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Barriers to NGO Access at the CSW

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The United Nations Commission on the Status of Women (CSW) is the leading international body dedicated to promoting gender equality and the empowerment of women.¹ Every year, United Nations leaders, representatives of Member States (also referred to as delegates), and representatives of non-governmental organizations (NGOs) attend the CSW at the United Nations Headquarters in New York to promote gender equality, document the reality of women's lives throughout the world, and shape global standards on gender equality and the empowerment of women.² NGO representatives play a vital role in CSW discussions and events, because they have firsthand knowledge of the gender equality issues facing their countries and/or regions. While the work of delegates and UN staff can be very political, NGOs are more concerned with exposing human rights abuses and making positive change. Thus, in order for the CSW to truly promote gender equality and the empowerment of women, NGO participation is fundamental.

However, there are currently many obstacles preventing NGO representatives from having a true voice in the CSW. There is a general lack of NGO participation at the CSW due to a lack of transparency and opportunities to address delegates. Furthermore, some NGO representatives have been prevented from participating in the CSW altogether due to visa denials by the United States government. This paper seeks to introduce the history and current status of the CSW, the lack of NGO access at the CSW generally, and the issue of visa denials for NGO representatives.

¹ "Commission on the Status of Women." *UN Women*, www.unwomen.org/en/csw.

² *Id.*

I. INTRODUCTION TO THE CSW

Soon after the founding of the United Nations, the CSW was created in 1946 by a resolution from the UN's Economic and Social Council (ECOSOC).³ The first CSW met in 1947 and consisted of fifteen government representatives, all of whom were women.⁴ Since then, the CSW has fostered the adoption of several international agreements promoting gender equality. For example, the CSW contributed to the Universal Declaration of Human Rights (UDHR), the first major international document establishing fundamental rights that should be universally protected, by successfully arguing against the use of the term "men" and instead using more inclusive terms, such as "people(s)" or "human beings."⁵

The Commission also drafted several major international conventions on women's rights, such as the 1953 Convention on the Political Rights of Women, the first international law instrument to recognize and protect the political rights of women,⁶ and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a legally binding international treaty that provides universal standards for protecting and promoting women's rights.⁷ In addition, the CSW has served as the preparatory body for the four World Conferences on Women,⁸ and the 1995 Fourth World Conference on Women adopted the landmark Beijing

³ *Id.*

⁴ "A Brief History of the CSW: Commission on the Status of Women." *UN Women*, www.unwomen.org/en/csw/brief-history.

⁵ *Id.* See also, The United Nations, *Universal Declaration of Human Rights*, 1948 ("[The] advent of a world in which *human beings* shall enjoy freedom... [The UDHR is] a common standard of achievement for all *peoples*...") (Emphasis added).

⁶ *Id.* See also, UN General Assembly, *Convention on the Political Rights of Women*, 20 December 1952, A/RES/640(VII).

⁷ *Id.*; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. CEDAW has been ratified by 170 countries, but the United States remains one of the only countries to have not signed the treaty. For more information, see Borup, Jeffrey, *An International Bill of Rights for Women? - Why the United States Refuses to Ratify the Convention on the Elimination of All Forms of Discrimination Against Women* (March 21, 2005).

⁸ *Id.*

Declaration and Platform for Action (“Beijing Declaration”), which is considered the most progressive blueprint ever for advancing women’s rights.⁹

After the creation of the CSW, four units were created within the United Nations system that were dedicated to gender equality: the Division for the Advancement of Women (DAW), the UN Development Fund for Women (UNIFEM), the International Research and Training Institute for the Advancement of Women (INSTRAW), and the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI).¹⁰ These four units merged in 2011 to become UN Women, which is now the Secretariat of the CSW.¹¹ Thus, the CSW now operates under UN Women.

The CSW has grown from its original fifteen government representatives and now has forty-five delegates from UN Member States that are elected every four years on the basis of geographical distribution: thirteen members from Africa, eleven from Asia, nine from Latin America and the Caribbean, eight from Western Europe and other states, and four from Eastern Europe.¹² Five of those forty-five delegates serve on the Bureau of the Commission, which plays a crucial role in preparing, facilitating and ensuring a successful outcome of the CSW’s annual two-week sessions.¹³

Another major contributor to the CSW is the NGO Committee on the Status of Women, New York (NGO CSW). NGO CSW describes its mission statement as, “ensur[ing] that the voices and leadership of feminist and women's rights organizations all over the world are

⁹ “Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome.” *UN Women*, 2015, www.unwomen.org/en/digital-library/publications/2015/01/beijing-declaration. See also United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, endorsed by GA Resolution 50/203, 22 December 1995.

