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THE CASE FOR THE REPEAL OF CONGRESSIONAL LEGISLATION THAT PLACES CONDITIONS ON SOVEREIGN STATES PARTICIPATION IN INTERNATIONAL ORGANIZATIONS

by Jason D. Flemma

I. INTRODUCTION

This Note examines legislation that would automatically compel the United States to deny foreign aid to UN member states based on the number of votes cast in the UN General Assembly that contravene United States objectives all without discussion, reflection or debate.¹ The danger is that if such legislation were enacted, it would legitimize further Congressional attempts to influence the independence of sovereign states in other international organizations.

It is important to look at this pending bill because fundamental precepts of international law would be violated, United States relations with the global community would be jeopardized, the ability of international organizations (that respond to global problems such as trade, finance, intellectual property, energy, natural resources, the environment, food, crime and human rights) to function effectively would be threatened and one of the most important international organizations - the UN Organization – would be undermined.² Such legislation will effect and impact the independent operations of treaty based international organizations, and can potentially taint the independence of sovereign state members essential autonomy necessary for the effective functioning of international organizations now and in the future.

The global community in the 21st century is forming more and more international organizations.³ With this increase comes the question of the relationship of these international organizations with the states that created

¹ See H.R. 1302, 107th Cong. § 1 (2001).
² See James E. Hickey, Jr., The Source of International Legal Personality in the Twenty First Century, 2 HOFSTRA L. & POL'Y SYMP. 1, 2 (1997).
³ In 1994 there were 1,753 international organizations, by 1997 that number increased to 1,830. See Union of International Associations, Yearbook of International Organizations (1994/95 & 1996/97 ed.), available at http://www.uia.org/website.htm.
In law, the question is the relation of international law with domestic law. The proposed legislation that is the focus of this Note squarely places in issue that future relationship and the relations of the international community with one another.

Representative John Duncan Jr. (R-TN) introduced a bill in the House of Representatives on March 29, 2001 entitled, the “United Nations Voting Accountability Act” (UNVAA). This proposed legislation provides in relevant part that:

United States assistance may not be provided to a country that consistently opposed the United States position in the United Nations General Assembly during the most recent session of the General Assembly.6

The term “consistently opposed the United States position” means that if a country votes with the United States less then 25% of the time they must lose United States foreign aid funds.7 Congress has enacted legislation placing restrictions on federal funds made available to the UN Organization.8 Congress also has instructed how American representatives to the UN can vote in the General Assembly9, but never has Congress tried to directly dictate though its legislation how sovereign UN member states vote.10

This Note argues that the proposed legislation disregards fundamental precepts of international law,11 United States international treaty obligations,12 the United States Constitution13 and should also be rejected as a matter of policy.

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4 For a discussion of the relationship between international legal personalities of non state entities and the states that created them see, Hickey supra note 2. Professor Hickey states “that the source of international legal personality for non state entities in the twenty first century ought to... be derived from states provided states generally both adhere to concepts of popular sovereignty and respond adequately to the changing realities of global integration.” Id. at 3.


6 Id. at § 2(a).

7 Id. at § 2(d)(1).


9 See generally, United Nations policy on Israel and the Palestinians Act, 113 Stat. 1501A-462 (1999) (declaring that the policy of the United States [is] to promote Israel objectives and end inequality experienced by Israel in the UN).

10 The proposed legislation would use the overall percentage-of-voting coincidences set forth in the annual report submitted to the Congress by the State Department pursuant to the Foreign Relations Authorization Act (22 U.S.C. § 2414a) to determine which foreign member countries consistently oppose the United States in the UN General Assembly. See H.R. 1302, 107th Cong. § 2(1)(2001).


13 See U.S. CONST. art. VI, § 1, cl. 2.
Section II of this Note provides the text of the UNVAA, its operation, and broadly explains the reasons for the bill. Section III demonstrates that the proposed UNVAA violates the fundamental international law principles of sovereign equality and the rule of *pacta sunt servanda*.

In addition, the UNVAA disregards the *UN Charter* and the *Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations* (hereinafter, *Headquarters Agreement*). Both of these treaties are the "supreme law of the land" according to the Constitution, and both impose special obligations on the United States in its legal relationship with the UN Organization. Section IV argues the UNVAA violates the Constitution of the United States.

Section V establishes that the UNVAA, if enacted, would contravene the policy interests of the United States. This Note, in Section VI, concludes that Congress should reject the UNVAA and similar statutory attempts to control the voting of foreign sovereign states exercising their voting rights as a participant in any international Organization.

II. THE UNVAA

The text of the UNVAA provides:

(a) PROHIBITION – United States assistance may not be provided to a country that consistently opposed the United States position in the United Nations General Assembly during the most recent session of the General Assembly.

(b) CHANGE IN GOVERNMENT – If –

(1) the Secretary of State determines that, since the beginning of the most recent session of the General Assembly, there has been a fundamental change in the leadership and policies of the government of a country to which the prohibition in subsection (a) applies, and

(2) the Secretary believes that because of that change the government of that country will no longer consistently oppose the United States position in the General Assembly, the Secretary may exempt that country from that prohibition. Any such exemption shall be effective only until submission of the next report under section 406 of the Foreign Relations Authorization Act, Fiscal Year 1990 and 1991 (22 U.S.C. 2414a). The Secretary shall submit to the Congress a certification of each exemption made under this subsection. Such certification shall be accompanied by a discussion of

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16 U.S. Const. art. VI, § 2, cl. 2.
the basis for the Secretary’s determination and belief with respect to such exemption.

