

The Time Limit for the Ratification of Proposed Amendments to the Constitutions of International Organizations

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I. Introduction

The constitutions¹ of many international organizations generally contain some provisions on the amendment process, but they seldom contain an explicit time limit for the ratification or acceptance of a proposed amendment.² Such a situation, on the one hand, may promote the

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¹ For the sake of simplicity, the term "constitution" is used to describe the constituent instrument or instruments of an international organization, although I understand that there is some disagreement as to whether it is appropriate to use the term "constitution" to describe them. Such constituent instruments are unique because they are at once "conventional" and "institutional" and thus present problems of interpretation, see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, 66 et seq., (74–75, para. 19), some of which are explored herein. See also generally P. Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited", *Max Planck UNYB* 1 (1997), 1 et seq.; A. Ross, *Constitution of the United Nations*, 1950.

² E.g., UN Charter, Arts 108–109; Articles of Agreement of the International Monetary Fund, UNTS Vol. 2 No. 20, art. XXVIII (originally art. XVII).

deliberativeness of the amendment process by giving the Member States all the time they deem necessary to consider and debate a proposal. On the other hand, it leaves the entry into force of a proposed amendment to the mercy of the Member States and thus results in considerable, if not inordinate, delay³ and uncertainty. This naturally leads one to ask whether there is an implied time limit, whether the organ of the organization that is responsible for proposing an amendment (the proposing organ) may impose a time limit, whether in the absence of such a pre-specified deadline, the proposing organ may withdraw a proposed amendment from consideration and ratification by Member States, whether a proposed amendment may simply lapse, and, finally, what constitutes a reasonable time limit if such a limit is applicable.

The United Nations and several other international organizations are considering making amendments to their constitutions. Therefore it may be fitting at this time to revisit the issues raised above.⁴ This article

The discussion herein with respect to the amendment process under the constitutions of international organizations also applies, in principle, to the amendment process under other international agreements. In this article, the terms "ratification" and "acceptance" are treated as interchangeable. Although there may be slight differences between the two, such differences appear to be immaterial. The ILC commented that "on the international plane, 'acceptance' is an innovation which is more one of terminology than of method." *ILCYB* (1966(II)), 198 (comment 10 to article 11 of the Draft Articles on the Law of Treaties).

³ See H. Schermers/N. Blokker, *International Institutional Law*, 3rd edition, 1995, 730 ("The 1965, 1978 and 1986 amendments to the WHO Constitution have not yet entered into force. The important 1986 amendments to the ILO constitution still lack a substantial number of ratifications required before their entry into force (86 ratifications obtained as of 1 March 1994)"). In 1968 another scholar gave the following "summary of the experiences of six agencies, with the time from approval to entry into force of their sixteen amendments: I.A.E.A. – one amendment, 15 months; I.B.R.D. – one amendment, 16 months; W.H.O. – two amendments, one in 17 months, the other not yet in effect; I.M.C.O. – two amendments, each in approximately 37 months; I.L.O. – five amendments, the first two in 11 months each, with three not yet in effect; and I.C.A.O. – five amendments, the first in 13 years and 10 months, the second, 47 months, the third, 30 months, the fourth, 13 months, and the fifth not yet in force". L. Phillips, "Constitutional Revision in the Specialized Agencies", *AJIL* 62 (1968), 654 et seq., (670) (footnotes omitted).

⁴ Various authors have discussed some aspects of these issues, see E. Schwelb, "The Amending Procedure of Constitutions of International Or-

will outline the debates on these questions in international law and in the constitutional law of the United States and discuss various positions. My discussion and analysis will focus on the text, context and drafting history, where possible, of the constitutions, the practices of international organizations, and the opinions of scholars addressing the particular issues. In so doing I will take as examples only the United Nations and the International Monetary Fund (the Fund) because a comprehensive survey is beyond the scope of this short article and is unnecessary for the purposes of analyzing these issues, although in general the more examples the better. The analysis will also be informed by general principles of international law not directly applicable and, to a considerable extent, by an analogy to the constitutional experience of the United States. While other states may also have dealt with these issues, I will discuss the constitutional experience of the United States because the question of time limits for the ratification of proposed constitutional amendments has figured more prominently in the judicial decisions and scholarly debates in the United States than in other states. As recently as in 1992, the United States had to struggle with the question whether the 27th Amendment⁵ to the Constitution was validly ratified, because it took more than 202 years to obtain the necessary ratifying majority. To the extent that international law is not clear, having recourse to national constitutional experiences should afford some comfort if not strong support, although there has been an ongoing debate as to the value of analo-

gizations", *BYIL* 31 (1954), 49 et seq., (90–91); id., "The Question of a Time Limit for the Ratification of Amendments to the Charter of the United Nations", *ICLQ* 4 (1955), 475 et seq., (477); id., "Charter Review and Charter Amendment – Recent Developments", *ICLQ* 8 (1958), 303 et seq., (325–326); Phillips, see note 3; L. Goodrich/E. Hambro/A. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd edition, 1969, 639–640; J.N. Saxena, *Amending Procedures of the Constituent Instruments of International Organizations*, 1972, 171; J. Dehaussy, "Article 108", in: J. Cot/A. Pellet (eds), *La Charte des Nations Unies*, 1985, 1421; W. Karl/B. Mützelburg, "Amendments", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 1169–1170. See also generally J. Frowein, "Are There Limits to the Amendment Procedures in Treaties Constituting International Organizations?", in: G. Hafner et al. (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, 1998, 201 et seq.; R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, 1968.

⁵ This amendment provides: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

gies to private or municipal law.⁶ I do not wish to venture into this controversy except to quote the following:

“In a stage of international law which is characterized by the increased role played by international organizations, the assistance given by private law to the interpretation and application of general international law can be paralleled in the province of the constitutional law of international organizations by national constitutional law. When interpreting an international treaty, which is the constitution of an international organization, it is therefore admissible to have recourse to the experience and to the jurisprudence of a national legal system which has been facing and which has solved analogous relations obtaining between the federation and its constituent units.”⁷

Part I has provided glimpses of the issues which I will discuss and of my analytical approach to discussing these issues. Part II will discuss whether there is an explicit or implied time limit for the ratification of the amendments under the constitutions of various international organizations. Part III will address whether the proposing organ of an international organization may have the power to impose a time limit. Part IV will analyse whether the proposing organ has the power to withdraw a proposed amendment before the necessary ratifying majority has been obtained. Part V will discuss whether and under what circumstances a proposed amendment may simply lapse. Part VI will finally take up the issue of what constitutes a reasonable time. Some conclusions will then follow in Part VII.

II. The Existence of a Time Limit under the Constitutions

The first question to consider is whether the constitution of an international organization provides a specific time limit for the ratification or acceptance of a proposed amendment. This depends on the particular language, context and history of that constitution. If there is a specific

⁶ See generally H. Lauterpacht, *Private Law Sources and Analogies of International Law*, 1927; M. Shahabuddeen, “Municipal Law Reasoning in International Law”, in: V. Lowe/M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, 1996, 90 et seq.

