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# Religion and the Public Defender

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INTERNATIONAL AGREEMENTS: UNITED NATIONS HEADQUARTERS AGREEMENT—*Dispute Over the United States' Denial of a Visa to Yasir Arafat*

On November 26, 1988, the United States denied a visa to Yasir Arafat, Chairman of the Executive Committee of the Palestine Liberation Organization (PLO), when he sought to enter the United States to attend the forty-third session of the United Nations (UN) in New York. The denial rekindled a forty-year-old dispute between the United States and the UN over the extent to which the United States may, under the terms of the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations (Headquarters Agreement), restrict entry to persons seeking to enter the country for UN business.

The Headquarters Agreement, enacted in 1947,[1] establishes the boundaries of the UN "headquarters district" in New York City and allocates to the United States and the UN spheres of authority over this district.[2] United States federal, state, and local laws apply within the district except in the areas of UN control specified in the Headquarters Agreement.[3] The UN may promulgate regulations operative

1. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, G.A. Res. 169(II), U.N. Doc. A/519, at 91 (1947), 11 U.N.T.S. 11 (1947), 61 Stat. 756, T.I.A.S. No. 1676, *authorized by* S.J. Res. 144, 80th Cong., 1st Sess., Pub. L. No. 80-357, *set out in* 22 U.S.C. § 287 note (1982) [hereinafter Headquarters Agreement]. Negotiations between the U.S. and the UN concerning a Permanent Headquarters Agreement began in 1946. The resulting Agreement was signed by UN Secretary-General Trygve Lie and U.S. Secretary of State George Marshall on June 26, 1947. *See* XVII DEPT. OF ST. BULL. No. 418, at 27 (1947). Marshall passed the Agreement on to President Truman, who transmitted it to Congress for final approval. *See* Letter from the Sec. of State to President Truman (June 30, 1947), *reprinted in* 1 FOREIGN REL. L. U.S., at 43 (1947); The President's Letter of Transmittal, *reprinted in* XVII DEPT. OF ST. BULL. No. 419, at 78 (1947). The State Department then drafted a joint resolution containing the text of the Headquarters Agreement and additional provisions authorizing the President to bring it into effect. An amendment to the resolution was added by the Senate and revised by the House of Representatives. *See* Editorial Note, 1 FOREIGN REL. L. U.S. 45 (1947); *see also infra* notes 11–14 and accompanying text. The Headquarters Agreement was then passed by the U.S. as Senate Joint Resolution 144, Public Law 80-357, on August 4, 1947. On October 31, 1947, the UN General Assembly approved the Agreement, but the official text was that of the Headquarters Agreement as signed by Lie and Marshall, without the additional provisions of Public Law 80-357. *See* G.A. Res. 169(II), 11 U.N.T.S. 11, *supra*. The Headquarters Agreement was finally brought into effect by an exchange of notes between UN Secretary-General Trygve Lie and Warren R. Austin, the U.S. representative to the UN, on November 21, 1947. For the texts of the notes see 11 U.N.T.S. 11, 39–40 (1947). Ambassador Austin's note stated that the U.S. approved the Agreement "subject to the provisions of Public Law 357." *Id.* at 40. *See also infra* note 17 and accompanying text.

2. The Headquarters Agreement describes the boundaries of the headquarters district as the area of Manhattan bounded by Franklin D. Roosevelt Drive to the east, First Avenue to the west, East Forty-Eighth Street to the north, and East Forty-Second Street to the south, along with an easement over Roosevelt Drive. Headquarters Agreement, *supra* note 1, Annex 1.

3. *Id.* § 7(a), (b).

within the headquarters district to provide for the execution of UN functions.[4] If any United States federal, state, or local law is inconsistent with these regulations, the UN regulations are to prevail.[5] Any dispute between the UN and the United States over whether a particular UN regulation is authorized by the Headquarters Agreement, or whether a particular United States law is inconsistent with an authorized UN regulation, is to be resolved by an arbitration panel pursuant to Section 21 of the Headquarters Agreement.[6]

Four sections of the Headquarters Agreement pertain specifically to the right of transit to and from the headquarters district for individuals engaged in official UN business. Section 11 identifies five categories of UN affiliates to whom the United States must grant entry.[7] Section 12 provides that Section 11 privileges of entry apply without respect to the state of relations between the United States and the governments of UN affiliates enjoying entry privileges.[8] Section 13 provides that United States immigration laws shall not interfere with Section 11 entry rights and that only the UN may control entry into the headquarters district.[9] Section 13 also affirms the United States' right to

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4. *Id.* § 8. The UN established, for example, regulations regarding its social security system, the practice of professional occupations within the headquarters district, and the hours of operation for services, facilities, and retail establishments within the headquarters district. *See* UN SECRETARIAT, LEGAL DEPT., HANDBOOK ON THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS 558–61, U.N. Doc. ST/LEG/3 (1952), *as cited in* WHITEMAN, DIGEST OF INTERNATIONAL LAW, at 75 (1968).

5. Headquarters Agreement, *supra* note 1, § 8.

6. The section provides as follows:

> Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

*Id.* § 21(a).

