

EDITORIAL COMMENTS

THE ARAFAT VISA AFFAIR: EXCEEDING THE BOUNDS OF HOST STATE DISCRETION

Pacta sunt servanda

The U.S. refusal to permit Yasir Arafat, Chairman of the Palestine Liberation Organization, to attend the 43d annual meeting of the General Assembly¹ in New York was almost universally condemned as a violation of international law.² Because Arafat publicly complied, on December 14, 1988, with the conditions the United States had long prescribed as prerequisite for direct contacts with the PLO,³ many have tended retroactively to validate the refusal to grant the visa, as a pragmatic and legitimate technique of diplomatic suasion.⁴ Consequently, it is all the more urgent that the record of international legal violation be confirmed, lest the refusal be cited, in the idiosyncratic fashion of international law, as precedent for future violations. Such a development would hasten the deterioration of the regime of restraints on the discretion of host states and reduce the effectiveness of resident international organizations.

Palestine has been a matter of international concern for most of this century. From the inception of the United Nations, Palestine has been continuously on its agenda.⁵ Since 1974, the Palestine Liberation Organization⁶ has been, by virtue of the invitation of the General Assembly, a Permanent Observer invited to participate in Assembly deliberations of concern to it.⁷ It was no secret that Chairman Arafat would address the General Assembly when the Palestine issue was taken up.⁸ On November 8, 1988, a visa

¹ See *U.S. Denies Arafat Entry for Speech to Session of U.N.*, N.Y. Times, Nov. 27, 1988, §1, at 1, col. 6; *U.S. Gets Deadline from U.N. on Barring Arafat*, N.Y. Times, Dec. 1, 1988, at A6, col. 1; *U.S. Declines to Reverse Decision on Arafat*, N.Y. Times, Dec. 2, 1988, at A10, col. 1.

² See *U.S. Gets Deadline from U.N. on Barring Arafat*, *supra* note 1; *U.S. Declines to Reverse Decision on Arafat*, *supra* note 1.

³ See *Statement by Arafat on Peace in Mideast*, N.Y. Times, Dec. 15, 1988, at A19, col. 5; see also *U.S. Agrees to Talks with P.L.O., Saying Arafat Accepts Israel and Renounces All Terrorism*, *id.* at A1, col. 6.

⁴ For elaboration of positions endorsing Secretary Shultz's denial, see *U.N. Welcome*, NEW REPUBLIC, Dec. 19, 1988, at 5-6.

⁵ See M. S. MCDUGAL & W. M. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 159 (1981).

⁶ The Palestine Liberation Organization (PLO) is "an umbrella organization for several Arab groups dedicated to the recovery of Palestine from the state of Israel and the return of refugees from the area to their homeland through diplomatic, military, and terrorist means." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1397 (2d ed. 1987).

⁷ GA Res. 3237, 29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974).

⁸ There are signs that, prior to the application for a visa, the PLO had made inquiries of the United States and received some indications that a request would not be rejected. An indication otherwise would have permitted the PLO Chairman to refrain from requesting a visa, saving face for himself and his organization and minimizing damage to the reputation of the United States as the host country.

request for Arafat to come to the headquarters district to participate in the General Assembly session was presented to the Secretary-General.⁹ On November 9, the UN Legal Counsel, according to his own testimony, personally transmitted the request to Ambassador Okun, the Deputy Permanent Representative of the United States Permanent Mission.¹⁰ According to his account, the Legal Counsel drew the United States official's attention to the fact that the note was drafted in the usual form for PLO visa requests and that the purpose of the visit was participation in the annual meeting of the Assembly. He also claimed to have noted the sections of the Headquarters Agreement¹¹ that provided the regime for such visas.¹²

On November 27, the Department of State issued a statement announcing its refusal to grant the visa.¹³ The statement acknowledged the obligations the United States had assumed under the Headquarters Agreement. Nevertheless, the statement contended:

The Congress of the United States conditioned the entry of the U.S. into the UN headquarters Agreement on the retention by the U.S. government of the authority to bar the entry of aliens associated with or invited by the United Nations "in order to safeguard its own security."