⁷ Schwelb, see note 4 (1955), 477.

constitutional provision providing for a time limit, that will be the end of the inquiry. For whatever reason, however, normally no such explicit time limit is provided. This holds true with respect to the constitutions of many international organizations including the United Nations Charter⁸ and the Articles of Agreement of the International Monetary Fund (the Fund Articles).⁹ This is also true with the United States Constitution, although Congress, the proposing organ, is granted the power

⁸ The UN Charter provides in part:
Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council.

....

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly and the conference shall be held if so decided by a majority vote of the members of the General Assembly and a vote of any seven members of the Security Council.

⁹ See the Fund Articles, article XXVIII, which provides in part: "(a) ... If the proposed amendment is approved by the Board of Governors, the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members. ... (c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram."

to propose a mode of ratification in addition to the text of the amendments.¹⁰

There is some controversy as to whether such a constitution should be read as implying a time limit, i.e., "a reasonable time." If there is such an implied time limit and if it can be ascertained, it might be argued that the proposing organ need not set any time limit on its own. The context of the relevant provisions normally does not support reading such an implied time limit into the text. This is because it appears that the drafters of the constitutions of international organizations would have provided for a time period for ratification if they had one in mind. For example, Article 109 para. 3 of the United Nations Charter specifically provides that if a general conference to consider amendments to the United Nations Charter "has not been held before the tenth annual session of the General Assembly", then a certain course of action would be taken. The fact that "the tenth annual session", which appears to represent the lapse of a reasonable period of time, was expressly provided in Article 109, but no time limit for the ratification of a proposed amendment was provided either in this article or in the adjacent Article 108 respecting the same subject matter may be considered to be evidence that the drafters did not intend to provide for one. If one sees any ambiguity in the text, that ambiguity would seem to be eliminated by the drafting history¹¹ of Arts 108 and 109. That history counsels against reading a time limit into the text. The drafters took note of the unsatisfactory experience of the League of Nations in amending the Covenant,¹² mostly because of inertia, and gave some thought to including a time limit within which the necessary ratifications would have to take place, but left the issue unresolved.¹³ This history cannot be considered as support

¹⁰ See U.S. Constitution, art. V, which provides in part: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress".

¹¹ Writers such as Schwelb, see note 4 (1955), 475-476; Zacklin, see note 4, 104-110, did not seem to inquire into the drafting history.

¹² For a description of this experience, see text accompanying notes 104-109 below.

¹³ Goodrich/Hambro/Simons, see note 4.

for an implied time limit. Therefore, the time to ratify a proposed amendment to the United Nations Charter would be whatever time it takes to obtain the necessary ratifications of two-thirds of the members of the United Nations, including all the permanent members of the Security Council. Carried to its logical extreme, this position will lead one to conclude that there is an indefinite time for acceptance, which is not very comforting. This does not, however, in itself destroy the legitimacy of this position as an interpretation of Article 108, if that is what the treaty-makers intended.

The same is also true with the Fund Articles, which is the Fund's constitution. The textual context of the Fund Articles does not appear to lend any support to the argument that a reasonable time may be read into the provision relating to amending the Fund Articles. Article XXVIII merely sets forth the requirements for the acceptance of a proposed amendment and, therefore, may support the position that the time for acceptance is whatever time it takes to fulfil those requirements. On the other hand, if the time element was of essence for the founders of the Fund, they could have addressed it expressly. For instance, article XXVIII lit.(c) expressly provides that "[a]mendments shall enter into force for all members three months after the date of the formal communication [regarding the fact that enough members have accepted the proposed amendment] unless a shorter period is specified in the circular letter or telegram." This language specifying three months, indicates that where the founding fathers of the Fund wanted to have a time limit they had expressly provided for one and, therefore, where they did not so provide, no time limit was intended.

Nor does the legislative history support the argument that an implied time limit has been built in. The *travaux préparatoires* reveal that the United Kingdom Delegation proposed a mechanism for making "urgent amendments". Under this proposal, a proposed urgent amendment would go into effect immediately upon adoption by the Executive Directors and remain in force unless the Board of Governors would not accept it or, if accepted by the Board of Governors, a certain number of members or members with a certain percentage of voting power would object to it within a certain number of days.¹⁴ This proposal did not become part of the final text of the Fund Articles. If anything, that rejection militates against the argument for an implied time limit.

¹⁴ See Addition Proposed by the UK Delegation, Document 344, C1/DC/4, *Proceedings and Documents of the United Nations Monetary & Financial Conference*, Vol. 1 (1948), 576-577.

The practices of international organizations do not support but rather go against reading into the text an implied time limit. Certain international organizations and/or their committees in charge of studying amendment proposals had voiced complaints about the undesirability of allowing an indefinite time for ratification.¹⁵ They proposed, however, that a time limit be specified in each proposed amendment¹⁶ or that the amendment clauses in various international agreements be amended to include such a limit,¹⁷ rather than arguing that there was already an implied time limit built in. The League of Nations proposed to amend the amendment provision of the League Covenant by adding a time limit of twenty-two months for the ratification of proposed amendments in the future.¹⁸

Scholarly opinion on this particular issue also weighs against the argument for an implied time limit. Manley O. Hudson noted that as of 1 April 1924 the proposed amendment to the Covenant had not come into effect and opined that “[s]hort of some amendment, ... it seems possible that no limit whatever exists, and that a ratification long after a proposal of amendment had been generally forgotten might have the effect of putting it into force.”¹⁹ Similarly, Saxena stated in 1972 that

¹⁵ See, e.g., League of Nations Committee on Amendments to the Covenant (League of Nations Committee), Second Report of the Committee to the Council, A. 24(1), 1921, V, 9; Intergovernmental Maritime Consultative Organization (IMCO), Amendment Procedures for Conventions for which IMCO is the Depositary, IMCO Doc. A. VIII/11, 20 September 1973. In 1982, the IMCO changed its name to International Maritime Organization (IMO). See <http://www.imo.org/imo/introd.htm>, footnote 1 therein.

¹⁶ League of Nations Committee, *ibid.*

¹⁷ IMCO, see note 15, especially Annex II (Draft Provisions on Tacit Amendment Procedure). See also A. Adede, “Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience”, *Va. J. Int’l L.* 17 (1977), 201 et seq. This tacit amendment procedure has been successfully implemented in various treaties administered by the IMCO. See Lei Shi, “Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law”, *University of San Francisco Maritime Law Journal* 11 (1998–1999), 299 et seq.

¹⁸ Letter from the Secretary-General Transmitting Copies of the Protocols of Ratification, 24 November 1921, and Annexes thereto, C.L. 100, 1921, V, reprinted in: League of Nations, *Official Journal*, January 1922, 6–8.