7. Section 11 provides that the U.S. "shall not impose any impediments to transit to or from the headquarters district" of persons falling into any one of the following categories:

> (1) representatives of Members or officials of the United Nations . . . or the families of such representatives or officials,
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> (2) experts performing missions for the United Nations . . . ,
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> (3) representatives of the press, or of radio, film or other information agencies, who have been accredited by the United Nations . . . after consultation with the United States,
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> (4) representatives of nongovernmental organizations recognized by the United Nations for the purpose of consultation . . . , or
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> (5) other persons invited to the headquarters district by the United Nations . . . on official business.

*Id.* § 11.

8. *Id.* § 12.

9. *Id.* § 13(a), (f). Section 13 also provides that "[w]hen visas are required for persons referred to in [Section 11], they shall be granted without charge and as promptly as possible." *Id.* § 13(a).

control the entry of UN aliens into United States territory outside the headquarters district, and grants the United States the right to deport aliens from the headquarters district in the event of an abuse of UN residence privileges.[10] Finally, Section 6 of Public Law 80-357, the United States' Congressionally-enacted version of the Headquarters Agreement,[11] provides that nothing in the Agreement shall be construed to abridge the United States' right:

> to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity, . . . and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.[12]

Disagreement between the United States and the UN over the effect and meaning of Section 6 surrounded the implementation of the Headquarters Agreement in 1947. The Senators who originally drafted Section 6 proposed it as simply a clarification of the United States' powers of restriction and deportation set forth in Section 13.[13] The House of Representatives' revision of the Senate proposal, however, reflected an intent to reserve for the United States greater control over

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10. Section 13 provides that, despite Section 11 entry privileges, deportation proceedings may be instituted with the approval of the Secretary of State after consultation with the UN if an alien abuses UN residence privileges in activities "outside his official capacity." *Id.* § 13(b). The section further provides that the U.S. retains full control and authority over the entry of persons or property into U.S. territory "[e]xcept as provided above in this section and in the General Convention." *Id.* § 13(d).

11. The Joint Resolution containing the Headquarters Agreement, *see supra* note 1, contains the full text of the Agreement followed by five additional sections, referred to as Sections 2 through 6 of Public Law 80-357. 61 Stat. 756, at 766–67, T.I.A.S. No. 1676, at 29–30. Sections 2 through 5 were drafted by the State Department to enable the U.S. to effectuate the provisions of the Headquarters Agreement. Section 6 was added by Congress to secure the support of legislators who feared that the Headquarters Agreement might be used as a device for evading U.S. immigration laws or endangering national security. *See Comment Paper, Agreement between the United Nations and the United States Regarding the United Nations Headquarters: Report of the Secretary-General* (August 6, 1947), *reprinted in* 1 FOREIGN REL. L. U.S., at 49 (1947). *See also infra* notes 12–14 and accompanying text.

12. 61 Stat. 756, at 767, T.I.A.S. No. 1676, at 30. *See supra* notes 1 and 11.

13. The Senate Report on the Headquarters Agreement, in which Section 6 was proposed as an amendment, noted that U.S. obligations under the Headquarters Agreement inevitably required the admission of aliens who "would not normally be admissible" under U.S. immigration laws, and that this was a necessary condition for the UN to maintain its headquarters in the U.S. S. Rep. No. 559, 80th Cong., 1st Sess., at 5–6 (1947). The Report concluded that the U.S. rights of restriction and deportation "adequately protect" national security, and explained that the purpose of Section 6 was to clarify these rights and reaffirm that the U.S. was under no obligation to amend its immigration laws "except to give effect to the rights referred to [in Sections 11 and 13 of the Headquarters Agreement]." *Id.* at 6. As written by the Senate, the proposed Section 6 did not include the language "to safeguard its own security," which was inserted by the House of Representatives. *See* Editorial Note, 1 FOREIGN REL. L. U.S. 45 (1947).

alien entry.[14] The UN Secretary-General asked the UN Subcommittee considering the United States' version of the Headquarters Agreement to take particular note of Section 6.[15] The UN Subcommittee's meetings resulted in heated debate and a decision to postpone consideration of Section 6 until circumstances demanded a resolution as to its legal effect.[16] In the meantime, the United States interpreted Section 6 as giving it the right to deny entry to UN affiliates for security reasons.[17]

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14. The House of Representatives explained the insertion of the clause "to safeguard its own security" as language meant to go "along with" the right to control entry into territories outside the headquarters district as a "right of self-defense . . . underlying all American policy." H.R. Rep. No. 1093, 80th Cong., 1st Sess., at 11 (1947). According to the House Report, the clause merely "[made] explicit what is a premise of such an agreement in any case." *Id.* The Report gave no specific examples of the use of this right.

15. The Secretary-General's report stated in pertinent part:

> Both the joint resolution and Public Law 357 refer to the interpretation placed on the [Headquarters] Agreement by Congress, in particular the right of the United States to control the entry of aliens into the territory of the United States. In this connection it would appear desirable to draw the General Assembly's attention to Section 6 of Public Law 357.