. . . . The Headquarters Agreement, contained in Public Law 80-357, reserves to us the right to bar the entry of those who represent a threat to our security.¹⁴

On November 28, the United States representative to the Committee on Relations with the Host Country expanded the U.S. legal position:

The Palestine Liberation organization (PLO) was invited by the United Nations General Assembly in 1974 to participate as an observer at the General Assembly. The United States has acknowledged that this United Nations invitation, and the Headquarters Agreement, obligate the United States to accord PLO observers entry, transit, and residence. Accordingly, visa waivers have been issued to PLO members for official business at the United Nations as a routine matter, and a PLO observer mission has been operating at the United Nations since 1975, notwithstanding any policy differences between the United States and the PLO.¹⁵

⁹ Statement by the Legal Counsel [Carl-August Fleischhauer] concerning the Determination by the Secretary of State of the United States on the visa application of Mr. Yasser Arafat (Nov. 28, 1988), UN Doc. A/C.6/43/7 (1988) [hereinafter Statement by the Legal Counsel].

¹⁰ *Id.* at 1-2.

¹¹ Agreement Regarding the Headquarters of the United Nations, United Nations-United States, June 26, 1947, 61 Stat. 758, TIAS No. 1676, 11 UNTS 11, *reprinted in* 22 U.S.C. §287 note (1982).

¹² Statement by the Legal Counsel, *supra* note 9.

¹³ United States Department of State, Statement on the Visa Application of Yassir Arafat, *reprinted in* 83 AJIL 253 (1989).

¹⁴ *Id.* at 253-54.

¹⁵ Statement by Patricia M. Byrne, United States Representative to the Committee on Relations with the Host Country, Nov. 28, 1988, Dep't of State Press Release USUN 154-(88) (Nov. 28, 1988) [hereinafter Byrne Statement].

As a general principle, the U.S. representative continued, “[t]he United States has not denied and will not deny a visa simply because of policy differences with an invitee of the United Nations.”¹⁶ The U.S. representative conditioned that principle, however, on two exceptions. The first exception was conventional: “specific provisions on the matter which exist and on which our acceptance [of the Headquarters Agreement] was conditioned.” The second exception was customary: “any host country . . . has the right to protect its national security.”¹⁷

Both of these alleged exceptions raise complex issues of law and fact. The first exception is of doubtful legal validity; the second appears to have been applied in a dubious fashion. The statement by the Department on November 27 alleging a treaty basis to the exclusion,¹⁸ which was reaffirmed by the U.S. representative on November 28,¹⁹ is incorrect in a number of respects. Section 11 of the Headquarters Agreement provides:

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials, (2) experts performing missions for the United Nations or for such specialized agencies, (3) representatives of the press, or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) in its discretion after consultation with the United States, (4) representatives of nongovernmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter, or (5) other persons invited to the headquarters district by the United Nations or by such specialized agency on official business. The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district. This section does not apply to general interruptions of transportation which are to be dealt with as provided in Section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation.²⁰

Section 12 provides: “The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.”²¹

Section 13 provides in pertinent part:

(a) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that Section, they shall be granted without charge and as promptly as possible.

(d) Except as provided above in this section and in the General Convention, the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

¹⁶ *Id.*

¹⁸ *See supra* note 13.

²⁰ Headquarters Agreement, *supra* note 11.

¹⁷ *Id.*

¹⁹ *See supra* note 15.

²¹ *Id.*

(e) The Secretary-General shall, at the request of the appropriate American authorities, enter into discussions with such authorities, with a view to making arrangements for registering the arrival and departure of persons who have been granted visas valid only for transit to and from the headquarters district and sojourn therein and in its immediate vicinity.²²

Thus, the Headquarters Agreement does not accord unilateral competence to the host state to bar the entry of a member of one of the designated classes in section 11 on the ground that the invitee poses a threat to national security.

Nor does Public Law No. 80-357,²³ the instrument incorporating the Headquarters Agreement into United States domestic law and directly governing the actions of U.S. officials in their dealings with the United Nations, contain such a reservation. That law was invoked by the Department of State in its statement of November 27. Annex 2, section 6 of Public Law No. 80-357 states:

Nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States 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.²⁴

Public Law No. 80-357 does not authorize the Executive to bar members of one of the classes in section 11 of the Headquarters Agreement from entry on grounds of national security. The law does no more than to authorize the Executive to restrict the movements of those who must be permitted to enter but are deemed security threats to "the headquarters district and its immediate vicinity."²⁵ Hence, the law was not dispositive of the Arafat case. There appears to be no basis for questioning the conclusion of the Legal Counsel in this regard. At the meeting of the Host Country Committee convened to deal with this problem, the Legal Counsel asserted:

Mr. Arafat's visa application is precisely to visit the Headquarters District and nothing else. The application thus situates itself precisely within the scope of Section 11, precisely within the scope of the exception provided for in 13(d) of the Headquarters Agreement and precisely within the area left open by section 6 of Public Law 80-357.²⁶

Thus, the visa refusal had neither a treaty nor a statutory basis. Neither of the relevant instruments allows for the first exception that the United States claimed.

