

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Trump Administration Takes Steps to Implement Bilateral Agreement with Australia Regarding Refugees

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Shortly after President Trump was elected in November 2016, Australia and the United States finalized a bilateral agreement pursuant to which the United States committed to accepting refugees from Australian-backed immigration detention camps located in Nauru and Papua New Guinea. While Trump criticized the deal after his inauguration, his administration has nevertheless taken steps to implement it.

In 2013, Australia adopted a “border blockade” policy, known as Operation Sovereign Borders.¹ A military directive enacted with the expressed aim of “combating people smuggling,” Operation Sovereign Borders prohibits any unauthorized maritime arrivals on Australia’s shores, including refugees.² To implement this policy, Australia made arrangements with Nauru and Papua New Guinea (PNG). Both countries agreed to operate detention centers on their territories to hold all asylum-seekers who either arrived at Australia’s shores or were detained by Australia while at sea.³ Australia administers the detention centers and pays the full costs of their operation.⁴ According to press reports, Australian government figures from May 2016 listed 466 people in the Nauru camp and 847 on Manus Island, most from Afghanistan, Pakistan, Iraq, Iran, and Sri Lanka.⁵

Australia’s border blockade has been criticized both inside and outside the Australian government. The Australian parliament’s Senate Legal and Constitutional Affairs Committee cited “deeply concerning” reports of “a deeply troubled asylum seeker and refugee population, and an unsafe living environment—especially for children” in demanding that “the major faults which mar the current manifestation of the policy of offshore processing must be acknowledged and rectified.”⁶ Documents leaked from Australia’s detention camp on Nauru revealed that more than 2,000 reported incidents of assault, sexual abuse, child abuse, and abysmal living conditions took place there.⁷ Australia’s practice of detaining asylum seekers offshore came under further legal pressure last year when the Papua New Guinea Supreme Court held that the refugee settlement on Manus Island violated fundamental rights

¹ Australian Government, Department of Immigration and Border Control, Operation Sovereign Borders, at <http://www.osb.border.gov.au>.

² *Id.*

³ Elibritt Karlsen, Parliament of Australia, *Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources* (December 2016), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore#_Total_number_of.

⁴ In 2016, Australia spent over \$1.1 billion on its offshore detention facilities. *See id.*

⁵ Robb M. Stewart, *Australia Strikes Deal to Resettle Refugees in U.S. U.S. to Vet Refugees; Most Are from Afghanistan, Pakistan, Iraq, Iran and Sri Lanka*, WALL ST. J. (Nov. 12, 2016).

⁶ Parliament of Australia, *Legal and Constitutional Affairs References Committee—Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre Report*, at vi (Apr. 2017), available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F8a71c329-c6de-4ca0-82f4-de5a61931e67%22>.

⁷ Paul Farrell, Nick Evershed & Helen Davidson, *The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention*, GUARDIAN (Aug. 10, 2016), at <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

guaranteed by the PNG constitution and therefore ordered the PNG and Australian governments to present a plan for resettlement.⁸

On November 13, 2016, the Australian Prime Minister, Malcolm Turnbull, together with the Minister for Immigration and Border Protection, announced that Australia had reached an agreement

with the United States and it will not under any circumstance be available to any future illegal maritime arrivals (IMAs) to Australia.

The priority under this arrangement will be for resettlement of those who are most vulnerable, namely women, children and families.

US authorities will conduct their own assessment of refugees and decide which people are resettled in the US.

Refugees will need to satisfy standard requirements for admission into the US, including passing health and security checks.

This process will take time and the resettlement will be gradual.

This arrangement is supported by the United Nations High Commissioner for Refugees and we will continue to engage with UNHCR on its implementation.

We will continue to support the Governments of Nauru and Papua New Guinea to return people determined not to be owed protection. These people should return to their country of origin.

...

Settlement in Australia will never be an option for those found to [be] refugees in regional processing centres nor for anyone who attempts to travel to Australia illegally by boat in the future.

Australia's border protection policy remains consistent and firm. Operation Sovereign Borders will continue to turnback people smuggling ventures where it is safe to do so and any illegal maritime arrivals to Australia will be sent to regional processing centres.⁹

Former U.S. Secretary of State John Kerry briefly addressed the agreement earlier in the day in response to a question from a reporter. Kerry said:

[O]bviously this has been a great concern of people everywhere because we have more refugees today than we've ever had since World War II. And it's a pressing, pressing issue.

We in the United States have agreed to consider referrals from UNHCR on refugees now residing in Nauru and in Papua New Guinea. And we know that these refugees are of special interest to UNHCR and we're very engaged with them on a humanitarian basis there and in other parts of the world.¹⁰

UNHCR issued a press release endorsing the agreement:

The approach taken by Australia in transferring refugees and asylum-seekers to open-ended detention in Papua New Guinea and Nauru has caused immense harm to vulnerable people who have sought asylum since 2013. In this context, UNHCR welcomes the announcement today that refugees currently held in Nauru and Papua New Guinea will be relocated under a bilateral

⁸ *Namah v Pato* [2016] PGSC 13; SC1497 (Papau N.G.).