2 U.N. GAOR C.6 Annex 11, at 327, U.N. Doc. A/371 (1947).

16. *See* U.N. Unclassified Summary No. 1029 (Oct. 16, 1947), *cited in* 1 FOREIGN REL. L. U.S., at 63 n.1 (1947). The U.S. representative objected to statements in the UN Subcommittee's report that the UN need not "take official cognizance of" Public Law 80-357, that the Headquarters Agreement "alone contained the obligations between the parties," and that "the actual contents of the resolution of Congress was a domestic matter for the U.S." *Id.*; *see also* Letter from the Sec. of State at the U.N. to the Acting Sec. of State (October 14, 1947), *id.* at 61. Nevertheless, the final report of the Subcommittee stated that the Subcommittee had "confined its study to the text of the Agreement and compared it with the draft Agreement." 2 U.N. GAOR C.6 Annex 11a, at 340, U.N. Doc. A/C.6/172 (1947). The UN then approved each of the reports recommending approval of the Headquarters Agreement. *See* 2 U.N. GAOR C.6 (53d mtg.), at 105, (1947) (Sixth Committee's approval of Subcommittee's report); 2 U.N. GAOR Annex 9b, at 1519, U.N. Doc. A/427 (1947) (Sixth Committee's report to General Assembly); 2 U.N. GAOR (101st plen. mtg.) at 467 (1947) (General Assembly's approval of Sixth Committee's report).

17. This position was established by a State Department interpretation of the language of Section 6 in light of its legislative history. *See* Memorandum by the Asst. Sec. of State for U.N. Affairs to the Sec. of State (February 6, 1952), *reprinted in* 3 FOREIGN REL. L. U.S., at 198 (1952–1954). The State Department insisted that the legislative history, *see supra* notes 13 and 14, indicated that the first part of Section 6, "to safeguard its own security," should be read disjunctively, thus reserving to the U.S. the separate rights of safeguarding its security *and* of controlling the entrance of aliens into U.S. territories other than the headquarters district and its immediate vicinity. *See* Memorandum by the Asst. Sec. of State for U.N. Affairs to the Sec. of State, *supra* at 200. Based upon this construction, the State Department contended that the U.S. could deny UN aliens access to the headquarters district for security reasons, and for any reason deny UN aliens access to areas outside the headquarters district. *Id.* at 200–01.

Moreover, the State Department argued that the UN could not assert that Section 6 had no effect since the U.S. note that effectuated the Headquarters Agreement, *see supra* note 1, stated clearly that the U.S. authorized the Agreement *"subject to* the provisions of Public Law 357." *See* Memorandum by the Asst. Sec. of State for U.N. Affairs to the Sec. of State, *supra* at 201 (emphasis in citation). To preserve the meaning of this phrase, the U.S. representative to the UN Subcommittee had insisted on the deletion of language in the final report stating that "the notes exchanged for the purposes of bringing the Headquarters Agreement into force should be limited to clearly effecting this purpose and should not contain any other matter having any effect by way of interpretation or otherwise on the provisions of the Headquarters Agreement."

The UN, on the other hand, maintained that, if Section 6 had any effect at all, it merely confirmed the United States' right to control the entry of UN affiliates *outside* the headquarters district.[18]

The first occasion to resolve the issue arose in 1953, when the United States denied entry visas to representatives of two nongovernmental organizations seeking to participate in UN meetings.[19] The

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*See* Memorandum Prepared in the Office of the Asst. Legal Adviser for U.N. Affairs: Part I (April 15, 1953), *reprinted in* 3 FOREIGN REL. L. U.S., at 262, 263 (1952–1954); *see also* Letter from the U.S. Rep. at the U.N. to the Acting Sec. of State (October 14, 1947), *reprinted in* 1 FOREIGN REL. L. U.S., at 61 (1947). The U.S. representative also insisted repeatedly that the U.S. could not authorize the Headquarters Agreement without the additional provisions of Public Law 80-357. *See* Memorandum Prepared in the Office of the Asst. Legal Adviser for U.N. Affairs, *supra* at 263.

18. *See* Memorandum by the Asst. Sec. of State for U.N. Affairs to the Sec. of State, *supra* note 17, at 201. When confronted with the U.S. interpretation of Section 6 in reference to the entry of a Czechoslovakian delegate in 1952, the UN Secretary-General told the U.S. that if the U.S. had intended Section 6 to constitute a reservation to the entry rights granted UN affiliates, the reservation had neither been considered nor accepted by the UN. *See* Letter from the Secretary-General of the U.N. to the Acting U.S. Rep. at the U.N. (June 16, 1952), *reprinted in* 3 FOREIGN REL. L. U.S., at 213–14 (1952–1954). Accordingly, the Secretary-General maintained, whether or not Section 6 conditioned obligations under the Headquarters Agreement was a question for the UN. *Id.* at 214.