¹⁰ “A Brief History of the CSW: Commission on the Status of Women.” *UN Women*, www.unwomen.org/en/csw/brief-history.

¹¹ *Id.*

¹² “Member States.” *UN Women*, www.unwomen.org/en/csw/member-states.

¹³ *Id.*

included in UN deliberations such as the annual Commission on the Status of Women (CSW).”¹⁴ NGO CSW works closely with accredited NGOs and UN Women and fosters NGO participation in the CSW by conducting advocacy trainings, preparing orientations, offering spaces to exchange ideas and collaborate, hosting regional caucus discussions, and more.¹⁵ NGO CSW also helps NGO representatives participate in the annual CSW by helping NGOs register for the CSW, apply for grounds passes for the UN Headquarters, and giving advice for obtaining visas to travel to the UN Headquarters.¹⁶

Every year, the CSW has a priority theme. The priority theme covers certain areas within the realm of gender equality issues, and the outcome of the Commission’s discussions of the priority theme is published in the Agreed Conclusions.¹⁷ Throughout the two-week annual convention, country delegates create, debate and edit the language of the proposed Agreed Conclusions through meetings, discussions and voting sessions. The Agreed Conclusions contain an analysis of the priority theme and a set of distinct recommendations for governments and the international community as a whole.¹⁸ Although the Agreed Conclusions are not binding, they can be persuasive authorities and serve as important documents to guide governments and policymakers on what actions are needed in order to promote gender equality. Therefore, it is vital that the Agreed Conclusions address important gender equality issues and contain inclusive language so that no one is excluded.

¹⁴ “Mission & Vision.” *NGO CSW/NY*, ngocsw.org/about-us/.

¹⁵ *Id.*

¹⁶ For an example, see NGO CSW Orientation Committee. “NGO CSW Forum Orientation Video Series.” *NGO CSW/NY*, 2019, ngocsw.org/ngo-csw-forum-orientation-video-series/.

¹⁷ “CSW63 (2019).” *UN Women*, 2019, www.unwomen.org/en/csw/csw63-2019. As an example of a priority theme, the CSW63’s theme in 2019 was “social protection systems, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls.” *Id.*

¹⁸ *Id.*

Thus, the CSW provides an opportunity for UN leadership, country delegates, and NGOs to promote gender equality and create international standards regarding gender issues. The Agreed Conclusions are the ultimate outcomes for the annual convention and consume much of the work of the CSW participants and attendees. While there are issues concerning NGO access, the CSW continues to be a crucial tool in the promotion of gender equality and women empowerment.

II. NGO ACCESS TO THE CSW GENERALLY

Since its creation, the CSW has forged a close relationship with NGOs, and NGOs have contributed greatly to exposing gender equality issues and fighting for positive change.¹⁹ Currently, in a typical year, approximately 5,000 NGO representatives travel to the UN Headquarters in New York to participate in the annual CSW.²⁰ These NGO representatives attend the CSW with the hopes of advocating for their issues and lobbying delegates to adopt certain language in the Agreed Conclusions. Almost all of these NGO representatives are women who have dedicated their careers to combatting gender discrimination and inequality and, therefore, have a vital input as to what gender issues need to be addressed in the international community. Furthermore, there are still many country delegates who are male, so it is even more important that female NGO representatives are able to participate in CSW discussions and speak with delegates.

However, NGOs have faced a number of obstacles that have prevented them from being able to fully and effectively participate in the CSW. One of the biggest impediments of NGO access is that the Agreed Conclusion discussions, whereby country delegates debate what

¹⁹ “A Brief History of the CSW: Commission on the Status of Women.” *UN Women*, www.unwomen.org/en/csw/brief-history.

²⁰ Connie de la Vega & Alen Mirza, *A Practical Guide to Using International Human Rights and Criminal Law Procedures* (2019).

language will be adopted in the final publication, are almost always behind closed doors. The meetings take place in rooms guarded by UN security, and only people with delegate passes are allowed to enter. Although many major meetings in the UN Headquarters in both New York and Geneva are broadcasted live on the United Nation's website, these Agreed Conclusion meetings are not.²¹ Therefore, if one is not allowed in-person access to the Agreed Conclusion meetings, it is nearly impossible to know what issues are being discussed and what language is being debated without speaking to a delegate.