(c) WAIVER AUTHORITY - The Secretary of State may waive the requirement of subsection (a) if the Secretary determines and reports to the Congress that despite the United Nations voting pattern of a particular country, the provision of United States assistance to that country is necessary to promote United States foreign policy objectives.

(d) DEFINITIONS - As used in this section –

(1) the term “consistently opposed the United States position” means, in the case of a country, that the country’s votes in the United Nations General Assembly coincided with the United States position less than 25 percent of the time, using for this purpose the overall percentage-of-voting coincidences set forth in the annual report submitted to the Congress pursuant to section 406 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991;

(2) the term “most recent session of the General Assembly” means the most recently completed plenary session of the General Assembly for which overall percentages-of-voting coincidences is set forth in the most recent report submitted to the congress pursuant to section 406 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991; and

(3) the term “United States assistance” means assistance under –

(A) chapter 4 of part II of the foreign Assistance Act of 1961 (relating to the economic support fund),

(B) chapter 5 of part II of that Act (relating to international military education and training), or

(C) the “Foreign Military Financing Program” account under section 23 of the Arms Export Control Act.18

For fiscal year 2000, this bill would have automatically precluded sixteen states from receiving a combined total of $2,146,031,000 in United States foreign aid, which is 13% of the total amount of United States foreign aid allocated in 2000.19 The most affected country would have been Egypt (the second top recipient of United States foreign aid) who voted only 21.1% of the time with the United States in the UN General Assembly and received a total of $2,054,182,000 in aid.20

20 See id.
There has been a "gradual decrease in voting coincidence with the United States overall votes since the Post-Cold War high of 50.6% in 1995", which in 2000 was down to 43%. There obviously is more to United States diplomacy abroad then how countries vote in the UN General Assembly.

Representative Duncan's proposed legislation is a rather ham-fisted and inappropriate reaction to the faulty idea that the UN and similar international Organizations somehow infringe on United States sovereignty by placing obligations on member states, such as to pay dues or deploy troops for UN peacekeeping efforts. In addition, the UNVAA broadly responds to the view that the United States allocates exorbitant amounts of taxpayer funds to a UN Organization that is wasteful and cumbersome by establishing a greater voice for the United States through the UN voting mechanism.

The United States appropriates only a fraction of U.S. public money to foreign aid. In 1998 the United States allocated a total of $13,820,000,000 in foreign aid. While this amount is substantial in dollar terms, when compared to the United States total budget for fiscal year 1998, $1,721,789 trillion, foreign aid allotment is less then 1% of the budget, hardly an "exorbitant" amount. In fact, when compared to the rest of the world, the United States gives the smallest amount of foreign aid in relation to gross domestic product. This dispels the erroneous contention that Congress overspends on foreign aid.

More to the point, is the subject of United States arrears to the UN Organization. The United States actually owes the UN $1.3 billion in dues and contributions it has failed to make over the past several decades. In 1999 the Clinton Administration agreed to pay $926 million of the $1.3 billion owed to the UN Organization in three tranches if the UN meets specific United States reform conditions. This agreement is ongoing. Until that debt is paid, the

21 Id. at 2.
22 United States foreign diplomacy comprises an expansive list, spanning everything from arms control to national security to war crimes issues. See generally, The United State Department of State website, at http://www.state.gov/intemtU.
24 See id.
26 See id.
27 See Executive Office of the President of the United State, Historical Tables, Fiscal Year 2002: Budget of the United States Government 22 (U.S. Gov't Printing Office 2001)
29 See U.S. CONST. art I, § 9 cl. 7 (giving Congress the spending power).
31 See id.
33 See Neuffer, supra note 30, at A1 (explaining that, "Democratic and Republican leaders of the House International Affairs Committee agreed this week to release $542 million in back dues, but
premise that the United States should exert more influence as a matter of right over the UN Organization and member states is tenacious at best.

In regards to federal expenditure, such as foreign aid, Congress has a Constitutional responsibility to place checks on the executive branch in its foreign diplomacy and spend money in the best interest of the people.\textsuperscript{34} Congress has appropriately participated in international law in such matters as requiring annual reports on UN member voting practices, narcotics and human rights, which compels the State Department to incorporate those matters into its foreign policymaking.\textsuperscript{35} For example, under the International Financial Institutions Act\textsuperscript{36}, the United States representative to international financial institutions must vote against financial aid if the putative recipient displays a “pattern of gross violations of internationally recognized human rights.”\textsuperscript{37} Of course, Congressional statutory instructions on votes cast by United States representatives is altogether a different matter from direct Congressional coercion of the votes of other sovereign states, particularly in the UN Organization’s plenary organ, the General Assembly.

III. THE UNVAA VIOLATES FUNDAMENTAL PRECEPTS OF INTERNATIONAL LAW AND THE TREATY OBLIGATIONS OF THE UNITED STATES UNDER THE UN CHARTER AND THE UN HEADQUARTERS AGREEMENT

“Although some individuals possess infinitely more wealth and influence than others, legal equality matters as it provides the possibility of access to legal institutions, including law-making processes.”\textsuperscript{38}

The Second Circuit stated, “[i]t is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered like any other, in the appropriate

\textsuperscript{34} See U.S. CONST. art. I.
\textsuperscript{36} See 22 U.S.C.A. § 262d.
\textsuperscript{37} The section entitled “Policy goals” states:

The United States Government, in connection with its voice and vote in the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Inter-American Development Bank, the African Development Fund, the Asian Development Bank, the African Development Bank, the European Bank of Reconstruction and Development, and the International Monetary Fund, shall advance the cause of human rights.