¹⁹ M. Hudson, “Amendment of the Covenant of the League of Nations”, *Harv. L. Rev.* 38 (1924), 903 et seq., (914).

where the constitution does not address the question, “[i]t was long supposed that the proposed amendments would be pending indefinitely and that states could ratify them at any time without regard to the date of their submission by the organization.”²⁰

Under such circumstances, one might ask whether there exist any general principles of international law which, although not directly saying so, nonetheless favour such an implied time limit. The answer would seem to be negative. No doubt the temptation to imply such a term in a provision of a treaty is strong and, in some circumstances, is supportable. For example, where no time period is specified for the termination of a treaty, a reasonable time is implied under the principle of good faith, as the ICJ stated in the *Nicaragua Case*.²¹ This does not seem to carry over to the entry into force of an international undertaking. The ICJ itself has resisted the strong arguments mounted by India²² in 1957 and by Nigeria²³ in 1998 for implying a reasonable time period for an Optional Clause declaration made under Article 36 para. 2 of the Statute to take effect, preferring to stick to the view that such a declaration takes effect immediately upon notification to the Secretary-General of the United Nations. It thus would seem that international law does not favour multiplying the requirements for an undertaking to take effect, albeit not *vice versa*. While one is tempted to say that the ICJ is trying to have it both ways, one may also draw the lesson that international law appears to favour the prompt and unhindered entry into force as well as the stability of an international undertaking. No doubt this is a reasonable rule of law.

Thus, the weight of authority in international law goes against the argument that there is always an implied time limit for the ratification of a proposed amendment to the constitution of an international organization, although that constitution does not expressly provide for one. This view is consistent with what appears to be the prevailing view on the United States Constitution. While in the past the view in favour of such an implied limit appeared to have some currency, it has now fallen out of favour. In *Dillon v. Gloss*, the United States Supreme Court held that Congress may set such a time limit as part of a proposed

²⁰ Saxena, see note 4, 171.

²¹ ICJ Reports 1984, 392 et seq., (419/420, para. 63).

²² *Right of Passage over Indian Territory*, ICJ Reports 1957, 125 et seq., (145–147).

²³ *Land and Maritime Boundary Case*, ICJ Reports 1998, 275 et seq., (290–300).

amendment and intimated that the ratifications of constitutional amendments by the constituent states must take place within a reasonable time after the proposal is made so as to assure a sufficiently "contemporaneous" consensus on the question.²⁴ Certain scholars supported this view, treating the Constitution as a compact and drawing upon contract law principles providing for a reasonable time for offer (i.e., a proposed amendment) and acceptance (i.e., ratification) where no such time is expressly provided.²⁵ This contract model does not seem to pay sufficient attention to the special nature of a constitution. Embodying more than a bilateral relationship, a constitution constitutes a community and creates a public order. This is true with both a national constitution and the constitution of an international organization.²⁶ Moreover, the offer and acceptance analogy is not a perfect one, as a true offer should come from the people of one state to those of another, rather than from Congress to the people. Similarly, a true offer to amend the constitution of an international organization should be made by one or more Member States rather than by the proposing organ of the organization. In any event, it is worth noting that this implied term contract model has not meaningfully influenced the debates in international law, if not completely rejected therein,²⁷ as international law tends to emphasize the intent of states and shuns presumptions.

The Office of Legal Counsel of the United States Department of Justice²⁸ as well as certain scholars²⁹ consider the Supreme Court's musings on an implied time limit as *obiter dicta*. Based on the text and context of the United States Constitution, the Office of Legal Counsel argues that proposed amendments are open for ratification for an unlimited time unless Congress specifies otherwise, and that the 27th Amendment to the Constitution was valid although it took more than

²⁴ 256 U.S. 368, 374–375 (1921); accord, *Coleman v. Miller*, 307 U.S. 433 (1939).

²⁵ See, e.g., S. Dalzell/E. Beste, "Is the Twenty-seventh Amendment 200 Years Too Late?", *Geo. Wash. L. Rev.* 62 (1994), 501.

²⁶ See note 1.

²⁷ See text accompanying notes 19 and 20, and Part V below.

²⁸ Memorandum for C. Boyden Gray, Counsel to the President, Office of Legal Counsel, 2 November 1992, *Opinions of the Office of Legal Counsel* 16 (1992) (preliminary print), 102 et seq., (111–119).

²⁹ E.g., Hudson, see note 19, 914.

202 years for ratification.³⁰ Although not completely free from doubt, this appears to be the stronger position. The 27th Amendment has been accepted as a valid amendment by Congress,³¹ the Archivist of the United States,³² and many scholars,³³ although not without its detractors.³⁴ The view that there is no implied time limit appears to have the upper hand at present and will be further strengthened by the 27th Amendment as a relevant precedent.³⁵

In summary, where the constitution of an international organization, properly interpreted, does not provide for a time limit for ratifying a proposed amendment, the practices of international organizations, scholarly opinion addressing this particular issue, general principles of international law that apply specifically to this issue, and the teachings from the United States constitutional experience all militate against the argument for an implied time limit.

³⁰ Office of Legal Counsel, see note 28. The memorandum specifically notes that other language in article V and other parts of the Constitution expressly provide for specific time limits for certain matters. *Ibid.*, 105–107.

³¹ See Senate Concurrent Res. 120, 102d Cong., 2d Sess. (20 May 1992); House Concurrent Res. 320, 102d Cong., 2d Sess. (20 May 1992).

³² See “Certification of Amendment to the Constitution of the United States relating to Compensation of Members of Congress”, *Federal Register* 57 (19 May 1992), 21187.

³³ See, e.g., M. Kalfus, “Time Limits on the Ratification of Constitutional Amendments Violate Article V”, *University of Chicago Law Review* 66 (1999), 437 et seq.; M. Paulsen, “A General Theory of Article V: The Constitutional Lessons of Twenty-seventh Amendment”, *Yale L. J.* 103 (1993), 677 et seq.; R. Bernstein, “The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment”, *Fordham Law Review* 61 (1992), 497 et seq.

³⁴ See, e.g., Dalzell/Beste, see note 25, 542–543.

³⁵ The special characteristics of the 27th Amendment, see note 5, and the view of Congress suggest that probably there will be no challenge as to its validity before the courts. Cf. *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994).