²² *Id.*

²³ Joint Resolution of Aug. 4, 1947, Pub. L. No. 80-357, 61 Stat. 756 (1947) (22 U.S.C. §287 note) (1982).

²⁴ *Id.* at 767.

²⁵ Because Pub. L. No. 80-357 is not inconsistent with the Headquarters Agreement, the question of its *international* legal force does not arise.

²⁶ Statement by the Legal Counsel, *supra* note 9.

The second exception invoked by the United States as the basis for refusing to issue the visa was customary: "No government can be expected to jeopardize its national security."²⁷ As the U.S. representative elaborated:

United Nations practice confirms that the host country is not expected to accept the entry of every individual to the Headquarters District, but must retain the right to exclude the entry of individuals in certain limited cases. This principle was established as early as 1954, when the United States, with United Nations acquiescence, denied a visa to Eskandary, who had been convicted of conspiring to kill the Shah. We argued that "no one would expect the United States to permit such a person to come to the United States, no matter what his United Nations business." This principle has been confirmed in recent United Nations practice. In 1981, we informed the United Nations that we could not accept the designation as a representative of Iran a deputy foreign minister who had been involved in the planning and attack on our embassy in Teheran. The United Nations was again informed in 1982, 1983, 1984, 1985, 1986, and 1988 that we would not accept the presence in the United States of individuals with a prominent role in the hostage incident and other acts of aggression against United States citizens which are a clear violation of international law. There was no objection to this United States position.²⁸

The allegation that the United Nations had been acquiescing in the serial United States exclusions was promptly challenged. On the same day, the UN Legal Counsel stated:

Mr. Chairman, for the record, I wish to state that the United Nations has never acquiesced in such a practice. It is true that on certain occasions, the United States has declined to issue visas to representatives of States or to persons invited to the United Nations, and the UN Secretariat has not insisted where the requesting State itself, for reasons of its own, did not pursue the matter. The UN legal position regarding the obligation of the Host Country to grant visas has at all times been perfectly clear to the Host Country, as was the UN position with respect to the so-called security reservation.²⁹

In fact, the record is more complex, for the history of relations between the United States and the United Nations on this particular issue reveals areas of both substantial agreement and disagreement. In March and April, 1953, two nongovernmental organizations in consultative relationship with the Economic and Social Council had designated representatives to attend a particular session of the Council.³⁰ The United States refused to issue the

²⁷ Byrne Statement, *supra* note 15.

²⁸ *Id.*

²⁹ Statement by the Legal Counsel, *supra* note 9.

³⁰ The Women's International Democratic Federation, which had been designated a nongovernmental organization in a consultative relationship with the Economic and Social Council in Category B, by virtue of Resolution 288 (X) of Feb. 27, 1950, designated Margarette Rae Lucock as its representative to attend the seventh session of the Commission on the Status of Women. The World Federation of Trade Unions, a nongovernmental organization in Category A, had designated Jan Dessau to attend the same meeting. *See generally* 1953 UN Y.B. 501, UN Sales No. 1954.1.15.

visas for these representatives on the ground that it was safeguarding its security, a privilege reserved under Public Law No. 357-80.³¹ On the proposal of Sweden and France, the Council decided to seek an opinion from the UN Legal Department. The Legal Department submitted a memorandum to the Economic and Social Council challenging the allegation by the United States that it had made a reservation. The Legal Department also observed that section 6 of Public Law No. 357-80 did not involve any qualification of access rights under sections 11-13 of the Headquarters Agreement.³² If the United States persisted in maintaining its position, the Legal Department stated, a dispute would exist to which the negotiation and arbitration section of the Headquarters Agreement would apply.³³ Because the U.S. representative announced to the Council that the United States was prepared to use the dispute-resolving machinery of section 21 of the Headquarters Agreement,³⁴ the Council adjourned its consideration of the matter.³⁵

On July 31, 1953, the Secretary-General reported to the Council on the negotiations between the United Nations and the United States.³⁶ According to the Secretary-General, the United States and the United Nations had agreed on the host country's obligation to allow transit for invitees of the Organization: "in those negotiations, the substance of the Agreement had been fully reaffirmed, especially with respect to persons in transit to the Headquarters District exclusively on official business of, or before, the United Nations."³⁷ The parties disagreed, however, over U.S. obligations to issue visas to people assigned to the United Nations—a class of people, one might add, that plainly raised issues different from, and probably graver than, those of more ephemeral visitors. The Secretary-General explained, "As regards cases where an assignment to the United Nations, formally entitling a person to a visa, served to cover another activity in the United States considered to be against the security of that country, it might be open to discussion whether they fell under the Agreement or not."³⁸ The Secretary-General expressed the view that even these cases fell within the Headquarters Agreement, which, he felt, should be strictly interpreted. As a result, he believed that he was not entitled to permit the United States the refusal competence it claimed.