\textit{Id.} at (a)(1).

case.” The UNVAA offers a prime opportunity to ascertain and administer international law.

A. The UNVAA Violates Fundamental Precepts of International and Treaty Law

International law and treaties derive their legitimacy from the international norms of sovereign equality and the rule of pacta sunt servanda. Treaties are key instruments of international organizations and diplomatic relationships between sovereign states.

1. The UNVAA Violates The Norm of International Law That States Are Sovereign Equals

On July 4, 1776 Congress declared, “That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved.” On that day United States Sovereignty was established. “National sovereignty is the undivided power of a people and their government within a territory and a nation draws on that power when it acts in relationship to other nations.” Clearly, Representative Duncan’s proposed legislation does not respect the independent sovereignty of fellow UN member states.

International law and relations between states are based on the principle of sovereign equality. Under sovereign equality no state may unilaterally exercise power over another sovereign state without that state’s permission. Such normative notions “are vital to the international legal system.” If Congress, who has no accountability whatsoever to sovereign member states, enacts the UNVAA, it would disregard the rights of those states within the democratic process of the UN General Assembly.

39 Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980).
40 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, introductory note (1987) (hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW). “The basic principle that makes international agreements (including the Vienna Convention on The Law of Treaties itself) binding is the principle of customary law that agreements must be observed. Indeed, codification itself assumes the essential validity of the customary law that is being codified and the authenticity of its substantive content.” Id.
41 See id.
42 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
43 See LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 17 (2d ed. 1996) (stating “[t]he Constitution did not declare or enumerate the Union’s powers to external sovereignty; it assumed them”) (citing Justice Sutherland’s opinion in United States v. Curtiss-Wright, 299 U.S. 304 (1936)).
44 United States v. Oriakhi, 57 F.3d 1290, 1296 (4th Cir. 1995).
45 See U.N. CHARTER art. 2 para. 1.
47 See id.
48 See Byers, supra note 38, at 82.
Senator Helms, in an address before the UN Security Council, stated, "[t]he Sovereignty of nations must be respected ... [and] nations derive their sovereignty — their legitimacy — from the consent of the governed." Senator Helms, in his closing paragraph, warns the UN:

If the United Nations respects the sovereign rights of the American people, and serves them as an effective tool of diplomacy, it will earn and deserve their respect and support. But a United Nations that seeks to impose its presumed authority on the American people without their consent begs for confrontation and, I want to be candid, eventual U.S. withdrawal.

The United States demands that the UN respect its sovereignty and in turn the United States must respect the sovereignty of member states that comprise international organizations. Senator Helms candidly told the Security Council that the UN must refrain from forcing authoritative directives upon the American people without their consent. In turn, the United States must refrain from inflicting authoritative directives upon the international community without their consent. President Woodrow Wilson stated it best, "we see very clearly that unless justice be done to others it will not be done to us."

Just as "the American people are one, and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. If it their government, and in that character they have no other", so to every foreign democratic state government is the government of their people for which they have no other. The arrogant attitude of the UNVAA's encroachment into state sovereignty, if enacted, would be as if the United States Congress said to the international community, 'we know best, place your sovereign interests in our hands.' Such disregard for the international community requires the repeal of the UNVAA.

2. The UNVAA Violates the Rule of Pacta Sunt Servanda

The pacta sunt servanda rule is fundamental to treaty and international law. Pacta sunt servanda, provides that a "treaty in force is ‘binding upon the parties to it and must be performed by them in good faith’ unless the treaty has been affirmatively terminated or suspended."
The United Nations Conference on the Law of Treaties, on May 22, 1969, at Vienna, adopted by a vote of 79 to 1, the Convention on the Law of Treaties (hereinafter, Law of Treaties). President Richard M. Nixon submitted the Law of Treaties to the Senate for ratification on November 21, 1971; however, the Senate has not yet done so. Even though the Law of Treaties has not been ratified, in the State Department's Letter of Submittal to the President it was stated, "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice."

The United States Judiciary has recognized and accepted certain provisions of the Law of Treaties, specifically the rule of pacta sunt servanda, as authoritative. The Restatement (Third) on the Foreign Relations Law of the United States, in general, considers the Law of Treaties as "constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention." The Restatement continued by declaring the doctrine of pacta sunt servanda as fundamentally essential to international law and agreements. The Second Circuit declared that, "[a]ccording to a widespread legal conviction of the international community, the Vienna Convention is largely a restatement of customary rules, 'binding States regardless of whether they are parties to the Convention.'

Even without adopting the Vienna Convention on the Law of Treaties, the United States has ratified the Charter of the United Nations, which works to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Accordingly, the United States has pledged to honor international agreements.

In addition, international law resolutions adopted by universal international organizations, such as the UN, "if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight." The Law of Treaties, which was adopted by a vote of 79 to 1, is codified customary law that

58 See id.
62 See id. at § 321, cmt. A.
65 See U.N. CHARTER, pmbl.
66 RESTATEMENT OF FOREIGN RELATIONS LAW § 103 cmt. (c)(1987).