An internal U.S. response to this argument suggested a modification of the U.S. position. *See* Memorandum by Albert F. Bender, Jr., of the U.S. Mission at the U.N. (July 1, 1952), *id.* at 214–19. The memorandum first noted that settlement of the issue was a question not for the UN, but for arbitration, if necessary, under Section 21 of the Headquarters Agreement. *Id.* at 218. The memorandum then gave three reasons why arbitration might support the UN position over that of the State Department. First, the U.S. representative to the UN Subcommittee studying the Headquarters Agreement never explicitly stated the U.S. intention to condition its Section 11 and Section 13 obligations by the language of Section 6 or Ambassador Austin's note. *Id.* at 217. Second, the UN was unaware of the legislative history of the section and therefore could not be bound by it. *Id.* at 218. Third, a plain reading of Section 6, without the interpretative aid of the legislative history, supported the U.N. position. The modifying clause "completely to control the entrance of aliens into any territory of the United States *other than* the Headquarters District and its immediate vicinity" was contained within the same sentence as the affirmation of the right of the U.S. "to safeguard its own security." *Id.* at 218 (emphasis in citation). *See also supra* text accompanying note 12. In light of the specific clause referring to U.S. control over the entry of aliens, the memorandum noted, it would be "unusual statutory construction" to interpret the immediately preceding "safeguard its own security" clause as referring to the same topic. Indeed, the "safeguard its own security" clause could be given full effect if read as relating to any of a number of other security issues raised by the Headquarters Agreement. Memorandum by Albert F. Bender, Jr., of the U.S. Mission at the U.N., *supra* at 218–19. The memorandum also urged that, in light of its importance, the issue be quickly resolved with the UN Secretary-General "by negotiation if possible, or failing that, by arbitration." *Id.* at 216.

19. The two were, respectively, a representative of the Women's International Democratic Federation (WIDF), designated by the WIDF to attend the seventh session of the UN Commission on the Status of Women, and a representative of the World Federation of Trade Unions (WFTU), designated by the WFTU to attend the fifteenth session of the UN Economic and Social Council. *See* Memorandum by the U.N. Legal Department, *Admission of Representatives of Non-governmental Organizations Enjoying Consultative Status*, 15 U.N. ESCOR Annexes (Agenda Item 34) at 2, U.N. Doc. E/2397 (1953) [hereinafter UN Legal Department Memorandum]; *see also* Letter from the U.S. Rep. at the U.N. to the Dept. of State (March 25, 1953), *reprinted in* 3 FOREIGN REL. L. U.S., at 250–51 (1952–1954); Memorandum by the Asst. Legal Adviser for UN Affairs to the Legal Adviser (March 26, 1953), *id.* at 252–54; Letter from the Dept. of

United States invoked Section 6 to explain its position, stating that the denials comported with the right reserved in that section to safeguard national security.[20] The UN Legal Department responded that Section 6 neither provided nor implied such a right, and that if the United States had intended such a reservation, it had never brought the matter before the UN for consideration or acceptance.[21] Even if the United States had intended a reservation in Section 6, the UN maintained, the section's language could refer only to the United States' right to control entry into territory *other than* the headquarters district, its immediate vicinity, and the necessary area of transit.[22] Finally, the UN concluded that if the United States were to adhere to its position regarding Section 6, the matter should be resolved by means of the arbitration procedure outlined in Section 21.[23]

An internal State Department memorandum set forth the United States' position.[24] First, the State Department maintained that, in light of the 1947 UN Subcommittee debates and the UN Secretary-General's report alerting the Subcommittee to Section 6,[25] the UN had been "well aware of" the Section 6 reservation.[26] The State Department argued that the UN "fully considered" the section before implementing the Headquarters Agreement, and therefore the UN had fully accepted the reservation.[27] The State Department further insisted that even if the UN had not expressly accepted the reservation by the time it implemented the Headquarters Agreement, continued application of the Agreement for over five years constituted the equiv-

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the Legal Adviser to the Deputy U.S. Rep. at the U.N. (March 28, 1953), *id.* at 254. *See also* Liang, *The Question of Access to the United Nations Headquarters of Representatives of Nongovernmental Organizations in Consultative Status*, 48 AM. J. INT'L L. 434 (1954).

20. UN Legal Department Memorandum, *supra* note 19, para. 3. *See also* XXVIII DEPT. OF ST. BULL. No. 722, at 625 (1953).

21. UN Legal Department Memorandum, *supra* note 19, para. 9. The UN Legal Department insisted that principles of international law required any such "qualifying declaration" to have been explicitly agreed to by the UN if it were to have any force. *Id.*, para. 10.

22. *Id.*, para. 11 (emphasis in citation). Some UN members disagreed with the Legal Department's contention that Section 6 had no legal effect on the Headquarters Agreement. *See supra* note 21 and accompanying text. They concurred, however, with the UN interpretation of the section. *See* 15 U.N. ESCOR (686th mtg.) (Agenda Item 34), at 83–85, U.N. Doc. E/SR.686 (1953). UN debate over the issue ended in a decision to leave the matter for negotiation between the U.S. and the Secretary-General. *See* 15 U.N. ESCOR (687th mtg.) (Agenda Item 34), at 89, U.N. Doc. E/SR.687 (1953).

23. U.N. Legal Department Memorandum, *supra* note 19, para. 14. For the text of the arbitration provision, see *supra* note 6.

24. Memorandum Prepared in the Office of the Asst. Legal Adviser for UN Affairs: Part I, *supra* note 17.

25. *See supra* note 15 and accompanying text.