Nevertheless, the Secretary-General expressed a broad principle that showed considerable sensitivity to the concerns of a host state:

³¹ 15 UN ESCOR (679th mtg.) at 37, UN Doc. E/SR.679 (1953).

³² 15 UN ESCOR Annexes (Agenda Item 34) at 2, UN Doc. E/2397 (1953).

³³ *Id.* at 3.

³⁴ 15 UN ESCOR (686th mtg.) at 83, UN Doc. E/SR.686 (1953).

³⁵ 15 UN ESCOR (687th mtg.) at 89, UN Doc. E/SR.687 (1953).

³⁶ 16 UN ESCOR (743d mtg.) at 249-56, UN Doc. E/SR.743 (1953); 16 UN ESCOR (745th mtg.) at 267-75, UN Doc. E/SR.745 (1953). For the report of the Secretary-General, see 16 UN ESCOR Annexes (Agenda Item 33) at 1, UN Doc. E/2492 (1953); *id.* at 2, UN Doc. E/2501 (1953) (oral statement subsequently distributed as a document).

³⁷ Annual Report of the Secretary-General on the Work of the Organization, 9 UN GAOR Supp. (No. 1) at 101, UN Doc. A/2663 (1954).

³⁸ *Id.*

[U]se of the rights under the Agreement in such cases [considered by the host state to be against its security] would, in fact, represent an abuse which would be against the interests of the United Nations and would, therefore, in fact be against the spirit of the Headquarters Agreement. If and when such a case were to arise it would have to be mutually studied on the basis of all the evidence supplied by the United States authorities to the Secretary-General, and if agreement were not reached, the problem would have to be solved under the Agreement, that was to say, by arbitration.³⁹

According to the Secretary-General, the United Nations and the United States had reached agreement about a procedure to be followed in case of disagreement on visas: the United States would take its decision at the highest levels; the decision would be taken in due time to allow the United Nations to consider the matter while it was still of practical significance; and the Secretary-General would be supplied to the greatest extent possible with the information on which the United States was basing its decision so as to allow an independent check.⁴⁰ This arrangement was presented by the Secretary-General as an appropriate compromise: "This procedure . . . offered a basis on which it would be possible . . . to safeguard the interests of the United Nations, while recognizing the legitimate interests of the United States, and acting in accordance with the Headquarters Agreement as it stood."⁴¹ The Secretary-General's report was discussed by the Council and adopted.⁴²

The Secretariat never challenged the competence of the United States to restrict the movement of visa holders to the headquarters district and its environs but also never acknowledged a unilateral right of the host Government to exclude invitees. Then-Secretary-General Dag Hammarskjöld conceded that it was arguable that a host state might lawfully refuse to grant a visa, the Headquarters Agreement notwithstanding, if there were clear evidence that the person in question intended to use the trip for activities against the host state's security, on the theory that it would no longer be covered by the Agreement. This conditional customary exception, as we might call it, is hardly a startling proposition: the inherent right of a host state to bar aliens in spite of its international obligations, if those aliens posed such a direct threat to the national security that their entry would imperil it, is a most modest elaboration of self-defense and self-preservation. But this concession was premised on procedural obligations. Difficult questions of fact would undoubtedly arise, to which the consultation and third-party dispute resolution procedures of the Headquarters Agreement would apply. The application and potential of these procedures for restraining abuse of the unilateral discretion was plainly fundamental to the understanding of the customary exception.⁴³

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² ESC Res. 509, 16 UN ESCOR Supp. (No. 1) at 19, UN Doc. E/2508 (1953), reprinted in 1953 UN Y.B., *supra* note 30, at 503.