III. The Imposition of a Time Limit by the Proposing Organ

The constitutions of the international organizations usually do not appear to provide for a power to set a time limit for the ratification of a proposed amendment. A question that naturally arises is whether the proposing organ may impose such a limit. As far as international practice is concerned, there does not appear to be any hard evidence proving that the proposing organ of any international organization has, in fact, imposed such a time limit. Writing in 1968, Phillips stated that "no time limitations have been imposed, whether by constitutions, rules of procedure, or resolutions of adoption."³⁶ The League of Nations Committee on Amendments to the Covenants proposed in 1921 that a time limit be added to each proposed amendment.³⁷ The Assembly of the League did not adopt this advice but proposed to amend the amendment provision in the League Covenant to provide for a time limit.³⁸ The IMCO (now called IMO) also proposed to amend the amendment provision of various treaties to provide for a tacit amendment regime under which proposed amendments would go into effect unless a certain number of parties raised objections within a specified time limit, rather than arguing that the proposing organ may impose a time limit. This proposal has been successfully implemented in some treaties.³⁹

The General Assembly of the United Nations is the only international proposing organ that has done something remotely resembling the "imposition" of a time limit. In the proposing resolution, the General Assembly adopted the proposed amendments to the Charter of the United Nations relating to the enlargement of the Security Council, and then proceeded to "[c]all [] upon all Member States to ratify the above amendments ... by 1 September 1965."⁴⁰ One should be careful not to treat this as a mandatory "imposition" of a time limit. First of all, the General Assembly itself did not use mandatory language. Second, the General Assembly has no binding power except with respect to certain internal matters not relevant here. The United Nations Charter did not grant the General Assembly the power to impose a time limit; therefore,

³⁶ Phillips, see note 3, 671.

³⁷ League of Nations Committee, see note 15, 9.

³⁸ Letter from the Secretary-General, Annex 13, see note 18, 28.

³⁹ See note 17.

⁴⁰ A/RES/1991A (XVIII) of 17 December 1963.

when it took the liberty of calling upon the Member States of the United Nations to ratify the proposed amendments within a certain time it was doing nothing more than merely issuing a recommendation.⁴¹ It so happened that the proposed amendments were ratified by the necessary majority on 31 August 1965.⁴² Thus there was no occasion to test the legal effect of the General Assembly's "recommendation." On two other occasions when the General Assembly adopted proposed amendments to the United Nations Charter, it either "call[ed] upon" all members to ratify the proposed amendment "at the earliest possible date"⁴³ or "urge[d]" all members to ratify the proposed amendment "as soon as possible."⁴⁴ This history thus is too tenuous to support the conclusion that the United Nations General Assembly has imposed a time limit for the ratification of amendments to the United Nations Charter.

As far as scholarly opinion is concerned, some commentators have voiced some doubt as to the competence of the General Assembly to set a time limit.⁴⁵ Others make a distinction between making the time limit a substantive part of the proposed amendment itself and setting a time limit by a resolution of the proposing organ, either in the same resolution adopting the proposed amendment but separate from it or in a separate resolution. For example, the League of Nations Committee recommended making the time limit part of a proposed amendment.⁴⁶ Writing before the General Assembly resolution was passed in 1963, Schwelb explicitly argued that under the United Nations Charter, it is "possible for the General Assembly or the General Conference to provide, as a substantive part of a proposed amendment, that the amendment will come into force only if it is ratified in accordance with Articles 108 or 109 within a given period."⁴⁷ The basis for this argument, Schwelb asserted, is the "amending power" of the United Nations:

⁴¹ UN Charter, Arts 108 and 109. See also Dehaussy, see note 4, 1421; Karl/Mützelburg, see note 4.

⁴² See Saxena, see note 4, 173.

⁴³ A/RES/2101 (XX) of 20 December 1965.

⁴⁴ A/RES/2847 (XXVI) of 20 December 1971.

⁴⁵ Cf. Dehaussy, see note 4, 1421; text accompanying note 13; J. Robinson, "The General Review Conference", *International Organization* 8 (1954), 319 (noting two hypotheses, pro and con, with respect to the problem with the time limit); H. Kelsen, *The Law of the United Nations*, 1951, 822; Ross, see note 1, 39-40 (noting the lack of a time limit as a defect).

⁴⁶ See note 15 and the accompanying text.

⁴⁷ Schwelb, see note 4 (1955), 476.

“If the ‘amending power’ of the United Nations, *i.e.*, the General Assembly or the General Conference plus the ratifying authorities of two-thirds of the Member States, including the permanent members of the Security Council, has the capacity to amend or, for that matter, not to amend, the Charter, there is no reason why it should not have the capacity to decide upon conditional Charter amendments. In making a determination of this kind, in providing that an amendment shall come into force only if ratified within a certain reasonable time, the General Assembly, or the General Conference, would not interfere with the rights of Member States or impose upon them new obligations.”⁴⁸

In 1963 the General Assembly did not make the time limit a substantive part of the proposed amendment and therefore did not follow Schwelb’s argument. As discussed above, however, the “precedential” value of the 1963 resolution as embodying an imposition of a time limit is minimal. Schwelb’s view may also be open to two objections. First, there might be limits to the amending power. For example, Frowein forcefully argued that the normal amendment procedure cannot be employed to effect fundamental changes to the structure and function of an international organization.⁴⁹ Assuming that Frowein’s argument is correct, it still does not affect the power to specify a time limit within the text of the proposed amendment for ratification, because such a limit can hardly be said to affect the fundamental structure and function of an international organization. Secondly, it has been argued that since the effect of a binding time limit would be to stop the process of amendment, it is not possible to deduce its legal validity from an amendment itself, and that it would be more logical to view the failure to obtain the necessary ratifications within the specified time as “a condition subsequent that nullifies the underlying amendment resolution”.⁵⁰ The first part of this second argument appears to lose sight of the fact that in essence an amendment to a treaty is itself a treaty and that a treaty can contain a valid provision stating that the treaty has no effect unless it is ratified within a certain time. This provision would have the force of law invalidating the whole treaty (amendment), if after the expiration of the time specified the treaty (amendment) were ratified (if such ratifica-

⁴⁸ *Ibid.*, 476–477. Schwelb, see note 4 (1954), 90–91, expressed the same view a year earlier and repeated it 1958, see note 4 (1958), 325–326. Saxena, see note 4, 172–173, concurred in this view.

⁴⁹ Frowein, see note 4.

⁵⁰ Karl/Mützelburg, see note 4, 1170 and note 52 therein.

tion could be done).⁵¹ The second part of the argument gives the power to propose an amendment a broader scope than normally understood, in effect granting the proposing organ the power to withdraw a proposed amendment, (which is rejected below in Part IV). Accordingly, these objections do not detract from the force of Schwelb's argument.

Implicit in Schwelb's argument is the view that the constitution of an international organization is a plan of distributing power among the different players: the various organs established under the constitution and the Member States. General international law regards international organizations as creatures of limited delegated power and reserves all other powers to the Member States.⁵² Thus, when the original treaty is silent on the ratification or entry into force of a proposed amendment, the Vienna Convention on the Law of Treaties (Vienna Convention) leaves it to the parties to a subsequent treaty intended to amend the original one to specify that process.⁵³ This leads one to conclude that if a constitution does not grant the proposing organ the power to set a time limit, its power is that of a proposer, and it is up to the ratifying authorities to dispose of its proposals. This analysis favours the proposing organ's placing of a time limit for ratifying a proposed amendment in its substantive text to be considered and ratified by the Member States; such a course of action accords with the plan of power distribution, as it leaves it to the Member States to decide whether they would approve of the time limit as part of the proposed amendment. On the other hand, the imposition by the proposing organ of a time limit either in the proposing resolution setting forth the text of a proposed amendment but in a section separate from the text of the proposed amendment or in a completely separate resolution would seem to disturb the plan of power distribution as reflected in the constitution, as such a course of action would give the proposing organ a power that is not granted thereunder, that is, to limit the rights of the Member States to ratify the proposed amendment.