Simply getting an opportunity to speak with a delegate can be an uphill climb. When the delegates are not in their behind-closed-doors meetings, they often spend their time in areas of the UN Headquarters building that are also closed off to NGOs. I managed to speak with a few delegates during my time at the CSW, but all but one of my discussions with a delegate took place outside of the UN building. In fact, the one discussion I had with a delegate inside the UN building occurred after I asked a question at one of the panel discussions, and the Bangladeshi delegate approached me to ask about the issues I was working on. Otherwise, I was able to talk to delegates in country-sponsored CSW events outside of the UN Headquarters or at the nearby bar, where I approached them after noticing they were still wearing their UN delegate badges. Previous Human Rights Advocates (HRA) representatives shared that they had "bathroom talks" with delegates after finding them in the restrooms.

Additionally, it is very difficult to get an opportunity to give a speech in a room full of delegates. During CSW63, NGOs were supposed to have an opportunity to give a three-minute speech to delegates within the first week. However, the whole process was quite disorganized and the times for NGOs to give speeches were repeatedly pushed back. After three days of

²¹ For more information, see "UN Live United Nations Web TV." United Nations, webtv.un.org/.

waiting to be called to give a speech, I was one of the fortunate NGO representatives who was able to give a speech during the second week of the CSW63. However, once the NGOs were given an opportunity to give speeches, many delegates left the room. By the time I gave my speech, there were just a handful of delegates in the room, most of whom were on their phones the entire time. I was very thankful for the opportunity to speak, but I felt that my speech would have made more of an impact if there were more delegates who were physically and mentally present.

Another issue is that the Agreed Conclusion drafts are not released according to a schedule but are released randomly, making it difficult for NGOs to stay updated with the status of the Agreed Conclusions and which country delegates are supportive or disapproving of certain language. The drafts are also rarely posted online or sent through a public email list. When I participated in the 63rd annual session of the CSW (CSW63) in 2019, I had to ask other NGO representatives to forward me the Agreed Conclusions drafts that had been circulated among CSW participants. Considering that it took me a couple days asking other NGO representatives to finally find someone who had the Agreed Conclusions draft, it is likely that many NGO representatives never saw the Agreed Conclusions until after the conclusion of the CSW when the final publication was released.

Thus, the difficulties in not having access to the Agreed Conclusions discussions, being able to speak to delegates, and finding the Agreed Conclusion drafts severely impact the ability of NGO representatives to be able to effectively lobby delegates or have a voice in the outcome of the CSW. Although there are thousands of NGO representatives who attend the CSW, there are solutions that would allow NGOs more access to the CSW, such as having a lottery system to allow a certain number of NGO representatives to attend the delegate meetings. There should

also be more opportunities for NGOs to ask delegates questions. The Agreed Conclusion drafts could easily be posted online or shared via email. In sum, there needs to be more transparency and NGO involvement during the Agreed Conclusions and delegate meetings.

III. VISA DENIALS BARRING NGO ACCESS

A. Visa Denials Facts

While NGO representatives face barriers to advocate for their issues and lobby delegates once they are at the UN Headquarters, many NGO representatives have been prevented from even traveling to the UN Headquarters and attending the CSW due to visa denials. According to multiple NGO CSW members and NGO representatives who have been attending the CSW for several years, visa denials have dramatically risen since 2017. Although no one knows how many people have actually been denied visas to attend the CSW, approximately fifty NGO representatives were denied visas for the CSW62 in 2018 and at least forty-one visas were denied for accredited NGO representatives who were invited to the CSW63 in 2019.²² All of these visa denials were voluntarily reported, so it is extremely likely that there are many more visa denials that have gone unreported.

According to NGO CSW and other NGO representatives I spoke to, almost all of these women who reported visa denials were denied nonimmigrant C-2 visas for failing to establish sufficient ties to their home countries (*i.e.*, proving that they will return home and not overstay their visa).²³ Additionally, some NGO representatives were denied for “being too young.”

²² “CSW62: Cases of US Visa Denials Must Be Addressed.” *ISHR*, International Service for Human Rights, 22 Sept. 2018, www.ishr.ch/news/csw62-cases-us-visa-denials-must-be-addressed. Forty-one NGO representatives self-reported their visa denials to NGO CSW in 2019.