26. Memorandum Prepared in the Office of the Asst. Legal Adviser for UN Affairs: Part I, *supra* note 17, at 263.

27. *Id.* at 264.

alent of formal acceptance.[28] Regarding the interpretation of Section 6, the State Department argued that the section's legislative history evinced a clear Congressional desire to retain some United States control over alien entry into the headquarters district and its immediate vicinity.[29] Thus, according to the State Department, Section 6 reserved the United States this right.[30]

The State and Justice Departments reiterated the United States' position in a subsequent study of the issue,[31] but Henry Cabot Lodge, the United States Ambassador to the UN, suggested that it was unwise for the United States steadfastly to adhere to its position.[32] Lodge insisted that Secretary-General Hammarskjold made out "a persuasive case" on the interpretation of Section 6.[33] Hammarskjold, however, was willing to agree to some procedure designed to protect the United States against potential security threats.[34] Lodge therefore suggested that the United States abandon legal debate in favor of "lasting and practical" solutions to the problem.[35] Lodge then served as liaison between Hammarskjold and the State Department in negotiations to reach an agreement.[36]

Hammarskjold summarized the result of the negotiations in a State Department-approved report[37] and a subsequent oral address to the UN.[38] First, the negotiations had "fully reaffirmed" the substance of

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28. *Id.* at 265. Any other contention, according to the State Department, would compel the unsettling conclusion that there had been no meeting of the minds between the U.S. and the UN, and that the parties therefore never reached any agreement at all regarding the UN Headquarters. *Id.*

29. *Id.* at 264–65. This argument apparently disregarded the earlier U.S. reappraisal of the issue. *See* Memorandum by Alfred F. Bender, Jr., of the U.S. Mission at the U.N., *supra* note 18.

30. Memorandum Prepared in the Office of the Asst. Legal Adviser for UN Affairs: Part I, *supra* note 17, at 264–65.

31. *See* Memorandum Prepared Jointly by the Dept. of State and the Dept. of Justice (May 14, 1953), *reprinted in* 3 FOREIGN REL. L. U.S., at 275–78 (1952–1954) [hereinafter Joint Memorandum].

32. *See* Memorandum by the U.S. Rep. at the U.N. (May 19, 1953), *reprinted in* 3 FOREIGN REL. L. U.S., at 278–79 (1952–1954).

33. Hammarskjold reiterated to Lodge the UN position on Section 6 presented to the U.S. by Secretary-General Lie in 1952. *See supra* note 18. Hammarskjold also pointed out that the Section 6 legislative history, *see supra* notes 13 and 14, did not clearly support the U.S. position. *See* Memorandum by the U.S. Rep. at the U.N., *supra* note 32, at 279.

34. *Id.*

35. *Id.*

36. *Id.* For correspondence between Lodge, the State Department, and the UN, see 3 FOREIGN REL. L. U.S. 278–305 (1952–1954).

37. Progress Report by the Secretary-General, *Question of Access to Headquarters of Representatives of Non-governmental Organizations*, 16 U.N. ESCOR Annexes (Agenda Item 33) at 1, U.N. Doc. E/2492 (1953) [hereinafter Progress Report by the Secretary-General].

38. Oral Statement by the Secretary-General, *Question of Access to Headquarters of Representatives of Non-governmental Organizations*, 16 U.N. ESCOR Annexes (743rd mtg.) (Agenda Item 33) at 2, U.N. Doc. E/2501 (1953) [hereinafter Oral Statement by the Secretary-General].

the Headquarters Agreement in that the United States had admitted its obligation under the Headquarters Agreement to grant visas to aliens on official UN business.[39] Unique cases, however, perhaps unforeseen and unaccounted for during the drafting of the Headquarters Agreement, might present compelling reasons for allowing the United States to exceed the scope of its powers as defined by the Headquarters Agreement and deny entry to potentially dangerous aliens.[40] According to Hammarskjold, such denial would be appropriate when, first, "clear and convincing evidence" showed that a UN affiliate sought entry for purposes outside the scope of his UN business, and, second, the United States believed that that person's entry would be "prejudicial to the national security."[41] In these cases, full consultation between the United States and the UN would precede any final decision.[42] Specifically, such cases would be considered at "the highest levels" of the United States government; decisions would be taken "in due time" to allow the UN to consider and react to the decisions; and the Secretary-General would be supplied, to the extent possible, with information and evidence supporting the United States' decision.[43] In the event of UN disagreement with a United States decision to deny entry, the arbitration provision remained fully available.[44] This arrangement admittedly left to future decision the particular outcome of each individual case.[45]

Some thirty-five years after this compromise, on November 25, 1988, Yasir Arafat submitted to the United States Embassy in Tunisia an application for a visa to enter the United States in order to attend the forty-third session of the UN General Assembly in New York.[46]

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39. Oral Statement by the Secretary-General, *supra* note 38, para. 4.

40. Progress Report by the Secretary-General, *supra* note 37, paras. 4, 6.

41. *Id.*, para. 4. Hammarskjold pointed out that, from the UN point of view as well, entry should not be granted any UN affiliate where clear and convincing evidence showed the affiliate's "bad faith" intention "to use his trip as a cover for activities against [U.S.] security." *Id.*, para. 6.

42. *Id.*, para. 5.