Moreover, the current state of international law and the special nature of the act of amending a constitution would seem also to militate

⁵¹ See text accompanying notes 61–62 below.

⁵² See, e.g., E. Lauterpacht, "Judicial Review of the Acts of International Organizations", in: L. Boisson de Chazournes/P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 92.

⁵³ See Vienna Convention, UNTS Vol. 1155 No. 18232, arts 39 and 40 (amendment) and arts 11, 24 (means of expressing consent; entry into force).

against the argument for an implied power of the proposing organ to set a time limit under the holding of *Reparation for Injuries (Advisory Opinion)*,⁵⁴ a power which no proposing organ seems to have asserted. Such an implied power is not necessary for any organ of the organization to perform its functions under the existing constitution. This removes the basis for any attempt to rely upon *Reparation*.⁵⁵

The constitutional experience of the United States indicates that as applied to the United States Constitution, the above view that a proposing organ may place a time limit in the text of the proposed amendment itself is a safe one, although there is some uncertainty as to whether it is the *only* correct one. It is generally accepted that the United States Congress may set a time limit for the ratification of proposed amendments for the reason that the Constitution grants Congress the power to specify a mode of ratification.⁵⁶ The distinction between making the time limit a substantive part of the proposed amendment and placing it somewhere else did not appear to figure importantly in the minds of the Supreme Court justices when they decided *Dillon v. Gloss*.⁵⁷ There the Court rejected the defendant's challenge against the power of Congress to set a time limit for the ratification of what had become the 18th Amendment. The time limit in question was a substantive part of the proposed amendment, but the Supreme Court might have had in mind a time limit separate from the text of the proposed amendment when it stated that "[w]hether a definite period for ratification shall be fixed ... is ... a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification."⁵⁸ For this reason, this decision has been criticised.⁵⁹

The Office of Legal Counsel did not appear to dwell upon the distinction,⁶⁰ although Walter Dellinger was of the view that "[a]n exami-

⁵⁴ ICJ Reports 1949, 174 et seq.

⁵⁵ *Ibid.*, 178-179.

⁵⁶ *Contra* Kalfus, see note 33.

⁵⁷ 256 U.S. 368 (1921).

⁵⁸ *Ibid.*, 376.

⁵⁹ R. Hajdu/B. Rosenblum, "The Process of Constitutional Amendment", *Colum. L. Rev.* 79 (1979), 106 et seq., (126 n.75).

⁶⁰ Office of Legal Counsel, see note 28, 112 n.13 ("if the absence of a time limit introduces a danger into the Article V amendment process, the solution is in Congress's hands, and is now in routine use: Congress may specify a time limit, either in the text of the amendment or the proposing resolution.").

nation of the theoretical basis of congressional power to place time limits in an amendment's text suggests that a textual time limit may stand on a firmer foundation than one merely included in the proposing resolution.⁶¹ A textual time limit, he argued, makes the proposed amendment self-destruct if enough states ratify it after the time limit expires (assuming that this can be done pursuant to the position of those opposing time limits), because when such an amendment has been ratified, the part providing that it would be inoperative unless ratified within a certain time has the force of law.⁶² Moreover, it appears that the amending power appears to be unlimited as to the content and substance of each amendment,⁶³ and therefore, a time limit placed within the text of the proposed amendment would be on safer ground. On the other hand, a time limit imposed by a separate resolution is more vulnerable to attack, although the time limit so placed may be amenable to easy change or extension by Congress and would not clutter up the text of the constitution after the proposed amendment has been ratified.

The distinction between a textual time limit and a time limit separate from the text of the proposed amendment, however, may still be alive and well in United States constitutional law. When proposing the equal rights amendment, Congress placed a time limit for ratification in the proposing resolution but separate from the text of the proposed amendment, contrary to its usual practice.⁶⁴ When that time expired, Congress attempted to extend the time limitation by a separate resolution,⁶⁵ causing a serious controversy. Although one may draw a distinction between setting a time limit in the proposing resolution and setting a new time limit in a separate resolution, one may argue that the ultimate issue is the same: what is the scope of the power of Congress. Many scholars considered the extension unconstitutional⁶⁶ and a de-

⁶¹ W. Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process", *Harv. L. Rev.* 97 (1983), 386 et seq., (406).

⁶² *Ibid.*, 409.

⁶³ Cf. text accompanying notes 48-49 above.

⁶⁴ See House Joint Res. 208, 92d Cong., 2nd Sess., 86 Stat. 1523 (1972).

⁶⁵ See House Joint Res. 638, 95th Cong., 2nd Sess., 92 Stat. 3799 (1978).

⁶⁶ E.g., G. Rees III, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension", *Tex. L. Rev.* 58 (1980), 875 et seq.

claratory judgement was obtained in a federal district court to annul it.⁶⁷ The proposed amendment was not ratified even upon the expiration of that extension and, as a result, the showdown before the Supreme Court on the legitimacy of the extension of time was avoided.⁶⁸

Even if *Dillon v. Gloss* is correct in holding that Congress may set a time limit without making it part of the proposed amendment, it might not support the argument that either the General Assembly of the United Nations or perhaps the Board of Governors of the Fund may set a time limit separate from the text of the proposed amendment itself. *Dillon* treats congressional power to do so as incidental to its power to designate the mode of ratification, an express authority under the United States Constitution. Neither the General Assembly of the United Nations nor the Board of Governors of the International Monetary Fund has the power under the respective constitutive instruments to designate the mode of ratification. The mode of ratification has already been mentioned in these instruments, neither of which gives the proposing organ any meaningful power that remotely resembles a power to specify a time limit.⁶⁹ As a result, the broad dictum in *Dillon* does not apply to a constitution of an international organization such as the International Monetary Fund and the United Nations.⁷⁰

The narrower position that Congress may place a time limit on the ratification of a proposed amendment in its substantive text itself and leave it to the states to decide whether or not to approve it also finds support in the received view that the United States Constitution is a plan of power distribution among the three branches of the federal government and the constituent states.⁷¹ As Congress's power to specify a mode of ratification does not seem to encompass setting a time limit that would derogate from the rights of the states to ratify the proposed amendment at their leisure and with due deliberation, placing the limit in a separate section of the proposing resolution or in a completely

⁶⁷ *Idaho v. Freeman*, 529 F. Supp. 1107, 1150-1153 (D. Idaho 1981), *vacated as moot sub nom. National Organization For Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982).

⁶⁸ See L. Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role", *Harv. L. Rev.* 97 (1983), 433 et seq., (437-438 and note 20 therein).

⁶⁹ See notes 8 and 9.

⁷⁰ Schwelb, see note 4 (1955), 482. But he also said this distinction might not be dispositive.