²³ A C-2 visa is a diplomatic travel visa specifically designed for foreign citizens to travel to the UN Headquarters in New York under the provisions of the Headquarters Agreement with the United Nations. The visa is limited to travel within the immediate New York City vicinity. A C-2 visa is a specific type of travel visa for foreign citizens traveling to the United Nations Headquarters in New York City. For more information, *see* “Transit Visa.” *Bureau of Consular Affairs*, U.S. Department of State, travel.state.gov/content/travel/en/us-visas/other-visa-categories/transit.html.

Several women who were denied a visa or knew someone in their organization who was denied a visa to attend the CSW reported that it was because they were not married and/or did not have children. Age, marriage, and whether or not a person has children are not requirements for a C-2 visa, yet these women were denied visas for these discriminatory reasons.²⁴

Many of the NGO representatives who reported visa denials were from African and Middle Eastern countries. They were well-prepared for their consular interviews and brought a number of documents to prove that they have sufficient ties and will return to their home countries after the CSW, including an invitation from the NGO CSW to the CSW Forum at the UN Headquarters in New York, evidence of property ownership, their children's birth certificates, marriage certificates, employment verification, receipts of their flights back to their home countries, and more. NGO CSW also sent their invitees visa interview tips in order to ensure their visa applications would be approved.²⁵ Still, it is reported that the U.S. Consular Offices refused dozens of applications.²⁶

Although the United States government generally has a right to admit or deny non-citizens to enter the country, the United States is under a unique obligation under a binding treaty, the 1947 United Nations Headquarters Agreement (“HQ Agreement”), to give United Nations’ invitees and attendees certain privileges with respect to immigration laws.²⁷ Section 11 of the HQ Agreement states, “[The] United States shall not impose any impediments to transit to or from the headquarters district of... (4) representatives of non-governmental organizations

²⁴ See 8 C.F.R. 214.2(c)(2); 22 C.F.R. 41.71 (requirements for C-2 visa eligibility).

²⁵ This information regarding visa interview tips and the various documentations provided to consular officials by visa applicants was gathered from multiple interviews with NGO CSW officials and NGO representatives from March 2019 to the present.

²⁶ See, e.g., Jha, Nishita. “The US Denied Visas To Women From Africa And The Middle East Hoping To Attend The UN's Women Conference.” *BuzzFeed News*, BuzzFeed News, 23 Mar. 2019, www.buzzfeednews.com/article/nishitajha/un-women-conference-visas-denied.

²⁷ Agreement Regarding the Headquarters of the United Nations, U.N.-U.S., June 26, 1947, 11 U.N.T.S. 11.

recognized by the United Nations for the purpose of consultation...”²⁸ Furthermore, Section 13(a) states, “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.”²⁹ Thus, the United States is failing to comply with its legal obligations under the HQ Agreement by arbitrarily denying NGO representatives their visas, thereby preventing them from participating in the CSW.

By denying NGO representatives’ visas to enter the United States (U.S.), the U.S. government is barring their participation at the CSW and worsening the already limited NGO access to the CSW. The international and national community must combat these arbitrary visa denials and ensure that NGO representatives from around the world are able to participate and have a voice in the CSW. There may be a viable legal case against the U.S. government, and the political process may also ensure compliance with the HQ Agreement.

B. Legal Arguments Against the Visa Denials

While civil society has been fighting against the issue of visa denials through the political process, there may be viable legal arguments against the denial of nonimmigrant visas for NGO representatives who have been invited to the UN Headquarters. The biggest weapon against these visa denials is the binding nature of the HQ Agreement. There are also potential arguments related to the failure of the consular officials to exercise a nondiscretionary duty and possible infringements on U.S. citizens’ constitutional rights. If any of these arguments succeed, potential plaintiffs may be able to seek injunctive relief to ensure the U.S. government does not arbitrarily deny visas for NGO representatives.

²⁸ *Id.*

²⁹ *Id.*

1. *The HQ Agreement*

The HQ Agreement is likely the most powerful legal source to combat the denial of C-2 visas for NGO representatives to the UN Headquarters. As stated before, the HQ Agreement, a legally binding treaty, gives privileges to NGO representatives to travel to and from the UN Headquarters and requires the U.S. government to not impose any travel impediments to NGO representatives.³⁰ Treaties and statutes are the supreme law of the land.³¹ Whenever possible, both the treaty and statute(s) are to be given effect, and only where Congress has expressed clear intent to supersede a treaty with a later enacted statute does the statute take precedence.³² Here, the U.S. government may argue that the obligations under the HQ Agreement are superseded by the authority given to consular officials under the Immigration and Nationality Act (INA). However, absent clear congressional intent for the immigration laws to supersede the HQ Agreement, the HQ Agreement has the force of law, and U.S. immigration laws must comply with the treaty.