43. Oral Statement by the Secretary-General, *supra* note 38, para. 11. Hammarskjold told the UN, however, that such application of the Headquarters Agreement, even in appropriate cases, was beyond the power of the Secretary-General, and would require authorization by the UN. *Id.*, para. 8; Progress Report by the Secretary-General, *supra* note 37, para. 6.

44. Oral Statement by the Secretary-General, *supra* note 38, paras. 8, 10.

45. *Id.*, para. 9. Hammarskjold stated that he did not consider the negotiations "finally concluded," but felt that further action was unnecessary until "concrete questions" arose. *Id.* The U.S. viewed this entire procedure as merely a temporary one, to last only as long as Hammarskjold and Lodge held their respective positions. New arrangements were to be made with new individuals. *See* Joint Memorandum, *supra* note 31, at 276.

46. N.Y. Times, Nov. 26, 1988, at 3, col. 1. Arafat's application was preceded by a formal request submitted to the U.S. by the UN on November 9, 1988. *See id.*, Nov. 10, 1988, at A11, col. 1. Arafat sought entry in order to participate in the UN General Assembly's scheduled discussions of the Middle East question, where he intended to explain the proclamation of an independent Palestinian state and other decisions reached by the Palestine National Council in

One day later, the State Department issued a statement announcing its decision to deny Arafat's visa request.[47] The ensuing debate revealed that the 1953 negotiations had brought the United States and the UN no closer to a lasting resolution of the Section 6 dispute.

In its statement, the State Department first admitted the United States' obligation under the Headquarters Agreement to permit the entry of individuals participating in UN business.[48] The State Department added that Congress had, however, reserved the right to deny entry to UN-affiliated aliens if protection of United States national security warranted such a measure.[49] The State Department then explained that United States law prohibits PLO members from entering the United States by virtue of their affiliation with a terrorist organization,[50] and that the Secretary of State may recommend to the Attorney-General that the prohibition against a particular PLO member be waived.[51] In acknowledgment of the United States' obligation under the Headquarters Agreement, the State Department continued, such waivers have been issued to PLO members "as a routine practice" since 1974, when the PLO Permanent Observer Mission to the UN

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Algiers on November 13–14, 1988. *See id.*, Nov. 10, 1988, at A11, col. 1; *id.*, Nov. 15, 1988, at A1, col. 6; *id.*, Nov. 16, 1988, at A1, col. 6; *id.*, Nov. 23, 1988, at A14, col. 1.

47. *Statement on the Determination by the Secretary of State on Visa Application of Yasir Arafat, reprinted in* N.Y. Times, Nov. 27, 1988, at A5, col. 1 [hereinafter State Department Statement].

48. *Id.*, para. 1.

49. *Id.*, para. 2.

50. *Id.*, para. 3. The Immigration and Nationality Act of 1952 specifies categories of aliens ineligible to receive visas to enter the U.S. One category covers aliens who the U.S. has reason to believe seek entry "solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Immigration and Nationality Act of 1952, § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1982). Another category covers all aliens belonging to any organization that advocates "the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of any . . . organized government," "the unlawful damage, injury, or destruction of property," or "sabotage." *Id.* § 212(a)(28)(F), 8 U.S.C. § 1182(a)(28)(F) (1982). PLO members could presumably be denied entry into the United States under either one of these categories. *But see infra* note 51 and accompanying text.

Recently, the U.S. elaborated on these categories in the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, affirming "the existing authority of the executive branch" to deny admission to any alien "for reasons of foreign policy or national security," and any alien "who . . . has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage after entry in a terrorist activity." 8 U.S.C. § 1182 note (Supp. V 1987).

51. State Department Statement, *supra* note 47, para. 3. An alien ineligible for a visa under an excluded category, *see supra* note 50, may be admissible "after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer." Immigration and Nationality Act of 1952, § 212(d)(3), 8 U.S.C. § 1182(d)(3) (1982). Such a waiver is not possible, however, for aliens declared ineligible under section 212(a)(27) of the Act. *See supra* note 50. If PLO members are determined ineligible to enter the country under one of the excluded categories, they must be classified under section 212(a)(28)(F) in order to enjoy the possibility of waiver.

was established in New York.[52] In the present case, the Secretary of State would not recommend a waiver for Arafat in light of "convincing evidence" of the PLO's continued engagement in terrorist activities and Arafat's responsibility for these activities as PLO Chairman.[53] The State Department concluded that the United States may deny entry to Arafat under the Section 6 security reservation since the PLO "through certain of its elements" has employed terrorism against Americans; as Chairman of the PLO, Arafat is an accessory to such terrorism; and "[t]errorism and those involved in it present a serious threat to our national security and to the lives of American citizens."[54]

The UN Legal Counsel presented objections to the United States' decision the next day,[55] with reasoning analogous to that employed by the UN Legal Department in 1953.[56] The UN first noted that Arafat's visa request in no way differed from "the normal PLO visa requests," and that Arafat's explicit purpose as stated in the visa request was to participate in the work of the forty-third session of the UN in his capacity as Chairman of the PLO Executive Committee.[57] According to the UN, the request thus fell squarely under Sections 11, 12, and 13 of the Headquarters Agreement.[58] Section 13(d) confirmed the "unrestricted right" of persons mentioned in Section 11 to

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52. State Department Statement, *supra* note 47, para. 4. Arafat himself must have enjoyed this right when he came to New York to address the UN General Assembly in 1974, although the visa issued to him then allowed Arafat to visit the U.S. "for business purposes." N.Y. Times, Nov. 27, 1988, at 4, cols. 1–2. The 1974 UN invitation to the PLO is contained in G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31) (Agenda Item 108) at 4, U.N. Doc. A/9631 (1974). For information regarding Arafat's 1974 visit, see N.Y. Times, Oct. 16, 1974, at 4, col. 4; *id.*, Nov. 13, 1974, at 1, col. 1; *id.*, Nov. 14, 1974, at 1, col. 8.