⁷¹ Cf. text accompanying notes 52-55.

separate resolution would seem to conflict with this received view of the Constitution. Indeed, one commentator argues against any time limit at all because it would disturb the balance of power between Congress and the states as ordained in the Constitution.⁷²

In summary, where the constitution of an international organization, properly interpreted, does not grant the proposing organ of that organization the power to set a time limit, it is difficult to argue that there is such an implied power. There is no solid evidence that any proposing organ has ever attempted to impose such a time limit. Nevertheless, it is reasonable to conclude that a proposing organ may place a time limit for ratifying a proposed amendment in its substantive text itself, leaving it to the Member States to decide whether or not to approve it. This finds support in the amending power in general and in an analogy to the United States constitutional experience, and does no violence to the scheme of power distribution as laid down in the constitution of an international organization.

IV. The Withdrawal of a Proposed Amendment by the Proposing Organ

Similarly, the constitutions of the international organizations do not appear to address the issue of whether the proposing organ may withdraw a proposed amendment. There is no evidence in the practices of international organizations that any proposing organ has ever attempted such a withdrawal. However, Saxena concluded, from two resolutions of the Assembly of the League of Nations, that the practice of the Assembly shows that it had the power to "cut off the possibility of further ratification, by attempting to withdraw a proposal of amendment."⁷³ One of the resolutions stated that "The Assembly begs the Council to notify the Members of the League of Nations that it is no longer necessary to continue the ratifications of the Amendments number 2 and 3 to

⁷² See Kalfus, see note 33. Kalfus' excessively broad argument against even a time limit placed in the substantive text of the proposed amendment is unwarranted and cannot be reconciled with the main basis for his position, that is, the balance of power as laid down in the Constitution. Placing a time limit in such a manner does not upset this balance but promotes the exercise of state power within this scheme of power sharing.

⁷³ Saxena, see note 4, 174.

Article 6 of the Covenant⁷⁴ The second resolution stated that “The Assembly, noting that the amendment to Article 16, paragraph 1, of the Covenant, ... has not entered into force and appears to be open to objections which seem to render its entry into force impossible, and considering accordingly that it is no longer opportune for further Members of the League to ratify the said amendment, adopts in place thereof [a new] amendment, which it recommends should be ratified.”⁷⁵ After quoting these two resolutions, Saxena proceeded to state that “[a]t present there seems to be no such possibility of eradicating the amendments once adopted by the General Body.”⁷⁶ It is not clear whether this last statement by Saxena is wholly consistent with his view that the practice of the Assembly shows that it had the *power* to “cut off the possibility of further ratification”. In any event, his view about the League Assembly’s power to cut off further ratifications is not solid. The language used in the League Assembly resolutions was not mandatory but recommendatory. It, therefore, did not indicate the exercise of a power but merely conveyed certain admonitions and wishes of the League Assembly.

At the national level, the United States Congress does not appear to have attempted to withdraw any of its proposals. The Supreme Court in *Coleman v. Miller*⁷⁷ intimated that Congress alone has the final control over the ratification process. Carried to the logical extreme, this position might support the argument that Congress need not withdraw any proposed amendments; it need only declare that certain amendments cannot be validly ratified. That case was decided without a clear majority and has been widely criticized. Commentators⁷⁸ as well as the Office of Legal Counsel⁷⁹ have argued that Congress has no role to play after enough states have ratified the proposed amendments.

Only Michael Paulsen appears to have explicitly argued that Congress has the power to withdraw or repeal a proposed amendment any-

⁷⁴ League of Nations, Records of Third Assembly, 1922, 381, quoted in Saxena, see note 4, 174–175.

⁷⁵ League of Nations, Records of Fifth Assembly, 1924, 180, quoted in Saxena, see note 4, 175.

⁷⁶ Saxena, see note 4, 175.

⁷⁷ 307 U.S. 433, 447–457 (1939).

⁷⁸ E.g., B. McAllister, “Across Two Centuries, A Founder Updates the Constitution”, *Washington Post* of 14 May 1992, A1 (quoting Laurence Tribe and Walter Dellinger).

⁷⁹ Office of Legal Counsel, see note 28, 118–126.

time before the necessary ratifications have been obtained.⁸⁰ This argument has no support in the text or history of the Constitution, but is merely based on what he called the “concurrent legislation model” for rationalizing the amendment process. This model essentially states that the amendment process is an ordinary legislative process involving “the combined, but separate, *legislative enactments* of specified super-majorities of Congress, and of state legislatures, resulting in their *concurrent approval* of an identical proposal.”⁸¹ An amendment results whenever there concurrently exists a valid, un-repealed enactment of Congress and the valid, un-repealed enactments of the requisite number of states ratifying the proposal.⁸² This will lead to the result that where there is no time limit specified by Congress, an amendment proposal can last forever. A corollary of the requirement of concurrent approval of ordinary legislative acts, Paulsen argued, is that Congress may also repeal an amendment proposal anytime before a ratifying majority is obtained.⁸³

It is hard to predict whether this theory will be accepted. One may venture to say that the basic premise, from which Paulsen derived his corollary, that the amendment process is simply an ordinary legislative process, is flawed. The Supreme Court itself has ruled that amendment proposals are not ordinary legislative enactments (which as a rule need to be presented to the President for his signature), and, as a result, the President has no role in the amendment process.⁸⁴ Paulsen’s answer was that the Supreme Court is simply wrong.⁸⁵ In his own words, the “better approach, however, would be that such congressional proposals be presented to the President.”⁸⁶ This argument is based on personal preferences as to what constitutes a “better approach”, rather than on what is constitutional. One should be slow to treat personal preferences as sufficient ground for saying that a particular viewpoint is constitutional or not. Moreover, while it is true that constitution-making shares some features of the ordinary legislative process, we should not for this reason alone say that it is therefore an ordinary legislative process. Constitution-

⁸⁰ Paulsen, see note 33, 724–732.

⁸¹ *Ibid.*, 722.

⁸² *Ibid.*

⁸³ *Ibid.*, 722–724.

⁸⁴ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). Accord, *Hawke v. Smith*, 253 U.S. 221 (1920); *National Prohibition Cases*, 253 U.S. 386 (1920).

⁸⁵ Paulsen, see note 33, 731.

⁸⁶ *Ibid.*

making (including amending a constitution) comes in many forms,⁸⁷ but generally it is not a simple affair calling for an ordinary legislative procedure. It is normally an extraordinary event in which the proposing organ is acting in its proposing mode, not law-making mode. If the proposing organ believes that a proposed amendment is no longer appropriate, it can propose a new one that would have the effect of removing the previous one. It would then be up to the ratifying authorities to decide which one to ratify.

In addition, Paulsen would have a difficult time reconciling his argument with the received view that the Constitution is a plan of power distribution, as discussed above.⁸⁸ In general, the power to withdraw a proposed amendment is a strong one and should not be usurped when it is not provided for in the Constitution. There is no basis for asserting that the proposing organ has an implied power to withdraw a proposed amendment, as such a withdrawal can hardly be said to be necessary for the performance of a function under the existing Constitution. This applies to the United States Constitution as well as to the constitution of an international organization.