Despite the HQ Agreement having been in force for over seventy years, there is little caselaw concerning this treaty, especially regarding the denial of nonimmigrant visas for NGO representatives. However, it has been established that the HQ Agreement remains a valid and outstanding treaty obligation of the United States.³³ Furthermore, the prohibition of interference with these UN privileges are “are not limited to [UN] members, but extend to invitees as well.”³⁴ Although there is no caselaw regarding the government’s duty for NGO representatives who

³⁰ Agreement Regarding the Headquarters of the United Nations, U.N.-U.S., June 26, 1947, 11 U.N.T.S. 11.

³¹ U.S. Const. art. VI, cl. 2..

³² *U.S. v. Palestine Liberation Org.*, 695 F.Supp. 1456, 1464 (S.D. N.Y. 1988) (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 599–602 (1889); *Edye v. Robertson*, 112 U.S. 580, 597–99 (1884); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968); *McCulloch v. Sociedad de Marineros*, 372 U.S. 10, 21–22 (1963); *Cook v. United States*, 288 U.S. 102, 119–20 (1933)).

³³ *U.S. v. Palestine Liberation Org.*, 695 F.Supp. 1456, 1471 (S.D. N.Y. 1988).

³⁴ *Id.* at 1466.

have been approved by the UN to attend the CSW, the exemptions should apply to both invitees and approved NGO attendees, because the language of the agreement does not distinguish between invitees and attendees.³⁵ Thus, one may argue that the obligations of the HQ Agreement supersede the discretion given to consular officials regarding nonimmigrant visas under the Immigration and Nationality Act (INA).

Furthermore, Congress has not expressed any intent to have the immigration statutes supersede the HQ Agreement. The one section explicitly addressing the HQ Agreement states that an alien whose visa is limited to and from the UN Headquarters, if otherwise admissible, shall be admitted on the additional conditions that she or he only be in the UN Headquarters District and have documentation evidencing his ability to enter another country afterwards.³⁶ This statute has been amended twenty-eight times, but Congress has never amended this section regarding the HQ Agreement.³⁷ Thus, Congress has had several chances to show its intent to supersede the HQ Agreement but has not done so. Even if there was an inference of congressional intent, the HQ Agreement would control absent an expression of *clear* intent to supersede the treaty.³⁸

Additionally, the executive branch has shown its intent to prioritize the United States' commitment to the HQ Agreement. A recent executive order implementing the suspension of entry for nationals of "countries of particular concern" (more commonly known as one of President Trump's "Muslim Bans") has an exception for any foreign national traveling on a C-2 visa for travel to the United Nations.³⁹ Thus, even an executive order greatly limiting visa

³⁵ *HQ Agreement*, Section 11.

³⁶ 8 C.F.R. § 214.2(c)(2).

³⁷ *See, e.g.*, 8 C.F.R. § 214.2 (2004).

³⁸ *Palestine Liberation Org.*, 695 F.Supp. at 1464.

³⁹ Exec. Order No. 13780 § 3(b)(v), 8 USC § 1182 (March 6, 2017).

approvals had an exception for UN invitees travelling under a C-2 visa, evidencing the government's commitment to its obligations under the HQ Agreement.

In conclusion, the plain language of the HQ Agreement, congressional intent and executive intent are evidence of the authority of the HQ Agreement and its potential effectiveness in persuading a court to issue an injunction forcing U.S. immigration officials to comply with the requirements of the HQ Agreement.

2. *Exceptions to the Doctrine of Consular Nonreviewability*

In most cases, immigrant and nonimmigrant visa denials, including C-2 visas, are not subject to judicial review due to the doctrine of consular non-reviewability, which provides that courts do not have subject-matter jurisdiction to review decisions made by consular officers regarding the grant or denial of visas.⁴⁰ Therefore, the government will argue these visa denials are not subject to judicial review under the doctrine of consular nonreviewability. However, courts have recognized some exceptions to this doctrine, including the failure to perform a nondiscretionary duty and visa denials affecting the constitutional rights of citizens.

a. *Failure to Perform a Nondiscretionary Duty Exception*

There have been a number of cases outlining an exception to the doctrine of consular nonreviewability for failure to perform a nondiscretionary duty.⁴¹ In all of these cases, courts have recognized that jurisdiction exists when the suit challenged the authority of the consul to fail or take action but not a decision regarding the consul's discretion. Cases under this exception

⁴⁰ See James Lockhart, *Construction and Application of Doctrine of Consular Nonreviewability*, 42 A.L.R. Fed. 2d 1 (2009) (citing *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999)).

