

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

February 26, 2020

Hon. Michael Pompeo
Secretary of State of the United States
Harry S. Truman Building
2201 C St., NW
Washington, DC 20520

H.E. Ambassador Kelly Craft
United States Ambassador to the United
Nations
799 United Nations Plaza
New York, NY 10017

Dear Secretary Pompeo and Ambassador Craft,

We write on behalf of the New York City Bar Association (“City Bar”) to urge the Trump administration to adhere to its legal obligations under the United Nations Headquarters Agreement (“Headquarters Agreement”), including issuing visas to representatives of United Nations Member States to permit unimpeded transit to and from the United Nations headquarters district.

During the 74th session of the United Nations General Assembly, several Member States expressed concern over the delay of the issuance of visas by the United States State Department to their representatives, who applied for visas to enter the United States to engage in business at the United Nations headquarters in New York City.¹ The non-issuance or severe delays in issuing visas for some delegations had the effect of delaying the negotiations of the General Assembly’s First and Sixth Committees and prevented some Member States from participating in the Organization’s activities. In addition, the Islamic Republic of Iran has raised concerns regarding the United States’ failure to issue a visa to Iranian Minister of Foreign Affairs Javid Zarif, who purportedly applied for a visa on December 20, 2019, to enter the United States to participate in a ministerial meeting at the United Nations headquarters on January 9, 2020. Facilitating the participation of the Iranian Minister of Foreign Affairs in a ministerial meeting at the United Nations Security Council at a time of heightened tension between the United States and Iran was crucial to the Security Council fulfilling its primary purpose of maintaining international peace and security.

Member States’ concerns that the United States is not adhering to its legal obligations under the Headquarters Agreement date back to at least 1988.² The current concerns of Member States,

¹ See, the Report of the Committee on Relations with the Host Country from the 74th session of the United Nations General Assembly, Chapter III. <https://undocs.org/en/A/74/26>. (All links in this report were last checked on February 25, 2020).

² In 1988, the United States denied a visa application submitted by the Palestine Liberation Organization for its representative, Yasser Arafat, to speak at the 43rd session of the United Nations General Assembly. Subsequently, the United Nations General Assembly moved the debate to Geneva, Switzerland, to permit Mr. Arafat to address the General Assembly, and adopted a resolution (with 151 votes in favor, two votes against and one abstention) stating that the denial of Mr. Arafat’s visa application violated the Headquarters Agreement. In 2014, the administration of

and the historical record of the United States in complying with its legal obligations under the Headquarters Agreement, indicate that the United States may not be adhering to its obligations under international law nor promoting a rules-based international order.

The United States entered into the Headquarters Agreement on November 21, 1947, when then-United States Ambassador to the United Nations Warren Austin and then-United Nations Secretary-General Trygve Lie exchanged notes bringing the agreement into force in accordance with Section 28 of the Headquarters Agreement. The United States codified the Headquarters Agreement into federal law through the enactment of Public Law 80-357 on August 4, 1947. The Headquarters Agreement, and Public Law 80-357, create clear legal obligations for the United States as the host country of the United Nations. Under Section 11 of the Headquarters Agreement, “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.” Section 11 of the Headquarters Agreement prohibits the United States from creating barriers for representatives from Member States to travel to and from the headquarters district.

Anticipating that the state of relations between the government of the United States and the governments of other Member States could prevent the proper functioning of the United Nations, the Headquarters Agreement expressly proscribes the United States from failing to adhere to its legal obligation to permit unimpeded transit to the headquarters district to representatives from Member States based on its relations with other governments. Section 12 of the Headquarters Agreement states, “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.” Thus, in order for the United States to comply with its legal obligations under the Headquarters Agreement, it is required to process visa requests for representatives from Member States without regard for the status of the relationship between the government of the United States and the governments of other Member States.

In addition to the legal requirement that the United States not impose impediments to transit to or from the headquarters district by representatives from Member States, the Headquarters Agreement expressly states that the issuance of visas by the United States should not be unduly delayed. Section 13 of the Headquarters Agreement states, “Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such a 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.”

While the Headquarters Agreement does not specify the time requirement for the United States to process Member State visa requests, the United States is obligated to interpret and implement the Headquarters Agreement in good faith. Common Article 31.1 of both the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations establish that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to

then-President Barack Obama withheld issuing a visa to the H.E. Ambassador Iranian permanent representative to the United Nations, Hamid Abutalebi, based on his role in the 1979 hostage crisis in Tehran, Iran.

the terms of the treaty in their context in light of its object and purpose.”³ The United States must make a good faith effort to process visa requests by all Member States in a timely manner, so as to facilitate the proper functioning of the United Nations.