⁴³ Since the ICJ's decision on jurisdiction and admissibility in the *Nicaragua* case, the U.S. position appears to have been that such questions are not susceptible to third-party decision,

There is no indication that any of the cases cited by the U.S. representative would qualify under the customary exception. None of the cases concerned people assigned to the United Nations. None of the people to whom visas were denied, it would appear, planned to exploit their presence in the United States to endanger its security.⁴⁴

In fact, the Arafat visa affair concerns a different issue. The cases cited by the U.S. representative and a further statement explaining the reasons for the exclusion of Arafat indicate that the United States is seeking to expand the customary right of exclusion. Until now, the right of exclusion has been limited to people posing a threat to the United States by their presence in the headquarters district. Henceforth, if the U.S. claim were to be accepted, this right would include (1) "wicked people," in the view of the United States; (2) people who have harmed U.S. interests or citizens in the past; and (3) people who, in the view of the United States, have violated international law. These grounds are apparently discretionary rather than mandatory and serve only U.S. interests. The grounds are not enforcement of some sort of universal jurisdiction. In addition, the United States is rejecting any collaborative procedural obligation and assuming that it is endowed in this matter with entirely unilateral competence.

Arafat was excluded on the basis of the second and third new exceptions. The U.S. representative stated:

In this case, the United States has convincing evidence that PLO elements have engaged in terrorism against Americans and others. This evidence includes a series of operations taken by the Force 17 and the Hawari organizations since the PLO claimed to foreswear the use of terrorism in the Cairo Declaration of November 1985. As Chairman of the PLO, Mr. Arafat is responsible for actions of these organizations, which are units of Fatah, an element of the PLO of which he also is Chairman and which is under his control. Having found that Mr. Arafat, as Chairman of the PLO, knows of, condones, and lends support to terrorism against Americans, the United States found that Mr. Arafat is an accessory to such terrorism and accordingly denied the visa.⁴⁵

None of these grounds has any basis in the Headquarters Agreement or in the customary exception. Moreover, all of them have been applied inconsistently, depending on the short-term interests of the United States. Many people who have been issued visas under sections 9–11 of the Headquarters Agreement would fall within one or more of the categories recited by the U.S. representative.

raising questions about the continuing effectiveness of the 1954 compromise. See United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 24 ILM 246 (1985); Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America, *id.* at 249. Although the reach of the procedural arrangements may now be in contention, the customary exception itself, the substantive acknowledgment of the right of the host state to act to protect itself in appropriate fashion, does not appear to have been qualified or withdrawn.

⁴⁴ See text accompanying note 28 *supra*.

⁴⁵ Byrne Statement, *supra* note 15.

However deplorable certain methods adopted by the PLO and/or groups operating in its name, Chairman Arafat's presence in the United States *per se* posed no security threat to the host state. Indeed, Secretary of State Shultz, in responding to press queries, as much as acknowledged that fact. Arafat was barred because of the personal animus of the Secretary, the widespread aversion to policies and practices of his organization, the fear that Arafat would "exploit" his presence diplomatically (the very *raison d'être* of international politics in a UN-type forum) and the belief that the exclusion would be diplomatically useful to the United States.

The U.S. action in the Arafat visa affair violated the nation's conventional and customary obligations. Like many international legal violations, the action also represents a claim for new law, for in the international system it is unfortunately too often the case that *ex delicto oritur jus*. If the new claim to a unilateral right of exclusion is accepted, the host state will henceforth be in a position to exploit its status by using and conditioning admission to UN headquarters as its own instrument of policy. Were such grounds for refusal by host countries to allow a treaty-authorized invitee to enter their territory to become lawful, international organizations would find it increasingly difficult to operate. Whether it is examined *de lege lata* or *de lege ferenda*, this treaty violation bodes ill for both the United Nations and the United States, a country that ultimately depends, as much as any other, on the integrity of the regime of international agreements.

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INTERNATIONAL LAW IN THE PUBLIC FORUM: THE *NEW YORK TIMES* AND THE LIBYAN CHEMICAL WEAPONS PLANT

Nations typically act first and worry about legalities afterwards. International lawyers thus find themselves relegated, for the most part, to the passive role of sorting out rationalizations of past events.¹ Once in a while, however, when a democratic government is contemplating an action that is legally questionable, international lawyers may have a chance to play a more active role. The government at that time might decide to introduce the issue of the legality of its contemplated action into the public forum, either in the hope that open debate may help pave the way for public acceptance of whatever action the government ultimately chooses to take or, more charitably, in a genuine search for the public will on the matter. The primary

¹ In a previous editorial, I discussed some aspects of governmental vs. academic international law rationalizations. See D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AJIL 657 (1985).