⁴¹ See, e.g., *Ruston v. U.S. Dept. of State*, 29 F. Supp. 2d 518 (E.D. Ark. 1998) (finding that the doctrine of consular nonreviewability precluded judicial review, because there was no nondiscretionary duty when consular officials denied an Australian alien's visa); *Raduga USA Corp. v. U.S. Dept. of State*, 440 F. Supp. 2d 1140 (S.D. Cal. 2005) (finding in favor of employer of alien after the United States Consulate in Moscow failed to issue a decision on the alien's visa application for four years); *Nwansi v. Rice*, 2006 WL 2032578 (N.D. Cal. 2006) (unreported opinion) (finding no failure of a nondiscretionary duty when consular officials suspended a Nigerian alien's visa application as authorized by law).

in which the court found in favor of the alien involved situations in which a visa application was neither approved nor denied for years.⁴²

Although consular officials are purportedly acting within their discretion when denying NGO representatives C-2 visas, they are arguably failing to perform a nondiscretionary duty under the HQ Agreement. There are no published cases applying the failure to perform a nondiscretionary duty exception to the HQ Agreement, but one may argue that the HQ Agreement creates a nondiscretionary duty by requiring the United States to “not impose any impediments to transit to or from the headquarters district” and to not apply its immigration laws in a way that would interfere with the privilege to travel to the UN Headquarters.⁴³ In other words, the HQ Agreement could create a non-discretionary duty to grant C-2 visas to NGO representatives who have been approved to attend the CSW, as long as the applicants meet the visa requirements. If a court finds that the HQ Agreement creates a non-discretionary duty, potential future plaintiffs will be able to overcome the doctrine of consular nonreviewability and have a viable case against the U.S. government.

b. Infringement of U.S. Citizens’ Constitutional Rights Exception

Some courts have recognized an exception to the doctrine of consular nonreviewability when United States citizens claim their own constitutional rights are infringed by the denial of an alien seeking entry into the United States.⁴⁴ In *American Academy of Religion v. Chertoff*, nonprofit organizations alleged that the federal government violated their First Amendment rights after revoking Professor Tariq Ramadan’s visa on the basis of his political views.⁴⁵ The

⁴² See, e.g., *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997) (naturalized citizen and alien spouse seeking to compel the United States Consulate in India to decide a visa application that had been pending for eight years).

⁴³ *HQ Agreement*, Section 11, 13.

⁴⁴ See, e.g., *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990); *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008); *American Academy of Religion v. Chertoff*, 573 F.3d 115 (2d Cir. 2009); *Afshar v. Everitt*, 2005 WL 2898019 (W.D. Mo. 2005) (unreported opinion).

⁴⁵ *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D. N.Y. 2006).

district court held that the doctrine of consular nonreviewability does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims.⁴⁶

Although the doctrine did not bar review of the organizations' valid First Amendment claims, the court could only review the decision to deny a visa under this exception to determine whether or not the government had provided a facially legitimate and bona fide reason to exclude the applicant.⁴⁷ The *Chertoff* court stated:

“Only where the Government is unable to provide a facially legitimate and bona fide reason for excluding the alien, thereby revealing that the true reason for exclusion was the content of the alien's speech, may a court remedy the constitutional infirmity by enjoining the Government from excluding the alien in contravention to the First Amendment.”⁴⁸

The court concluded that the government had an inadequate reason for its denial of Ramadan's visa by simply stating “national security,” and there was no basis in the record where the court could find that the national security concerns were a facially legitimate or bona fide reason in Ramadan's case.⁴⁹ The court ultimately ordered the government to issue a formal decision on Ramadan's pending visa application.⁵⁰ Less than three months later, the government denied Ramadan's visa because he had contributed money to Hamas, a terrorist group, in violation of INA § 212(a)(3)(B).⁵¹

Thus, United States citizens may overcome the doctrine of consular nonreviewability by alleging that the denial of C-2 visas for NGO representatives, or at least NGO representatives invited to speak at CSW events, violates their First Amendment rights. Plaintiffs will have the burden of proving that the government failed to provide a facially legitimate or bona fide reason

⁴⁶ *Chertoff*, 463 F. Supp. at 417.

