, p. 2 of the Articles of Agreement of the IMF, which allow for a termination on the basis of a (majority) decision of the Board of Governors.
21. According to Art. XIX of the Convention for the Establishment of a European Space Research Organization the organization was to be dissolved when the membership dropped to less than five.
22. Hahn (1964: 171). Some examples in this section are borrowed from Hahn, others from the text books referred to earlier by C.F. Amerasinghe (2005), H.G. Schermers and N.M. Blokker (2003), J. Klabbers (2002), P. Sands and P. Klein (2001).
23. See K. Jayasuriya (1999: 425–455). In his book *International Organizations as Law-makers* (2005) José Alvarez reveals that the role of international organizations in law-making not only increased, but also that international law is not always well enough equipped to handle this development. Cf. also D. Sarooshi, (2005), J. Delbrück (1996) and R.A. Wessel (2001).
24. An example can be found with the WHO, which endorsed all technical decisions taken with regard to International Sanitary Conventions and their application, biological standards and habit-forming drugs by the International Office of Public Hygiene, the Health Organization of the League of Nations, the Quarantine Commission of the United Nations Relief and Rehabilitation Administration and the Interim Commission of the WHO itself. See Hahn (1964: 179).
25. See Council Decision of 19 July 2000, OJ EU L 194/36, 2002. Cf. also Hahn (1964: 222). Hahn points to the OECD which replaced the OEEC as a party to agreements with the consent of the other parties (the International Atomic Energy Agency, the Bank of International Settlements and the French Government).
26. Contrary Schermers and Blokker (2003: 1057): 'It would not be acceptable to declare that all such Community trade agreements would terminate if ever the EC were dissolved. The rules for state succession are much more appropriate and, accordingly, should be applied.'
27. Ribbelink (1998: 212). Cf. also the case *Pan American Union (PAU) v. American Security and Trust Company*, in which a US District Court seems to point to a principle of automatic succession of assets and contractual rights.
28. See the description of functionalism by Klabbers elsewhere in this book as well as P.H.F. Bekker (1994).

29. Cf. in relation to the autonomous processes in the 'intergovernmental' cooperation in the area of the European Union's Foreign and Security Policy: R.A. Wessel (2009).
30. Compare for instance A. Nollkaemper and J.E. Nijman (2007).
31. Obvious first candidates being the EU, the WTO and the UN, alongside technical organizations such as the World Postal Union (WPU), the International Civil Aviation Organization (ICAO) or the International Standardization Organization (ISO) without which international cooperation would be virtually unthinkable.

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## CASE

*Pan American Union (PAU) v. American Security and Trust Company*, Decisions of 6 May 1952,  
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