In short, where the constitution of an international organization does not grant the proposing organ the power to withdraw a proposed amendment, it does not have such a power. There is no support for such a power in the practices of international organizations or general principles of international law. Nor does the United States constitutional experience lend any credence to the argument for such a power. The limited scholarly opinion to the contrary is ill founded.

V. The Lapse of a Proposed Amendment

Even if the proposing organ has no power to withdraw a proposed amendment, it may become obsolete because of a fundamental change of circumstances which defeats the very purpose that the proposed amendment is to serve or renders impossible the performance of the obligations contemplated by the proposed amendment. Such a change may afford a ground for terminating or withdrawing from a treaty then

⁸⁷ Cf., e.g., S. Yee, "The New Constitution of Bosnia and Herzegovina", *EJIL* 7 (1996), 176 et seq.

⁸⁸ See notes 52, 71–72 above.

in force. This is uncontroversial under international law.⁸⁹ By analogy, such a change of circumstances should be sufficient to moot a proposed amendment yet to take effect. It does not matter whether such a proposal is withdrawn or not, as its subsequent ratification will simply be an exercise in futility.

It is not the purpose of this paper to discuss in general what constitutes a fundamental change of circumstances; it suffices to note that the mere passage of a long time is not listed as such a change in the Vienna Convention.⁹⁰ One may ask whether a proposed amendment may nevertheless lapse simply because an extraordinarily long period of time has passed, even if there is no fundamental change of circumstances. The answer would seem to be negative. The mere passage of a long time is not a basis for terminating a treaty⁹¹ and, by analogy, should not have the effect of mooting a proposed amendment to the constitution of an international organization.

When the passage of a long time is coupled with the "discontinuance of the use of, and resort to, a treaty or acquiescence in such discontinuance",⁹² the treaty is said to have fallen into "desuetude".⁹³ Nevertheless, as pointed out in the joint dissenting opinion in *Nuclear Tests*, "Desuetude is not mentioned in the Vienna Convention on the Law of Treaties as one of the grounds for termination of treaties, and this omis-

⁸⁹ See Vienna Convention, arts. 61 ("Supervening Impossibility of Performance") and 62 ("Fundamental Change of Circumstances"). Article 62 provides in part:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

See also *ILCYB* (1966(II)), 256-260 (ILC commentaries to the draft article that became article 62).

⁹⁰ *Ibid.*

⁹¹ See A.D. McNair, *The Law of Treaties*, 1961, 516 ("That mere lapse of time does not bring about the termination of a treaty is patent upon a consideration of the ancient treaties which the United Kingdom Government and other Governments regard as being still in force").

⁹² *Ibid.*

⁹³ *Ibid.*

sion was deliberate.”⁹⁴ The ILC explained that “While ‘obsolescence’ or ‘desuetude’ may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty.”⁹⁵ Accordingly, the answer is to be found in whether there is a continuing existence of consent to be bound on the part of the parties to the treaty. It is not clear whether this position can be applied by analogy to the process of amending the constitution of an international organization, as in such a situation it is impossible to speak of consent to abandon a treaty or, more accurately, a future treaty, yet to be formed. That is, it is difficult to speak of the consent of the parties to abandon a proposed amendment when it is still open for ratification.⁹⁶ It would seem that as long as a proposed amendment is being considered or debated by some Member States, the possibility exists for the establishment of a consensual bond between the Member States with respect to that proposed amendment. As a result, desuetude probably does not have any application in this context.

Although limited, the practices of international organizations confirm that neither the mere passage of a long time nor the state of desuetude, if ever there is one, has been treated as a ground for mooting a proposed amendment. It has been noted that “there has been no instance of an amendment being killed for lack of ratification.”⁹⁷ Commentators seem to be content with this state of the law. In their view, a proposed amendment does not cease to be one because it has been proposed a long time ago or because it has been generally forgotten.⁹⁸

This view finds support in the United States constitutional experience. Although desuetude normally is a ground for not performing certain obligations, it does not seem to be a ground for mooting a proposed amendment. The debut of the 27th Amendment more than 200 years after it was proposed by Congress, and its general acceptance as a valid amendment would seem to prove this point. Walter Dellinger has the misfortune of being the most confident proponent of the view that “[a] court troubled by the existence of amendment proposed over a hundred years ago could invoke a doctrine of desuetude and declare the

⁹⁴ ICJ Reports 1974, 253 et seq., (Joint Diss. Opinion by Onyeama, Dillard, Jimenez de Arechaga and Waldock, 337, 338).

⁹⁵ *ILCYB* (1966 (II)), 237.

⁹⁶ See, e.g., Kelsen, see note 45, 822.

⁹⁷ Phillips, see note 3, 671.

⁹⁸ See text accompanying notes 19 and 20.

amendments dead. No such need, however, is likely to arise.⁹⁹ In the face of the 27th Amendment, such confident prophecy has been treated derisively.¹⁰⁰

This disregard of the doctrine of desuetude may be disquieting. The idea that a proposed amendment may be floating out there for an unlimited period of time is not attractive. However, one can take solace in the fact that this position promotes deliberation in the ratifying process and thus improves the quality of the exercise of the ratifying power by the Member States. Furthermore, even in a worst case scenario, such a state of affairs does no harm to anyone.¹⁰¹

In the light of the above analysis, one may conclude that a fundamental change of circumstances which renders a proposed amendment without object or renders impossible the performance of the obligations contemplated by the proposed amendment has the effect of mooting it. However, the mere passage of a long time does not have such an effect. The related doctrine of desuetude does not appear to apply to a proposed amendment. In any event, the state of desuetude has not been treated as sufficient to moot such a proposed amendment either in practice or by international law commentators. Furthermore, the constitutional experience of the United States also seems to reject the idea of desuetude.

VI. What Constitutes a Reasonable Time

The idea of a reasonable¹⁰² time has an impact on the issues discussed in this article. The argument that there exists an implied time limit on the

⁹⁹ Dellinger, see note 61, 425.

¹⁰⁰ Paulsen, see note 33, 694.

¹⁰¹ Since the proposed amendments floating out there have no binding effect, they do not exert any costs on society, in contrast to legally binding instruments. Thus, the arguments for the "sunsetting" of statutes, as forcefully put forward by G. Calabresi, *A Common Law for the Age of Statutes*, 1982, 59–65, do not apply to the proposed amendments.

¹⁰² The notion of reasonableness is a protean one. It is said that the notion "is both definable and undefinable, both within law and outside law". O. Corten, "The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions", *ICLQ* 48 (1999), 613 et seq., (614). I will not go into the theoretical speculations on this issue, which Corten has explored in his article.

ratification of a proposed amendment necessarily has a built-in component that such a limit must be a reasonable one. The power of a proposing organ to impose a time limit, if at all, must mean the imposition of a reasonable time limit. The argument that the proposing organ may withdraw a proposed amendment would seem to be premised on the condition that the proposing organ should wait until a reasonable time has passed before it attempts to do so. Otherwise, Member States would not have a reasonable opportunity to assess the propriety of the proposed amendment. An essential component of the desuetude argument is that an unreasonably long period of time has passed. Accordingly the determination of what constitutes a reasonable time, if applicable, is of importance.