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carries with it great authoritative weight in spite of the fact that the United States did not formally ratify it.\(^6\)

Therefore, it can be maintained that the fundamental principle of *pacta sunt servanda* is codified customary international law adhered to by the United States and the international community.\(^6\) The UNVAA breaches two United States treaties\(^6\) and thus violates the *pacta sunt servanda* rule and disgraces the good faith of the United States.\(^7\)

**B. The UNVAA Violates the United Nations Charter**

The *UN Charter* came into force on October 24, 1945,\(^7\) and created the United Nations and its organs including the General Assembly, which is the object of attack by the UNVAA.\(^7\) The UN Organization is determined “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”\(^7\) “The Organization is based on the principle of the sovereign equality of all its members.”\(^7\) An important aspect of that sovereign equality is the freedom of all states to deliberate, recommend and independently vote within the General Assembly.\(^7\) Therefore, member states ability to cast their vote in the General Assembly free from outside conditions is paramount to realizing the goal of the UN as “a centre for harmonizing the actions of nations in the attainment of ... common ends.”\(^7\)

The objective test of the UNVAA disregards United States obligations under the *UN Charter*’s democratic principles of respect for the rule of law and sovereign equality of states.\(^7\) While virtually every state has accepted limitations on their liberty of actions by international agreements,\(^7\) fundamental

\(^{67}\) See id.

\(^{68}\) See id. at § 321, comt. A. “[T]he fact remains that the process of progressive development and codification of international law through the activities of the International Law Commission and the United Nations General Assembly is bound to continue.” See SINCLAIR, supra note 55, at 258.

\(^{69}\) See infra Part III. B-C.

\(^{70}\) See SINCLAIR, supra note 55, at 119 (stating “[t]he principle of good faith underlies the most fundamental of all the norms of treaty law – namely, the rule *pacta sunt servanda*.”).


\(^{72}\) See U.N. CHARTER pmbl.

\(^{73}\) Id.

\(^{74}\) Id. at art. 2, para. 1.

\(^{75}\) See Stephan Zamora, *Voting in International Economic Organizations*, 74 A.J.I.L. 566, 566 (1980) (stating “[t]he importance of decisionmaking procedures to successful international organizations can be seen by the amount of attention paid by governments to the adoption of appropriate rules of voting procedure for new organizations. Ever since international organizations began taking decisions by majority vote, conflicts have arisen over decisionmaking controls.”).

\(^{76}\) U.N. CHARTER art. 1, para. 4.

\(^{77}\) See H.R. 1302, 107th Cong. § 2(d)(1)(2001).

liberties such as the sovereign equality of states are not to be compromised.\textsuperscript{79} To do so would invite a proliferation of retaliatory measures by member states.\textsuperscript{80}

The General Assembly is the plenary organ of the UN Organization,\textsuperscript{81} within which independent voting allows each state to democratically voice its sovereign authority and it is this right Representative Duncan's legislation would curtail.\textsuperscript{82} "Sovereign equality ... provides states with equal votes in many international organizations and ensures them the equal benefit of essential privileges."\textsuperscript{83} The United State, which celebrates democracy and equality, instead of curbing should encourage equal voting rights.

Although this Note deals with UN voting practices, the Supreme Courts discussion of a United States citizen's right to vote in presidential elections in \textit{Bush v. Gore}\textsuperscript{84} is useful to our analysis of how equal voting rights within international organizations is fundamental to state sovereignty.\textsuperscript{85} The Court stated, "[w]hen the state legislature vests the right to vote for president in its peoples, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."\textsuperscript{86} Votes are to be equally valued and freely cast and voters equally respected.\textsuperscript{87}

Similarly, the states that created the UN Organization vested the right to vote in the General Assemble in each of its members equally.\textsuperscript{88} Once established, this voting system adopted by the UN Organization is to be uniformly respected. Conditions placed on the one-nation, one-vote General Assembly system\textsuperscript{89} intrudes on state autonomy and would disenfranchise member states.\textsuperscript{90} Consequently, the UNVAA should be discarded for violating

\textit{reprinted in note following 49 U.S.C.A. \S\ 40105. "The Warsaw Convention sets forth uniform rules of liability for loss, damage, or delay of international shipments by air, and embodies a tradeoff between the interests of carriers and shippers." Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 428 (2d Cir. 2001).}
\textsuperscript{80} See infra Part V.A.
\textsuperscript{81} See UN CHARTER art. 9, para. 1 (stating, "[t]he General Assembly shall consist of all the Members of the United Nations").
\textsuperscript{83} See Byers, \textit{supra} note 38, at 82 (stating that one of those essential privileges is "diplomatic immunity for their representatives abroad").
\textsuperscript{84} 531 U.S. 98 (2000).
\textsuperscript{85} See id. at 104.
\textsuperscript{86} Id.
\textsuperscript{87} See id.
\textsuperscript{88} See U.N. CHARTER art. 18, para. 1.
\textsuperscript{89} See Zamora, \textit{supra} note 75, at 590.
\textsuperscript{90} See Bush, 531 U.S. at 104; see also, Byers, \textit{supra} note 38, at 81 (stating, "[t]he struggle to achieve and maintain equal rights for all is fundamental to this history of many national legal systems"). Professor Byers goes on to state "[p]rotection of equality in U.S. law is found in the fifth and fourteenth amendments of the Constitution, which served as a foundation for twentieth century civil rights legislation." \textit{Id.} at n.3 (citing \textit{MARY ANN HARRELL, EQUAL JUSTICE UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE} (4th ed. 1982)).
the UN Charter's respect for the rule of law and the fundamental right of a state to exercise its sovereign equality through its vote in the General Assembly.91

C. The UNVAA Violates the Headquarters Agreement

The United States entered into the Headquarters Agreement with the UN Organization, and was unanimously approved by the Senate, which makes it a treaty in force in the United States.92 As a result of Congresses ratification of this treaty93 the United States is obligated to follow its provisions.94 The Headquarters Agreement established the UN Organization's permanent headquarters in New York City.95

The proposed legislation violates the Headquarters Agreement by unilaterally imposing conditions on member states votes in the General Assembly located at UN headquarters96.