⁴⁷ *Id.* at 418-419.

⁴⁸ *Id.* at 415.

⁴⁹ *Id.* at 418.

⁵⁰ *Id.* at 422-423.

⁵¹ *Am. Acad. of Religion v. Chertoff*, 2007 WL 4527504 (S.D. N.Y. 2007) (unpublished opinion).

for the denial of their visas. Like the vague reason of “national security” in the *Chertoff* case, it may be possible to argue that the vague reason of failure to prove they will return to their home country is not a facially legitimate or bona fide reason in these cases, where these visa applicants have provided substantial evidence showing their intent to return to their home countries. Almost all of these denials are from particular regions of which the Trump Administration has outwardly discriminated against,⁵² and the applicants who were denied visas had provided sufficient evidence of their intent and ability to return to their home countries.

The visa denials affecting the constitutional rights of citizens exception will be the easiest argument to prove legal standing, as the U.S. citizen plaintiffs may allege that they themselves have been injured from a constitutional violation rather than asserting an injury based on government action towards alien third parties who are outside the territory of the United States.⁵³ More evidence needs to be gathered in order to strengthen this argument, but it may be possible to assert a violation of citizens’ constitutional rights and overcome the doctrine of consular nonreviewability.

In conclusion, there are several viable legal arguments that could ensure that the U.S. government complies with the HQ Agreement and grants C-2 visas for NGO representatives who meet the visa requirements. Because of the lack of information as to how many visas have been denied and the circumstances surrounding each visa denial, there needs to be more fact gathering in order to build a stronger case. If potential plaintiffs are successful in arguing their case on the

⁵² Dawsey, Josh. “Trump Derides Protections for Immigrants from ‘Shithole’ Countries.” *The Washington Post*, WP Company, 12 Jan. 2018, www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/.

⁵³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Am. Acad. of Religion v. Chertoff*, 463 F.Supp.2d 400, 412 (2d Cir. 2009).

merits, a court may issue an injunction requiring the United States government to grant C-2 visas for NGO representatives invited to the CSW and other UN events.

C. Using the Political Process to Combat Visa Denials

While the legal case against the U.S. government is a work in progress, NGOs and other members of civil society have already been putting pressure on the U.S. regarding visa denials for the CSW through the political process. These visa denials have also caught the attention of media sources, such as BuzzFeed News and the Guardian.⁵⁴ By sharing these visa denials with the media, UN leadership, state personnel, and politicians, civil society hopes to put pressure on the government to reform its consular officials' practices and prevent the denial of visas for the CSW's NGO attendees.

Some NGOs have sent communications to the CSW, UN Women, and the U.S. State Department informing them of the rise in visa denials and the United States' obligation under the HQ Agreement. In August 2018, the International Service for Human Rights (ISHR), one of the leading NGOs that has been combatting visa denials for the CSW, sent a letter to the CSW to explain the prevalence of visa denials, stating, "The disproportionate denial of visas to women who are poor, unmarried, childless, living in rural areas, and from developing and Least Developed Countries, runs contrary to the purpose of the Commission—the promotion of gender equality and the empowerment of women."⁵⁵ The letter also contained a set of recommendations to ensure NGO representatives are not denied visas for arbitrary and/or discriminatory reasons,

⁵⁴ Jha, Nishita. "The US Denied Visas To Women From Africa And The Middle East Hoping To Attend The UN's Women Conference." *BuzzFeed News*, BuzzFeed News, 23 Mar. 2019, www.buzzfeednews.com/article/nishitajha/un-women-conference-visas-denied; Owen, Margaret. "Women Losing out under US Visa Policy." *The Guardian*, Guardian News and Media, 20 Mar. 2019, www.theguardian.com/us-news/2019/mar/20/women-losing-out-under-us-visa-policy.