International law does not provide for an *a priori* answer to this question of what constitutes a reasonable time, either in general or in particular with respect to the issues under discussion in this paper. The circumstances from which the question arises must inform its answer.¹⁰³ With respect to the time period for ratification of a proposed amendment to the constitution of an international organization, the key is to find the right period of time which will permit sufficient deliberation on the proposal and which will not cause undue delay, taking into account the realities of international relations, in bringing the proposed amendment to life. If this can be ascertained, all other issues become unimportant from the perspective of policy considerations. On the other hand, if the period specified is too short, deliberation will suffer and more administrative inconveniences will result if attempts are made to resurrect a proposed amendment. If the period is too long, delay and uncertainty will plague the amendment process.

It would seem that the answer to this question should be informed by two considerations. The first is the characteristics of the ratification process and the political and social conditions surrounding this process such as the number of the Member States that will participate in the ratification process, the nature of the ratification process under municipal law and the availability of technological facilities. There are some experiences and discussion on this issue. At the international level, in 1921 the League of Nations Committee on Amendments to the Covenant apparently believed two years would be reasonable.¹⁰⁴ The League

¹⁰³ Cf. *Certain Phosphate Lands in Nauru*, ICJ Reports 1992, 240 et seq., (253–255).

¹⁰⁴ League of Nations Committee, see note 15, 9.

Assembly proposed to cut it to twenty-two months.¹⁰⁵ The United Nations General Assembly urged all the members to ratify the first set of amendments within twenty-two months and it succeeded.¹⁰⁶ Such a short time is probably insufficient. Egon Schwelb was of the opinion that the 1921 statesmen were overly optimistic.¹⁰⁷ The League of Nations had little success in procuring ratifications within this time. He reported that it took three to five years to ratify even the minor amendments to the League Covenant, seven years to ratify the 1929 amendment to the Statute of the Permanent Court of International Justice, and twelve years to ratify the 1922 amendment to the Constitution of the ILO.¹⁰⁸ Subsequent surveys of the experiences of international organizations painted the same picture.¹⁰⁹

At the national level, the United States Supreme Court held in one case that the decision on how much time should be reasonable involves "an appraisal of a great variety of relevant conditions, political, social and economic" and should be left to the political branches of the government.¹¹⁰ In an earlier case, it held that seven years is a reasonable time for the ratification of a proposed amendment to the United States Constitution.¹¹¹ This has been generally accepted, and Congress has provided for a seven-year time limit several times.¹¹² An international ratification process is messier than that in the United States and could militate against adopting such a fixed limit of seven years. In sum, the consideration of the characteristics of the ratification process eliminates any illusion of arriving at a fixed time limit for all occasions. We can only hope that the relevant authorities may arrive at a reasonable time limit on a case-by-case basis.

The second, and perhaps the more important, consideration is that the nature of the proposed amendment itself should be taken into account in order to arrive at what a reasonable time is for ratification. If a proposed amendment relates to a matter which has *eternal* value such as, for example, how to promote equality between the rich and the poor,

¹⁰⁵ Letter from the Secretary-General, Annex 13, see note 18, 28.

¹⁰⁶ See notes 40–44 and the accompanying text.

¹⁰⁷ Schwelb, see note 4 (1954), 91; Saxena, see note 4, 172.

¹⁰⁸ Schwelb, *ibid.* See also note 3.

¹⁰⁹ See note 3.

¹¹⁰ *Coleman v. Miller*, 307 U.S. 433, 453–454 (1939).

¹¹¹ See *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

¹¹² See U.S. Const., amds. XVIII, § 3; XX, § 6; XXI, § 3; XXII, § 2.

then perhaps the Member States should have unlimited time to ratify it. For example, the 27th Amendment to the United States Constitution provides for a check on the self-interest of the members of Congress, a matter which, undoubtedly though unfortunately, has *eternal* value, and is certainly worth the 200 years' wait. With respect to such a proposed amendment, no time limit appears appropriate. If a proposed amendment relates to a situation that probably will exist for the next fifty years, then a period of several years may be reasonable. If a proposed amendment deals with an urgent situation, perhaps the time should be much shorter.¹¹³ Otherwise, the amendment process would be an exercise in futility.

In short, there does not appear to be a prefixed "reasonable time", if applicable, for the ratification of a proposed amendment to the constitution of an international organization. What constitutes such a reasonable time should be decided upon two considerations: (1) the characteristics of the ratification process and the political and social conditions surrounding this process, and (2) the nature of the proposed amendment itself.

VII. Conclusions

The preceding discussion has led me to the following conclusions:

First, where the constitution of an international organization, properly interpreted, does not provide for a time limit for ratifying a proposed amendment, the practices of international organizations, scholarly opinion addressing this particular issue, general principles of international law that are not specific on this issue, and the teachings from the United States constitutional experience all militate against the argument for an implied time limit.

Second, where the constitution of an international organization, properly interpreted, does not grant the proposal organ of that organization the power to set a time limit, it is difficult to argue that there is such an implied power. There is no solid evidence that any proposing organ has ever attempted to impose such a time limit. Nevertheless, it is reasonable to conclude that a proposing organ may place a time limit for ratifying a proposed amendment in its substantive text itself, leaving it

¹¹³ Cf. The British proposal for "urgent" amendments to the Fund Articles, described in text accompanying note 14.

to the Member States to decide whether or not to approve it. This finds support in the amending power in general and in an analogy to the United States constitutional experience, and does no violence to the scheme of power distribution as laid down in the constitution of an international organization.

Third, where the constitution of an international organization does not grant the proposing organ the power to withdraw a proposed amendment, it does not have such a power. There is no support for such a power in the practices of international organizations or general principles of international law. Nor does the United States constitutional experience lend any credence to the argument for such a power. The limited scholarly opinion to the contrary is ill founded.

Fourth, a fundamental change of circumstances which renders a proposed amendment without object or renders impossible the performance of the obligations contemplated by the proposed amendment has the effect of mooting it. However, the mere passage of a long time does not have such an effect. The related doctrine of desuetude does not appear to apply to a proposed amendment. In any event, the state of desuetude has not been treated as sufficient to moot such a proposed amendment either in practice or by international law commentators. Furthermore, the constitutional experience of the United States also seems to reject the idea of desuetude.

Finally, there does not appear to be a prefixed "reasonable time", if applicable, for the ratification of a proposed amendment to the constitution of an international organization. What constitutes such a reasonable time should be decided upon two considerations: (1) the characteristics of the ratification process and the political and social conditions surrounding this process, and (2) the nature of the proposed amendment itself.