Article III, § 8 of the Headquarters Agreement states,

The United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district.97

The UNVAA violates article IX, § 27 of the Headquarters Agreement, which states, "[t]his agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfill its purposes."98

The UN Organization thus has the power to create an environment, within its headquarters, conducive of conducting its affairs.99 Independent voting in the General Assembly is an integral part of the UN Organization's legal personality. Making United States foreign aid contingent on member states voting practices in the General Assembly would severely impair the UN's ability to perform its functions and duties in accordance with the UN Charter. "[S]tates impliedly conferred on the [UN] organization the international legal personality needed to carry out the functions assigned to it consistent with the purposes and principles specified in the legal instrument creating it."100 When

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91 See U.N. CHARTER art. 2, para. 1.
94 See U.S. CONST. art VI, § 1, cl. 2.
98 Id. at art. IX, § 27.
99 See id.
100 See Hickey, supra note 2, at 5.
resolutions and initiatives are voted on by the General Assembly located in UN headquarters, article 18 of the UN Charter accords each member state one vote. The equality and sovereignty maintained by the one-nation, one-vote system in the UN’s plenary organ cannot be compromised.

The congressional resolution that authorized the President to bring into effect the Headquarters Agreement provided in relevant part:

1. The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United States and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Congress was clear in enacting the Headquarters Agreement, that sovereign members would have privileges and immunities within America’s borders to independently carry out official UN duties.

By placing conditions on member states and their representatives who vote in the General Assembly, the UNVAA violates the privileges and immunities states maintain at UN headquarters by frustrating those representatives independence within the General Assembly. Accordingly, this bill should be rejected.

IV. THE UNVAA VIOLATES THE UNITED STATES CONSTITUTION

As a result of Congresses treaty undertakings, the United States is legally bound to support and advance the purposes and principles in the UN Charter and the Headquarters Agreement. The UNVAA disregards United States treaty obligations and consequently circumvents United States Domestic law.

The United States Constitution makes reference to the Law of Nations in article I, § 8, “To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.” International law is
given effect by the judiciary, is respected by the executive and legislative branches, and is a part of the law of the United States. "Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which in its relations with foreign states, is bound both to observe and construe the accepted norms of international law." Article VI, § 1, cl. 2 of the United States Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." It is undisputed that treaties are the supreme law of the land. Congress, in implementing the United Nations Charter and the Headquarters Agreement into law, has obliged the United States to uphold the rules and policies of these two treaties. However, treaties can be superceded by a subsequent act of Congress, which is referred to as the later-in-time rule. This rule should not apply to the UNVAA, because of "[t]he long standing and well-established position of the Mission at the United Nations, sustained by international agreements."

The United States District Court for the Southern District of New York, being wise to the fact that the later-in-time rule should not be implemented to disregard the United States obligations under the UN Charter and the Headquarters Agreement, denied Congresses attempt to usurp those treaties when Congress passed the Anti-terrorism Act of 1987. The Anti-terrorism Acts objective was to ban the Palestine Liberation Organization (PLO) from operating in the United States. The Act would have forced the PLO to give up its Permanent Observer status at UN headquarters in New York. The court, in finding the Anti-terrorism Act of 1987 did not obstruct the PLO's Permanent Observer status at UN headquarters, stated:

The proposed legislation would effectively require the United States to deny PLO observers the entry, transit, and residence

106 See Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) (discussing the proposition that customary international law is federal law); see also, The Paquete Habana, 175 U.S. 678, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).
109 Filartiga, 630 F.2d at 877.
110 U.S. CONST. art. VI, § 1, cl. 2.
111 See Holland, 252 U.S. at 432.
114 Id. at 1465.
115 See id. at 1464.
116 See id. at 1460.
117 See id. at 1466.
rights required by sections 11-13 [of the Headquarters Agreement] and, as a later enacted statute, would supersede the Headquarters Agreement in this regard as a matter of domestic law. The proposed legislation would also ... break a 40-year practice regarding observer missions by nations hosting U.N. bodies and could legitimately be viewed as inconsistent with our responsibilities under sections 11-13 of the United Nations Headquarters Agreement.122

The court continued with a discussion of the later-in-time rule for when a statute is passed subsequent to a treaty.123 The court explained

Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. Wherever possible, both are to be given effect. Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedent.124

As previously stated, a treaty can be superseded by a subsequent act of Congress.125 However, the Supreme Court has expressed concerns in overriding treaties.126 In the Head Money Case,127 the Supreme Court, using the later-in-time rule to overturn a treaty with a number of European counties, warned:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the government which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.128

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122 Id.
123 See id.
124 Id. at 1463.
125 Whitney v. Robertson, 124 U.S. 190, 194 (1888) (stating: By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no supreme efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing).
126 Head Money Case, 112 U.S. 580, 589 (1884).
127 See id.
128 Id.
Whenever possible, statutes should be construed as to not override treaty obligations.\(^{129}\)

Congress should have an extremely credible reason for passing legislation that directly contradicts a treaty, especially multilateral treaties such as the \textit{UN Charter} and the \textit{Headquarters Agreement}.\(^{130}\) Treaties are the swiftest and easiest way to effect global cooperative decisions.\(^{131}\) We are at a point in history where every new day brings an increase to the myriad of pressing global problems that require global debate and resolution.\(^{132}\) As a result, the United States should not adopt an approach to international agreements that would suppress amicable solutions to global issues. The reasons for the UNVAA are flawed\(^{133}\) and do not warrant breaching the United States multilateral obligations to the UN Organization.