⁹ Prime Minister of Australia Malcolm Turnbull Press Release, Refugee Resettlement from Regional Processing Centres (Nov. 13, 2016), at <https://www.pm.gov.au/media/2016-11-13/refugee-resettlement-regional-processing-centres>.

¹⁰ U.S. Dep't of State Press Release, Remarks by Secretary of State John Kerry (Nov. 13, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/11/264266.htm>.

arrangement between Australia and the United States.

The arrangement reflects a much-needed, long-term solution for some refugees who have been held in Nauru and Papua New Guinea for over three years and who remain in a precarious situation. It is on this basis that UNHCR will endorse referrals made from Australia to the United States, on a one-off, good offices, humanitarian basis, in light of the acute humanitarian situation. . . .¹¹

Further details of the agreement are unavailable because the agreement remains classified.¹² Among other things, the Australian government declined to say whether Australia had promised the United States anything in exchange.¹³ At an early stage of the negotiations, Prime Minister Turnbull had indicated that Australia would accept refugees who are being held in Costa Rica during the assessment of their U.S. asylum claims.¹⁴ More recently, Ann Richard, who was the U.S. Assistant Secretary of State for Population, Refugees and Migration at the time the agreement was negotiated, explained in an interview:

When the Australians first came to us my motivation was let's do this, let's make this happen, we have got to get these individuals to a better place.

I have never been to either of these locations but my understanding is that the people there are really suffering and they are suffering in part because their situation is so open-ended.

They don't know what is going to become of them and they don't know where they are going to live out the rest of their lives so I thought we should really make this happen. Others at the State Department then got involved and said, "Well, what kind of things can we discuss with the Australians in order to affect an arrangement where everybody does a little extra from their country."¹⁵

Richard explained that Australia would be expected to increase its intake of refugees from Africa, a troubled region hosting more than a quarter of the world's refugees, and to do more to reunite families torn apart during the refugee journey.¹⁶

Shortly after his inauguration, President Donald Trump expressed serious reservations about the agreement. President Trump spoke with Australian Prime Minister Malcolm

¹¹ UNHCR Press Release, UNHCR to Endorse the Australia-United States Relocations as "Offshore Processing" Arrangements Fail Refugees (Nov. 13, 2016), at <http://www.unhcr.org/en-au/news/press/2016/11/58290a5b4/unhcr-to-endorse-australia-united-states-relocations-as-offshore-processing.html>.

¹² Helen Davidson, *Senior US Republicans Criticize 'Secret' Refugee Deal with Australia*, GUARDIAN (Nov. 25, 2016), at <https://www.theguardian.com/australia-news/2016/nov/25/us-republicans-secret-refugee-deal-australia>; Zoe Daniel & Stephanie March, *US Refugee Deal: Architect of Deal Says Arrangement Loosely Based on Australia 'Doing More'*, ABC NEWS (Mar. 21, 2017), at <http://www.abc.net.au/news/2017-03-22/us-refugee-deal-architect-says-based-on-australia-doing-more/8375250>.

¹³ Stewart, *supra* note 5. In September 2016, at then-President Obama's global migration summit, Australia announced it would resettle migrants from U.S.-backed detention camps in exchange for the United States taking refugees in Australia's island detention centers. Tara Jon, *U.S. and Australia Might Be Close to a Deal on Refugee Swap*, TIME (Nov. 11, 2016), at <http://time.com/4567890/australia-refugee-deal-obama-nauru>.

¹⁴ Prime Minister Malcolm Turnbull, Speech at President Obama's Leaders' Summit on Refugees (Sept. 21, 2016), at <https://www.malcolmturnbull.com.au/media/speech-at-president-obamas-leaders-summit-on-refugees>; see also Dep't of Homeland Security Press Release, U.S. Expands Initiatives to Address Central American Migration Challenges (July 26, 2016), at <https://www.dhs.gov/news/2016/07/26/us-expands-initiatives-address-central-american-migration-challenges>.

¹⁵ Daniel & March, *supra* note 12.

¹⁶ *Id.*

Turnbull by telephone on January 28, 2017.¹⁷ According to press reports, the conversation became heated when discussing the refugee agreement, and Trump abruptly ended the call.¹⁸ A few days later, White House Press Secretary Sean Spicer said:

So the deal specifically deals with 1,250 people. They're mostly in Papua New Guinea, being held. Those people—part of the deal is that they have to be vetted in the same manner that we're doing now. There will be extreme vetting applied to all of them. That is part and parcel of the deal that was made. And it was made by the Obama administration with the full backing of the United States government.