53. State Department Statement, *supra* note 47, paras. 5–7. The statement included as this evidence "a series of operations by Force 17 and the Hawari organizations," two PLO-affiliated groups, and "the presence at the [November 14, 1988] Algiers session of the Palestine National Council . . . of Abu Abbas, a member of the Executive Committee of the [PLO] . . . convicted . . . of the [1986] murder of an American citizen, Mr. Leon Klinghoffer." *Id.*, para. 5. *See also* N.Y. Times, Nov. 23, 1988, at A14, col. 1.

54. State Department Statement, *supra* note 47, paras. 6–7. In a subsequent statement to the UN in support of the U.S. decision, a U.S. spokesperson invoked not only "the United States security reservation to the Headquaters Agreement" but also precedent. *See* Statement by the U.S. Rep. to the Committee on Relations with the Host Country, U.S. Mission to the UN [USUN] Press Release 154-(88), Nov. 28, 1988 (available from the UN Office of Legal Affairs). Noting "United Nations acquiescence" to visa denials to UN affiliates in 1954, 1981, 1982, 1983, 1984, 1985, 1986, and 1988, the representative asserted that "United Nations practice confirms that the [U.S.] is not expected to accept the entry of every individual to the Headquarters District." *Id.*, paras. 5, 7. These prior visa denials, about which no apparent public record exists, involved, *inter alia*, a UN designate from Iran convicted of conspiring to kill the Shah of Iran, and Iranians involved in the 1979–1980 hostage incident at the U.S. embassy in Tehran. *See id.*, para. 5.

55. 43 U.N. GAOR _____ (Agenda Item 137) at _____, U.N. Doc. A/C.6/43/7 (1988) [hereinafter UN Legal Counsel Statement].

56. *See supra* notes 19–23 and accompanying text.

57. UN Legal Counsel Statement, *supra* note 55, para. 2.

58. *Id.*

enter the United States for the purpose of proceeding to the headquarters district since it granted the United States full control over the entry of aliens into the United States "[e]xcept as provided above in this section and in the General Convention."[59] Section 6, the UN insisted, gave the United States no right to bar entry of UN participants to the headquarters district, since the clause affirmed undiminished United States control over entry of aliens into territories *"other than the Headquarters district and its immediate vicinity."*[60] Since Arafat's visa application requested entry into the headquarters district only, the UN concluded, the request fell precisely within Section 11 and the Section 13(d) exception, and within the area left open by Section 6.[61] The "so-called security reservation" to the Headquarters Agreement thus did not apply.[62]

Moreover, the UN maintained that the denial of Arafat's visa did not comport with the procedure agreed upon in the 1953 talks between Hammarskjold and the United States for possible "security exceptions."[63] The United States never consulted with the UN Secretary-General before making the decision.[64] Nor did the State Department allege that Arafat's presence in the country would itself present a security threat.[65] The UN thus concluded that the United States was fully obliged to grant Arafat a visa.[66]

Both the immediate dispute and the much larger disagreement over the effect of the Section 6 provision on the Headquarters Agreement remain unresolved. The arguments of the UN and the United States in 1988 in fact echoed precisely those employed by each some forty years ago. The compromise procedure outlined in 1953 to manage difficult cases was not followed in the case of Arafat; that procedure

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59. *Id.*, para. 4. That is, Section 13(d) explicitly reaffirmed the provision of 13(a) that U.S. law "shall not be applied in such a manner as to interfere with the privileges referred to in Section 11." *See supra* notes 9 and 10 and accompanying text.

60. *Id.*, para. 6 (emphasis in citation).

61. *Id.*, para. 7.

62. *Id.*, paras. 3, 5.

63. *Id.*, paras. 8, 11. *See supra* notes 37–45 and accompanying text.

64. *Id.*, para. 8. *See supra* notes 42–43 and accompanying text.

65. *Id.*, para. 11. Thus, the UN contended, the standard agreed upon in 1953 for possible security exceptions had not been met, since there was neither clear and convincing evidence that Arafat sought entry to the U.S. for purposes outside the scope of his UN activities, nor an allegation that his presence in the United States "would *per se* in any way threaten [U.S.] security." *Id.*; *see also supra* text accompanying note 41.