In addition, nowhere in the Constitution does it state or infer that Congress or the Executive has the power to place conditions on sovereign state representatives. "[A]ll governmental authority derives from the Constitution; every action by President or Congress, by any official or institution of government, must find justification and show authority in the Constitution."\(^{134}\) Thus, United States representatives who conduct diplomatic relations with other nations derive their authority from the Constitution.\(^{135}\)

Article II of the Constitution grants the President the authority "with the Advice and Consent of the Senate" to "appoint Ambassadors, other public Ministers and Consuls."\(^{136}\) It can be inferred that through Article II the President

\(^{129}\) See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). There is a canon of construction, expressed by the Supreme Court, which says, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." \textit{Id.} This cannon is commonly referred to as the "Charming Betsy canon." \textit{Id.}

\(^{130}\) See \textit{HENKIN, supra} note 43, at 210-11. Some have concluded that the later-in-time doctrine should not apply to multilateral treaties. \textit{See Szasz, The Palestine Liberation Organization Mission Controversy, 82 A.S.I.L. Proceedings} 534, 538 (1988) (stating: While it is a very old and perhaps outmoded principle of statutory interpretation, the Supreme Court has held that the supremacy clause of the U.S. Constitution, article VI, section 2, places laws and treaties on the same level and thus allows the later in time to prevail, I cannot agree with my learned predecessor that this constitutes black-letter law. The later-in-time rule depends on a series of court decisions which . . . are decisions that bear reexamination, particularly as to their application to multilateral treaties such as the UN Charter and to agreements made pursuant to the Charter).


\(^{132}\) For example, President Bush, in his 2002 State of the Union Address, proclaimed that: America is working with Russia and China and India, in ways we have never before, to achieve peace and prosperity. In every region, free markets and free trade and free societies are proving their power to lift lives. Together with friends and allies from Europe to Asia, and Africa to Latin America, we will demonstrate that the force of terror cannot stop the momentum of freedom.


\(^{134}\) \textit{HENKIN, supra} note 43, at 25 (citing \textit{Ex parte Quirin}, 317 U.S. 1, 25 (1942)).

\(^{135}\) \textit{See id.}

\(^{136}\) U.S. CONST. art. II, § 2 cl. 2.
is "able to decide . . . the contents of communications to his ambassadors and to foreign governments, including the attitudes and intentions of the United States that constitute U.S. foreign policy."

However, the President does not appoint the UN representatives of foreign states and the Senate has no opportunity to offer consent. Consequently, the United States has no authority over sovereign state representatives to any international organization, and thus wields no direct influence on how member states "should" vote within the General Assembly.

Congress has been known "to attach strings to its expenditures, to coerce recipients into conduct which it might not be able constitutionally to compel if it sought to do so by direct regulation." For example, an Act, entitled "United States Participation in the United Nations if Israel is Illegally Expelled", declared that the United States would "reduce its annual assessed contribution to the United Nations ... by 8.34 percent for each month" that Israel is banned from participating in the UN Organization. While Congress may have authority to condition federal funds to international organizations that the United States is a party to, Congress, with no accountability to sovereign states, cannot place conditions on their participation in international organizations. However, Congress has no authority to trespass upon how sovereign foreign governments choose to vote in international organizations. To do so would be a perversion of the democratic ideals the UN Organization and United States uphold and encourage throughout the world.

Congress also has the power to regulate extraterritorially with respect to United States citizens who reside outside of the United States. However, Congress has never attempted to directly place conditions on sovereign state citizens. If the United States expects foreign nations to respect our sovereignty, then we should respect theirs and honor the principles found in the UN Charter, the Headquarters Agreement, The Law of Treaties and the Constitution. The UNVAA flagrantly violates United States domestic law. For these reasons the UNVAA should be repealed.

V. THE UNVAA SHOULD BE REJECTED AS A MATTER OF POLICY

Today, international diplomacy has "a substantive goal, the promotion of democracy." "United Nations-based values enjoy worldwide acceptance and can provide that common understanding, for societies and markets alike.

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137 HENKIN, supra note 43, at 38.
140 See U.N. CHARTER; see also THE DECLARATION OF INDEPENDENCE (U.S. 1776).
143 See Watson, supra note 35, at 852 (emphasis in original).
They are the cornerstone of our interdependent world and the foundation of the global economy.\textsuperscript{144}

The United States is comprised of 290 million citizens who place their trust in elected officials to represent their interests.\textsuperscript{145} "But the international community is a tiny one, comprising fewer than two hundred states, and when it addresses major issues that will affect most member's for a long period of time, that community can still afford the luxury of counting every member's vote."\textsuperscript{146}

The ability to cast a vote free from conditions is paramount to the democratic process the United States and the United Nations promote.\textsuperscript{147} Legislation such as the UNVAA, by usurping United States treaty obligations, invites ramifications and disdain from the international community.\textsuperscript{148}

\textbf{A. The UNVAA Would Incite Retaliation From Member States}

Retaliation would most likely come in the form of reciprocity from any or all of the 185 Governments that comprise the UN Organization.\textsuperscript{149} The concept of reciprocity governs much of international law in the area of diplomatic privileges and immunities.\textsuperscript{150} The UNVAA would prompt other states, if sovereign equality is to be preserved, to enact similar domestic legislation placing conditions upon United States General Assembly voting. The United States Supreme Court in interpreting a provision of a treaty stated, "[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intentions of the parties to secure equality and reciprocity between them."\textsuperscript{151} The court went on to define treaties as "contracts between independent nations."\textsuperscript{152} These agreements, if broken, will lead other states to breach their obligations owed to the United States, equality would be threatened and global stability endangered.\textsuperscript{153}