⁵⁵ The International Service for Human Rights (ISHR). "Communication to the Commission on the Status of Women Communication Procedure Regarding Denial of Visas to Participants." Received by Commission on the Status of Women, *ISHR*, 1 Aug. 2018, www.ishr.ch/sites/default/files/article/files/08_01_2018_ishr_-_csw_communication.docx_.pdf.

including ensuring that the United States government is aware of its commitments under the HQ Agreement and that the consulates are informed of the need to grant C-2 visas for NGO representatives who meet the visa requirements.⁵⁶ Other organizations have also sent letters to the CSW, UN Women and/or the U.S. State Department, such as NGO CSW and Human Rights Advocates (HRA).⁵⁷

Some civil society members have advocated against the administration's visa denials through creative symbolic measures and forming coalitions. In 2017, a coalition of NGOs launched the "No Borders on Gender Justice" campaign at CSW61, calling for an "end to policies of authoritarianism and xenophobia."⁵⁸ Throughout the two weeks at CSW61, campaign members placed an empty chair at events with a sign stating "Why is this chair empty?" in order to highlight the absence of women's rights activists who would have been at the CSW if not for their visas being denied.⁵⁹

In 2019, a petition to the U.S. Mission to the United Nations was circulated among registered NGOs and CSW attendees asking for the U.S. State Department to create a uniform process at all embassies and consulates to ensure that UN-accredited NGOs are able to attend UN events at the UN Headquarters in New York City.⁶⁰ Although the number of signatures has not been posted, I was informed by NGO CSW staff that they had hundreds of signatures within the first few days of sending out the petition.

⁵⁶ *Id.* at 6-7.

⁵⁷ NGO CSW staff informed me in 2019 that they had sent a letter to CSW, UN Women and the U.S. State Department to express their concern over the visa denials. HRA also sent a letter to UN Women in 2019 and 2020 regarding the lack of NGO access at the CSW and the issue of visa denials.

⁵⁸ Sekyiamah, Nana Darkoa. "CSW 61 Marred by US Travel Bans." *AWID*, Association for Women's Rights in Development, 30 Mar. 2017, www.awid.org/news-and-analysis/csw-61-marred-us-travel-bans.

⁵⁹ *Id.*

⁶⁰ See "Petition to U.S. Mission to the United Nations." *Google Forms*, NGO Committee on the Status of Women, docs.google.com/forms/d/e/1FAIpQLSeJfhJ6sOKvXXhyJKHWl60XpXTYgJaAcJXvRIbrZttUm2smww/viewform?mc_cid=b281ffe919&mc_eid=a0e6be2e0b.

The campaigns, letters, petitions, and news articles have also caught the attention of at least one politician, Congresswoman Carolyn B. Maloney, whose congressional district includes the United Nations Headquarters.⁶¹ Congresswoman Maloney sent a letter to the U.S. Secretary of State Michael Pompeo regarding the reports of visas being denied to women seeking to attend the CSW. In her letter, she explained how the visa denials appeared to disproportionately affect women from Africa and the Middle East and that the U.S. should be commending these women for putting themselves at risk in their home countries to participate in the CSW instead of preventing these women from attending the CSW.⁶² The Congresswoman also sought answers from the government, such as the number of approved and denied visas by country of origin for people seeking to attend the CSW.

Thus, civil society has been far from inactive concerning the rise of the U.S. government rejecting visas to attend the CSW. The letters, campaigns, petitions, and other methods of advocacy seek to pressure politicians and government personnel to reform the U.S. practices and ensure NGO representatives are able to attend the CSW. Although the U.S. government has not reformed its practices regarding C-2 visa applications for CSW attendees yet, civil society must continue to bring attention to the visa denial issues through creative campaigns, the media and the political process.

IV. CONCLUSION

Although the CSW continues to be an inspiring and influential international body, the goals of women empowerment and gender equality will never become actualized without the active involvement of NGOs. People must continue to put pressure on the United Nations to

⁶¹ “Maloney Presses State Dept on Rejection of Visas for Participants of United Nations Commission on the Status of Women.” *Rep. Carolyn B. Maloney*, 27 Mar. 2019, maloney.house.gov/media-center/press-releases/maloney-presses-state-dept-on-rejection-of-visas-for-participants-of.

⁶² *Id.*

open access for NGOs at the CSW, including opening the Agreed Conclusions meetings and making delegates more accessible to NGOs. There is also much work to be done in order to effectively reform the United States visa applications process for NGO representatives wishing to participate at the CSW. Whether it be through the legal or political process, the international community must ensure that visas to participate in United Nations events are not denied in an arbitrary and discriminatory manner. By ensuring that NGO women have a voice, we ensure that women throughout the world have a voice.