The language of Public Law 80-357, which codified the Headquarters Agreement in United States federal law, is in large part identical to the language of the Headquarters Agreement, but Public Law 80-357 does include language not included in the text of the Headquarters Agreement that is relevant to the issue of processing visas for the representatives of Member States. Section 6 of Public Law 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, as to be defined and fixed in a supplementary agreement between the Government of the United States and the United Nations in pursuance of section 13(3)(e) of the agreement, and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.” The language contained in Public Law 80-357 expressly reserves the right of the United States to control the entry of aliens into its territory; however, it specifically constrains this right with respect to access to the headquarters district, to which the United States has no right to restrict the access of the representatives of Member States.

Member States have asserted that the United States has imposed travel restrictions on their representatives that violate the Headquarters Agreement, including restricting travel to within a 25-mile radius from a designated point in the center of Manhattan, restricting certain representatives from the Islamic Republic of Iran to travel within a 3-mile radius from their places of residence, and restricting the ability of certain representatives from Cuba to travel outside of Manhattan.⁴ The City Bar acknowledges that nothing in the Headquarters Agreement explicitly prevents the United States from imposing geographic travel restrictions on representatives of Member States, so long as those restrictions do not impede the transit of such representatives to and from the headquarters district. However, the United States does have an obligation to construe the Headquarters Agreement in a manner that facilitates the business of the United Nations. Section 27 of the Headquarters Agreement states, “This 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 purpose.” In order to fulfill the spirit, if not the letter, of the Headquarters Agreement, the United States should refrain from imposing restrictions on travel outside the headquarters district and its immediate vicinity for representatives from Member States, except in those instances when doing so is strictly necessary to safeguard the national security of the United States.

³ The United States became signatory to the Vienna Convention on the Law of Treaties on April 24, 1970, and recognizes that parts of the Convention constitute customary law binding upon all nations. See, “Vienna Convention on the Law of Treaties” available at the U.S. Department of State, Office of the Legal Adviser, Treaty Affairs, Frequently Asked Questions (archived content). <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm>. The United States became signatory to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations on June 26, 1987, which reproduces Article 31 of the prior convention unchanged.

⁴ See, the Report of the Committee on Relations with the Host Country from the 74th session of the United Nations General Assembly, Chapter III. <https://undocs.org/en/A/74/26>.

Should the United States continue to engage in conduct that is arguably in violation of the Headquarters Agreement, including willfully delaying the approval of Member State visa requests, it opens itself up to allegations of “bad faith” implementation of the Headquarters Agreement, and the activation of Section 21 of the Headquarters Agreement, including the real possibility of being subjected to arbitration. Section 21(a) of the Headquarters Agreement states, “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.” The only way for the United States to avoid having the United Nations exercise its right to initiate a costly and politically damaging arbitration against it is for the U.S. to adhere to its legal obligations under the Headquarters Agreement and ensure that the purpose of the Headquarters Agreement is fulfilled.

The United Nations bestowed a great privilege and responsibility upon the United States in selecting it as the host of the United Nations headquarters and seat of its principal organs. The United States has generally fulfilled its obligations as the host country in a manner that reflects the values of the United States, as a champion of democracy and the rule of law as well as a steadfast promoter of the peaceful resolution of disputes through diplomatic means. It is vital that the United States continue to uphold these values in facilitating the work of the United Nations by fully adhering not only to its legal obligations under the Headquarters Agreement, but also to the original spirit of this agreement. At a time of heightened geopolitical tensions around the world, supporting the purpose and principles of the United Nations, including upholding the United Nations headquarters as a “center for harmonizing the action of nations in the attainment of these common ends,”⁵ is critical to maintaining international peace and security.

Based on the aforementioned legal framework and the growing concerns of numerous Member States, the City Bar and its United Nations Committee respectfully make the following recommendations to the government of the United States:

- Adhere to the legal obligations of the United States established by the Headquarters Agreement, in good faith, including the approval, as promptly as possible, of all visa requests from Member States to permit their representatives unimpeded transit to and from the headquarters district;
- Bearing in mind the particular disruption to the work of the United Nations when access is impeded for Presidents, Prime Ministers, and Ministers of Foreign Affairs and their deputies, ensure that these categories of entrants receive the utmost priority and timeliness in visa issuance, full diplomatic courtesies and a diplomatic security detail in accordance with applicable law;
- Only impose travel restrictions upon Member State representatives when it is strictly necessary to protect the national security of the United States and, when imposing such restrictions, doing so in the least restrictive manner possible;

⁵ United Nations Charter, Chapter I, Article 1(4).

- Should the United States formally deny a Member State’s visa application, to do so in as transparent a manner as possible, including by providing the United Nations Secretary-General, the United Nations Committee on Relations with the Host Country, and the concerned Member State with written notice and rationale for such denial;
- Implement the recommendations and conclusions contained in paragraph 165 of the most recent report of the Committee on Host Country Relations (A/74/26); and
- Invite and encourage the personal participation of the Chair of the Committee on Host Country Affairs and of the Secretary-General, through his designated representative, in bilateral discussions between the host country and affected missions.

Respectfully,

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