Retaliation between states probably would intensify.\textsuperscript{154} Senator Jesse Helms provides an example in his address before the UN on the subject of

\begin{thebibliography}{9}
\bibitem{Ann} Secretary General Kofi Annan, Address Before the United States Chamber of Commerce (June 10, 1999).
\bibitem{Watson} See Watson \textit{supra} note 35, at 830.
\bibitem{Reynolds} See Reynolds v. Sims, 377 U.S. 533, 555 (1964) (stating "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").
\bibitem{Boos} See Boos v. Waller, 485 U.S. 312, 323 (1988).
\bibitem{Geoff} Geoffroy v. Riggs, 133 U.S. 258, 271 (1890). The treaty the Supreme Court interpreted was between the United States and France, entered into on May 23, 1853, to restrict the ownership of real estate in the Territories of the American Citizens. See id.
\bibitem{Vagts2} Id.
\bibitem{See} See Vagts \textit{supra} note 148, at 313.
\end{thebibliography}
United States arrears. He stated that if the UN did not institute reform according to United States wishes:

The alternative would have been to continue to let the U.S.-UN relationship spiral out of control. You [the UN Security Council] would have taken retaliatory measures, such as revoking America's vote in the General Assembly. Congress would likely have responded with retaliatory measures against the UN. And the end result, I believe, would have been a breach of U.S.-UN relations that would have served the interests of no one.

Similarly, the UNVAA would invite reciprocal disregard for international law and democracy that would benefit no one. Additionally, America’s participation in what Secretary-General Kofi Annan calls “the ‘soft infrastructure’ of the global economy, ensuring the free flow of goods, services, finance and ideas” could be complicated by states who rally together against the United States violation. UN Secretary-General Kofi Annan stated, without democratic values such as “rules governing contracts and property rights; without confidence based on the rule of law; without trust and transparency – there could be no well-functioning markets.”

Specifically, the United Nations has negotiated international agreements that allow ships to navigate the seas and international straits, authorize airplanes to fly and land across borders and allow mail and related goods to flow throughout the world. In addition, UN agreements regulate trademarks, patents and international telecommunications. While these UN labors seldom make news and are not blatantly obvious, one would know the minute they were missing. The UNVAA’s disregard for international law could start a reciprocity domino effect within the international community that could hinder America’s participation in and the stability of this “soft infrastructure of the global economy”.

The UNVAA could also create internal conflict and retaliation. Effective United States foreign diplomacy requires the government to speak with one voice. The UNVAA could have Congress claiming foreign aid is prohibited to State A because of the UN voting mechanism, while the

155 See id.
156 Id.
158 Id.
159 See id.
160 See id.
161 See id.
162 Id.
163 See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting the Senate Committee on Foreign Relations, February 15, 1816, stating, “[t]he nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch”)
Executive Branch has promised State A foreign aid to further strategic diplomatic relations. For example, a few days after Senator Helms speech before the UN, the then Secretary of State Madeleine K. Albright spoke before the UN Security Council. Secretary Albright, discussing Senator Helms’ speech, stated:

Chairman Helms is a man of conviction and strong advocate of a distinct point of view about the United Nations and America’s relationship to it.

So let me be clear: only the President and the Executive Branch can speak for the United States. Today, on behalf of the President, let me say that the Administration, and I believe most Americans see our role in the world, and our relationship to this Organization, quite differently than does Senator Helms.

On this occasion, the United States spoke with different voices, “thereby diluting or even obscuring American intentions and American influence abroad.” Similarly, the UNVAA could cause the United States to speak with divergent voices, which would damage United States credibility and influence in global community.

B. The UNVAA Would Create Uncertainty in International Law

“International law is law like other law, promoting order, guiding, restraining, regulating behavior.” The greatest challenge for international law is enforcing its norms against member states. Consent of the international community through treaties offers an answer to achieving this goal. The UNVAA could place the international communities commitment to treaty obligations in doubt by sparking a host of reciprocal statutory initiatives by other states violating their treaty obligations to offset the United States intrusion on their sovereignty.

The Restatement (Third) of the Foreign Relations Law of The United States argues:

A principal weakness perceived in international law is the lack of effective police authority to enforce it. That is indeed a weakness, but the criticism reflects misplaced emphasis. Effective police authority deters violations of law, but there are other inducements to compliance. In the international system, law is observed because of a combination
of forces, including the unarticulated recognition by states generally of the need for order, and of their common interest in maintaining particular norms and standards, as well as every state's desire to avoid the consequences of violation, including damage to its 'credit' and the particular reactions by the victim of a violation.\textsuperscript{174}

The UNVAA would damage United States "credit", invites negative reciprocity from member states and the general need for harmony among states.\textsuperscript{175} Equally damaging, the UNVAA would stigmatize UN precepts and standards, particularly the one-nation, one-vote General Assembly system.