The President, in accordance with that deal to honor what had been agreed upon by the United States government, and in ensuring that that vetting will take place in the same manner that we're doing it now, will go forward.¹⁹

Then on February 1, 2017, President Trump tweeted: “Do you believe this? The Obama Administration agreed to take thousands of illegal immigrants from Australia. Why? I will study this dumb deal!”²⁰ White House Press Secretary Sean Spicer subsequently addressed the agreement again, saying:

We have a tremendous amount of respect for the people of Australia, for Prime Minister Turnbull, and it was a follow-up on the call. But we're going to continue to work through this. We're going to honor the commitments that we've made in some way, meaning that we are going to vet these people in accordance with the agreement that happened. And we'll continue to have further updates as we do.²¹

In early April, officials from the U.S. Department of Homeland Security reportedly spent several days on Manus Island, distributing information about resettlement, interviewing refugees, and collecting fingerprints and photographs.²² After meeting with Prime Minister Turnbull on April 24, Vice President Mike Pence spoke about the agreement, confirming that the United States would implement the agreement, notwithstanding the Trump administration's doubts about its wisdom:

Let me make it clear the United States intends to honor the agreement, subject to the results of the vetting processes that now apply to all refugees considered for admission to the United States of America. President Trump has made it clear that we'll honor the agreement. It doesn't mean we admire the agreement. Frankly, looking back on the last administration, the President has never been shy about expressing frustration with other international agreements, most notably the so-called nuclear agreement with Iran. But rest assured, as I confirmed today with the Prime

¹⁷ White House Press Release, Readout of the President's Call with Australian Prime Minister Malcolm Turnbull (Jan. 28, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/28/readout-presidents-call-australian-prime-minister-malcolm-turnbull>.

¹⁸ Greg Miller & Philip Rucker, *This Was the Worst Call by Far': Trump Badgered, Bragged and Abruptly Ended Phone Call with Australian Leader*, WASH. POST (Feb. 2, 2017), at https://www.washingtonpost.com/world/national-security/no-gday-mate-on-call-with-australian-pm-trump-badgers-and-brags/2017/02/01/88a3bfb0-e8bf-11e6-80c2-30e57e57e05d_story.html.

¹⁹ White House Press Release, Press Briefing by Press Secretary Sean Spicer (Jan. 31, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/31/statement-press-secretary-sean-spicer>.

²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 1, 2017), at <https://twitter.com/realdonaldtrump/status/827002559122567168>.

²¹ White House Press Release, Press Briefing by Press Secretary Sean Spicer (Feb. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/03/press-briefing-press-secretary-sean-spicer-232017-8>.

²² Zoe Daniel & Stephanie Anderson, *US Officials Fingerprint Refugees on Manus Island as Part of US-Australia Resettlement Deal*, ABC NEWS (Apr. 5, 2017), at <http://www.abc.net.au/news/2017-04-05/us-officials-fingerprinting-refugees-on-manus-island/8416574>.

Minister, the United States of America will honor the agreement. And actually we've initiated the process of fulfilling that agreement, subject to the results of the vetting processes that now apply to all refugees in the United States.²³

INTERNATIONAL ORGANIZATIONS

Trump Administration Criticizes NATO Members for Failing to Meet Defense Spending Guideline; United States Joins Other NATO Members in Supporting Montenegro's Membership in the Organization

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Throughout Donald Trump's presidential campaign and into the first months of his presidency, he has warned that the United States' commitment to the North Atlantic Treaty Organization (NATO) may depend on whether its partner states increase their defense spending in line with previously adopted guidelines. While senior administration officials have reaffirmed U.S. commitments to the NATO alliance, including the North Atlantic Treaty's mutual defense obligation on several occasions,¹ President Trump himself did not so until mid-June. Separately, the Trump administration signaled its support for NATO by supporting the admission of Montenegro as a new member state.

The North Atlantic Treaty does not impose a quantitative requirement for defense spending. Article 3 provides:

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.²

This treaty obligation has been supplemented by various subsequent agreements. In 2006, NATO member states made a political commitment to spending at least 2 percent of their gross domestic product (GDP) on defense.³ In 2014, the heads of state present at the meeting of the North Atlantic Council in Wales reiterated and expanded upon this commitment. An excerpt follows:

Allies currently meeting the NATO guideline to spend a minimum of 2% of their Gross Domestic Product (GDP) on defence will aim to continue to do so. . . . Allies whose current proportion of GDP spent on defence is below this level will: halt any decline in defence expenditure; aim to increase defence expenditure in real terms as GDP grows; aim to move towards the 2% guideline within a decade [i.e., by 2024] with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls.⁴

²³ White House Press Release, Remarks by the Vice President and Australian Prime Minister Turnbull at a Press Conference (Apr. 22, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/24/remarks-vice-president-and-australian-prime-minister-turnbull-press>.

¹ The North Atlantic Treaty, Art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 UNTS 243.

² *Id.* Art. 3.

³ North Atlantic Treaty Org., *Funding NATO* (last updated June 2, 2017), at http://www.nato.int/cps/en/natohq/topics_67655.htm.

⁴ North Atlantic Treaty Org., *Wales Summit Declaration*, para. 14 (Sept. 5, 2014), at http://www.nato.int/cps/en/natohq/official_texts_112964.htm.