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Australia's Guantanamo dilemma

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President Obama has made a clear and decisive promise to close Guantanamo Bay. This means solutions will have to be found for the 250 remaining detainees.

An estimated 773 detainees have passed through the Guantanamo military base since 11 January 2002, the population hitting its peak of 680 in May 2003. About 450 detainees have already been returned to their home countries. Some went on trial, but most were simply released and sent home by consent of the receiving country. Of these 450 returnees, the US alleges that 30 have rejoined hostilities of some kind.

Some of the remaining detainees have been charged under the military tribunal system and are still waiting on a hearing. David Hicks is, however, the only conviction, and he was returned to Australia after receiving a plea deal.

The status of the tribunals is still under constitutional challenge in the US. President Obama has directed an immediate halt to the military commissions in order to permit the newly inaugurated president and his administration time to review the military commission process, generally, and the cases currently pending before the military commissions, specifically.

Another thorny issue that President Obama faces if he is to close Guantanamo is what to do with the 50-to-60 detainees who will not be charged but who cannot be returned to their country of origin for fear they will be tortured or killed. This cohort includes ethnic Uighurs allegedly training to fight for independence from the Chinese government in Xinjiang province; they are now wanted by the Chinese authorities.

This contextualises the two requests from the Bush administration in its closing weeks for Australia to accept for resettlement a small number of those former Guantanamo Bay prisoners who will not be charged. Both requests were rejected by Prime Minister Rudd.

There are some persuasive arguments as to why Australia should not get involved. The main argument revolves around the impropriety of the Howard government's attempts to enlist the support of other states, including the US, in securing resettlement of refugees on Nauru to places other than Australia when it was

Australia's international legal obligations that had clearly been engaged.

In that case, Australia created a monster in the Pacific Solution that it was bound to resolve itself. Just as Australia should not have proposed swapping refugees on Nauru in return for Cuban refugees who had engaged the protection obligations of the US in mid-2007, so Rudd should not have agreed to the Bush administration's resettlement proposal.

Under this argument, there is no doubt that Guantanamo was a monster created by the United States, a monster for which it should remain fully accountable. It is reminiscent of Colin Powell's "you break it, you own it" line to President Bush about the US invasion of Iraq in 2002.

Converse arguments emphasise Australian complicity in Guantanamo and, while acknowledging US responsibility, make room for an immediate humanitarian and moral response to the detainees. Australia sat on its hands while David Hicks and Mamdouh Habib were quietly rotting there and accepted the Hicks plea deal. Australia was also a small but key member of the coalition of the willing in Afghanistan and Iraq.

Despite the departure of the Bush administration and the close of the Howard years, the problem may not will itself away so easily. With a change of leadership in both countries, the diplomatic situation presents new challenges for Australia.

The Obama administration's legal responsibilities to the detainees are clear. Detainees must be retrieved from the legal black hole into which they were thrown. Their extra-territorial location and dubious categorisation as unlawful non-combatants must not be permitted to deny them their rights. Opaque processes that have obscured clarity as to guilt or innocence must be discarded. Evidence of torture must be thoroughly investigated.

In exiting this Guantanamo nightmare, there remains a chance that President Obama will make another request to Australia to accept former detainees. The new diplomatic dynamic between the two countries could therefore impale Australia more firmly on the horns of quite a dilemma.

Although Australia may not be legally obliged to render assistance to the US, there are valid humanitarian reasons why the Rudd government should play a role and accept some detainees should the Obama administration extend such a request.

These include the need for a quick closure of the detention facility so the US can visibly draw a line under that policy and associated practices in breach of international law. Australia too can distance itself from its past and unholy alliance by assisting the United States to comply with its international obligation not to return people to torture.

Diplomatic challenges in finding solutions for some of the individuals in the US, including the Uighurs, should be confronted not side-stepped. There may also be special consideration that needs to be given to the rights and needs of those young men who were minors when they were taken into detention, or those whose suffering may be perpetuated by settlement in a country they may regard as having persecuted them.

Importantly, Australia's assistance would restore its recognition of a fundamental legal principle that seemed to get lost in the so-called war on terror: that people are innocent until proven guilty in a fair trial.

The bottom line is that the world learns its lesson that the Guantanamo experiment should never again be allowed to occur. And the sooner this sorry chapter is closed, the better.

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