66. *Id.*, para. 12. The UN Legal Counsel also objected to the statement of the U.S. Representative to the Committee on Relations with the Host Country, *see supra* note 54, that the UN had acquiesced in prior visa denials. The Legal Counsel argued that the UN had not acquiesced in the denials but had chosen not to insist "where the requesting state, for reasons of its own, did not pursue the matter." *Id.*, para. 10. The UN also maintained that its positions regarding both the U.S. obligation to grant visas and the "so-called security reservation" had "at all times been perfectly clear to the [U.S.]." *Id.*

appears all but forgotten. Even the Section 21 arbitration option remains unexercised in efforts to settle the dispute. Rather, both the United States and the UN have permitted the disagreement to persist instead of seeking a final resolution concerning exactly how and under what circumstances the United States may deny visas to UN affiliates.

The Arafat visa denial was only a step towards greater disagreement. The United States relied on the "security reservation," which was added to the Headquarters Agreement to be invoked in cases of clear threats to national security, in a case that may not have warranted it. The United States' decision appeared supported less by security concerns than by United States policy regarding the PLO—policy expressed in the State Department's explanation of Arafat's visa denial[67] and reflected in the broader political milieu.[68] The failure of the United States and the UN to resolve the underlying legal issue had thus paved the way for an overtly political result. In response, the UN could only "deplore" the United States' decision and move the General Assembly to Geneva in order to accommodate Arafat's speech.[69] This is far from a practical solution.

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67. The State Department statement asserted that "[a]ll parties" must "demonstrate their desire to make peace," "adhere to internationally accepted principles and norms," and "renounce violence and terrorism" in order to be participants in the settlement of the Arab-Israeli conflict. State Department Statement, *supra* note 47, para. 8.

68. The Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, *supra* note 50, included an Anti-Terrorism Act (ATA) declaring, *inter alia*, that the PLO is a terrorist organization and that the establishment or maintenance of any office in the U.S. funded or directed by the PLO or its constituents is unlawful. 22 U.S.C. §§ 5201–5203 (Supp. V 1987). On March 21, 1988, the day the ATA took effect, the U.S. brought an action in the U.S. District Court for the Southern District of New York seeking an injunction to close the PLO Permanent Observer Mission to the UN in New York. *See* United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988). The court ruled against the U.S., holding that the ATA could not override the U.S. obligation under the Headquarters Agreement to "refrain from impeding the functions" of the PLO Observer Mission. *Id.* at 1466.

In the fall of 1988, 51 Senators wrote a letter to Secretary of State George Shultz urging him to deny Arafat a visa until the PLO renounced terrorism and accepted Israel's right to exist. N.Y. Times, Nov. 9, 1988, at A8, col. 3; *id.*, Nov. 10, 1988, at A11, col. 1; *id.*, Nov. 23, 1988, at A14, col. 1. In his response, Shultz declared he had "no desire whatever to see Arafat in the U.S." *Id.*, Nov. 9, 1988, at A8, col. 3; *see also id.*, Nov. 10, 1988, at A11, col. 1; *id.*, Nov. 23, 1988, at A14, col. 1. American officials were also reported to have said that a PLO decision to renounce terrorism could enhance Arafat's chances of getting a visa. *Id.*, Nov. 9, 1988, at A8, col. 3. The State Department Legal Adviser for UN Affairs was said to have advised Shultz that the decision whether or not to grant Arafat a visa was essentially "a policy call." *Id.*, Nov. 26, 1988, at 3, col. 1.

On December 14, 1988, in response to the PLO's renunciation of terrorism and acceptance of Israel's right to exist, the U.S. reversed long-standing policy and opened up a dialogue with the PLO. *Id.*, Dec. 15, 1988, at A1, col. 6. Then, on March 8, 1989, the U.S. granted visas to three PLO members seeking to attend a weekend conference on Middle East peace at Columbia University in New York. *Id.*, March 9, 1989, at A8, col. 5.

69. *See* G.A. Res. 43/48, 43 U.N. GAOR _____ (Agenda Item 137) at _____, U.N. Doc. A/RES/43/48 (1988) (deploring U.S. decision to deny Arafat visa); G.A. Res. 43/49, 43 U.N. GAOR _____ (Agenda Items 137, 138) at _____, U.N. Doc. A/RES/43/49 (1988) (UN to reconvene in Geneva). *See also* N.Y. Times, Dec. 1, 1988, at A6, col. 1; *id.*, Dec. 3, 1988, at 1, col. 1.

The dispute should perhaps be submitted for arbitration in accordance with Section 21 of the Headquarters Agreement. If it were, the sound UN interpretation of Section 6 might well be too late; the United States has a powerful argument that forty years of practice confirm its right to deny entry to UN aliens for security reasons.[70] Whatever the outcome, the issue should be resolved once and for all. Leaving it unsettled only guarantees confrontation whenever the UN disagrees with United States decisions to deny entry to UN affiliates. Moreover, as the Arafat case suggests, failure to resolve the issue could invite a steady erosion of the broad rights of alien access to the UN originally intended in the Headquarters Agreement. Such erosion would undermine the very function of the UN as an open forum for discussion among all members of the international community.

S. Sadiq Reza

70. Nations are generally thought to be bound by "customary international law" resulting from "a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). A law thus formed "is not binding on a state that declares its dissent from the principle during its development," *id.*, comment b, but acquiescence may bind the silent party. *Id.*, comment d.