In the private sector "[b]usinesspeople honor their contracts for many of the same reasons as states -- they may fear retaliation, or more commonly, they do not wish to jeopardize a mutually beneficial long-term relationship for short-term gain."\textsuperscript{176} Similarly, states need to maintain order by honoring their treaty obligations to facilitate constructive steadfast relationships.\textsuperscript{177}

The terms, good faith and honor have been used to describe the binding effect of treaties.\textsuperscript{178} The Third Circuit defined "good faith" as, "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."\textsuperscript{179}

While international law has evolved over time, it still is "derived to some extent from principles of morality."\textsuperscript{180} President Woodrow Wilson would agree.\textsuperscript{181} In President Wilson's \textit{Fourteen Point Speech}, which was his vision of what needed to transpire in order to affect a lasting peace in the wake of World War II, argues that morality, good faith and ethics have to be the foundation for the foreign diplomacy of a democratic society.\textsuperscript{182} These values continue to be a foundation of treaty obligations, which are vital to beneficial and stable

\textsuperscript{174} Id.
\textsuperscript{175} See id.
\textsuperscript{176} Watson, supra note 35, at 795.
\textsuperscript{178} See Vagts, supra note 148, at 324.
\textsuperscript{179} General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 325 n.16 (3d Cir. 2001) (quoting 28 U.S.C. § 1221(e)).
\textsuperscript{180} Bradley, supra note 112, at 512.
\textsuperscript{181} See Woodrow Wilson, Fourteen Points Speech (Jan. 8, 1918), \textit{reprinted in Arthur S. Link et al., eds., The Papers of Woodrow Wilson} (vol. 45 1984).
\textsuperscript{182} See id.
diplomatic and economic relationships. States have “a right to expect and require its stipulations to be kept with scrupulous good faith.”

The UNVAA is blatantly unethical in its disregard for international law and invades the sovereignty of General Assembly member voters. Consequently, the UNVAA would undermine international law, and, at best, would put the honor and good faith of the United States on uncertain ground.

C. The ‘Exemption’ and ‘Waiver’ Provisions of the UNVAA

The proposed legislation contravenes United States treaty obligations even though the UNVAA allows the Secretary of State to exempt countries or waive the requirement of voting accountability. The UNVAA provides that after determining a fundamental change has taken place within a UN member state that has been prohibited from receiving federal aid because of their voting practices, and this change will cause the country to no longer oppose the United States position in the UN General Assembly, the Secretary of State may exempt that state allowing it to receive foreign aid. This exemption only lasts until the next report on Voting Practices in the United Nations is released by the State Department pursuant to 22 U.S.C. 2414a. This “exemption” does not change the fact that the UNVAA does not respect the equal rights of sovereign members within the UN General Assembly.

In addition, “[s]ecret in respect of information gathered by them [the State Department] may be highly necessary, and the premature disclosure of it productive of harmful results.” For national security reasons the Secretary of State may not be able to reveal the reasons for exempting a foreign state. The same logic can be applied to the “waiver authority.”

The “waiver authority” delineated in the UNVAA would allow the Secretary of State to waive the voting accountability requirement if it was necessary in fulfilling United States diplomacy objectives. As previously stated, the Secretary of State, in the interest of national security, may not be able to disclose the reasoning behind the waving of voting accountability for a particular foreign member. More material is the fact that if the UNVAA is

183 See O. Lee Reed, Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study, 38 AM. BUS. L. J. 441, 442 (2001); see also, SINCLAIR, supra note 55, at 84 (stating: [i]the [Vienna Convention] Commission was also of the opinion that a means should be found in the ultimate text of a convention on the law of treaties to emphasise the fundamental nature of the obligation to perform treaties in good faith . . . be given stress in the preamble to the convention just as it is already stressed in the Preamble to the [UN] Charter.).
184 See Vagts, supra note 148, at 334.
185 See H.R. 1302, 107th Cong. § 2(b)(2001).
186 See id. at § 2(c).
187 See id. at § 2(b).
188 See supra Part III. C. 1.
190 See id.
192 Id.
enacted and even if the Secretary of State waived the objective voting accountability test for every UN member state, the UNVAA would still be law and this violates US-UN treaty obligations and domestic law.\textsuperscript{194}

VI. CONCLUSION

This Note has explored the inappropriateness of enacting the UNVAA on the grounds that it violates fundamental precepts of international and treaty law, conflicts with the \textit{UN Charter} and the \textit{Headquarters Agreement}, disregards the Constitution and amounts to dangerous and bad policy.

The UNVAA would have a negative impact on the UN Organization, member states, the United States and democratic diplomacy at a time when there is increased interdependence among nations and increased discourse of global issues.\textsuperscript{195} The United States should not degrade its honor, good faith and democratic ideals with legislation such as the UNVAA. As the Supreme Court stated, "[a]s a government, the United States is invested with all the attributes of sovereignty. As it has the charter of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. \textit{We should hesitate long before limiting or embarrassing such powers.}"\textsuperscript{196}

"[T] hose in the United States or elsewhere 'who believe we can do without the UN, or impose our will upon it misread history and misunderstand the future."

Former President William Jefferson Clinton stated, "[t]he great question of this new century is whether the age of interdependence is going to be good or bad for humanity. The answer depends upon ... whether we all can develop a level of consciousness high enough to understand our obligations and responsibilities to each other."\textsuperscript{197}

With increased globalization and the necessary rise in the number and breath of international organizations created to deal with essential global problems, it is vital that the respect, integrity and independence of those organizations not be undermined, coerced and inappropriately devoid.\textsuperscript{198} Rejection of the UNVAA will help to ensure the right of independent sovereign states to cast their votes and freely participate in all international organizations.

\textsuperscript{195} See Hickey, \textit{supra} note 2, at 18.
\textsuperscript{196} Mackenzie v. Hare, 239 U.S. 299, 311 (1915) (cited in \textit{Curtiss-Wright Express Corp.}, 299 U.S. at 322) (emphasis added).
\textsuperscript{199} See Hickey, \textit{supra} note 2, at 18.
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