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The Cost of our Fear

Black Sites and the Erosion of our Values

D espite their extraordinary character, Western responses to the attacks of 9/11 failed to bring the security Western populations demanded. Our fear, however, led us to support the erosion of our values, institutions, and laws beyond repair.

Following the attacks of 9/11, an important part of public debate in the West focussed on what would constitute an appropriate response. Apart from a few dissenting voices, most agreed that the scale of the attacks justified extraordinary measures both as a response and to prevent future attacks. Hence, 82 % of Americans initially supported the invasion of Afghanistan and, according to a 2007 Pew Research Center survey, only 29 % of Americans believed torture was never justified, with 43 % saying that the use of torture can be justified against suspected terrorists to gain key information sometimes (31 %) or often (12 %).

Following an attack, there is a general pattern according to which outsiders are blamed. The crisis then leads to heightened individual and group consciousness, i.e., an "us versus them" mentality. As violent crises are consensus-generating events, in-group bias and group polarisation predict that, when the response adopted targets outsiders (or non-citizens), political leaders are likely to receive strong support from the electorate while incurring little political costs. Such was the case for most of the measures adopted by the Bush administration in response to 9/11, irrespective

of their actual effectiveness or legality, leading to a peak in public trust in government and to Bush's re-election in 2004.

Yet, another part of the US-led "global war on terror" developed as a response to 9/11 was kept secret even from those who supported torture and a reduction in civil liberties to achieve greater security. The CIA-led rendition, detention and interrogation programme, operated between 2002 and 2008, was to remain fully secret, forever. The programme was highly classified, conducted outside the US, and was designed to place detainee interrogations beyond the reach of both US and international law. It entailed the abduction and disappearance of detainees and their extralegal transfer on secret flights to undisclosed locations, followed by their incommunicado detention, interrogation, and abuse at the hands of the CIA or of other states' intelligence services.

The most classified parts of the programme were black sites: secret detention sites set up and operated by the CIA on foreign states' territories for the incommunicado detention and torture of suspected Al-Qaeda operatives. A hundred and nineteen men, suspected by the CIA to be affiliated with Al-Qaeda or the Taliban, were at some point held in one or more black sites. Victims who survived the torture were eventually transferred into US military custody at Guantánamo Bay, into another state's custody, or released.

How did a democratic government come to believe that black sites were a necessity? How did we, the "general public" in Western societies, come to believe that our security depended on the complete negation of the dignity of other human beings? What remains today of this dismantling of the legal and moral structures of society?

The liberty-security conundrum and our moral complicity

The existence of black sites rested on the security-liberty conundrum, that is, the assumption that security and liberty may be balanced, so that the protection of security might require the sacrifice of the rule of law and human rights. The debate on a trade-off between security and liberty had its heyday after 9/11. It is now embedded in political and legal discourse well beyond the United States. The liberty-security conundrum rests on many fallacies but, for present purposes, one is particularly salient: the proposed compromise is not a trade-off between the security and rights of the same person. It is rather a trade-off between the rights of a few (the *others*), for the alleged enhanced security of the general population (*us*) but in fact benefiting the executive power (*national* security).

Whereas this trade-off was already visible in the global response to 9/11 and further terrorist attacks in the West, black sites represent the paroxysm of this "othering". The

establishment of the CIA-led programme and its culmination in black sites required that terrorist suspects be considered *others*, less human than *us*, or at least less worthy of having their rights and dignity respected and secured. Suspected terrorists became disposable human beings, a potential source of information, and a mere means to the US' war on terror. In other words, for the purpose of gathering intelligence, the US government denied black sites' victims their inherent dignity as human beings.

In so doing, society as a whole became morally complicit. After all, was it not for *our* security and in *our* name that these acts were committed? Was it not to alleviate *our* fear of the *others* that *our* democratically elected governments denied their human dignity? In the trade-off discourse, security is understood as security against violent attacks, as well as the easing of anxiety or apprehension caused by the prospect of such attacks. When citizens fear an attack, they expect their government to act and respond. The more radical the response, the more it reassures the population psychologically – this phenomenon is called action bias.

However, this does not mean that the safety of individuals has benefited in any way from this governmental exercise of power. On the contrary, in exchange for such psychological reassurance, civil liberties could be compromised, the rule of law undermined, and security as a social good damaged. Hence, not only were Western populations morally

complicit by condoning the use of torture and other extra-legal measures on *others* to enhance *our* security, but we also sacrificed our own rights and dignity in the process. Yet, lest one condone the underlying ideological justification that human beings are not all entitled to the same amount of dignity and rights, the obvious risk of the government also using its powers on *us* should only be an ancillary objection to such practices.

The objection that black sites were a secret policy does not have much purchase in excusing our moral complicity because black sites epitomise the post-9/11 counter-terrorism ideology. They differ from less secret measures, policies, and detention sites such as Abu Ghraib or Guantánamo Bay only in degree, not in nature. And more importantly, they rest on the same justification: the liberty-security conundrum and the othering and denial of the dignity of Muslim men.

Besides, revelations about the existence of black sites came as early as December 2002, less than a year after the first black site was established in Thailand and almost six years before the last one, in Afghanistan, was closed. Yet, as the numbers mentioned in the introduction show, these revelations did not give rise to a general uproar from the American population. Nor did it stop US allies from providing aid or assistance to the CIA. In fact, estimates for the number of states implicated in the CIA-led rendition, detention and

interrogation programme range from 44 to more than 65 in recent studies.

How did black sites even become a plausible response to 9/11?

I mentioned in the introduction of this blog the effect of violent crises on our perceptions. Several biases and heuristics affect how we perceive an attack and what we deem adequate responses. I will address two of these here.

Hindsight bias, which refers to individuals' tendency to overestimate an event's likelihood after they observe its occurrence, first tends to encourage tough responses to past attacks (here, 9/11) to avoid being blamed for a failure to prevent future threats. Hence, if the American population believes that 9/11 was more foreseeable than it really was, they deduce that not enough has been done to prevent it from occurring. Hindsight bias thus encourages extreme measures to "correct" previous failures and ensure that future attacks are thwarted.

Another reason for our misperceptions can be found in representativeness heuristics, the cognitive bias leading individuals to evaluate an event's probability by assessing how closely it relates to available data but ignoring the relevance of base rates in assessing probability. Representativeness heuristics are at the source of the "harbinger theory" identified by Robert Diab (pp. 99-100), according to which

> *"9/11 was the harbinger of a new order of ter-*
> *ror, in which further attacks in North America*
> *are likely to occur at some point in the near fu-*
> *ture, on a similar or greater scale as 9/11, pos-*
> *sibly, but not necessarily, involving weapons of*
> *mass destruction [...] And on this basis, earlier*
> *assumptions about the absolute limits of state*
> *force against individuals have come to seem un-*
> *tenable or imprudent."*

If one believes that 9/11 could have been prevented had *more* been done, and that another 9/11 (or worse) is likely to happen, then it might seem that no response is too extreme. Said otherwise, in the immediate aftermath of an attack, anything – including black sites – can be perceived as a plausible, proportionate, and justifiable response.

The role of law, then, is to guard us against these misperceptions. By imposing strict limits on what can be done, including and especially in times of acute crisis, (international) law allows decision-makers to safeguard their own values and address the crisis lawfully and effectively. Trespassing the confines of legality to respond to a crisis is not only ineffective (as the US Senate Select Committee on Intelligence clearly stated with regard to the CIA programme); it also undermines the legality of the institutions of the state. State-sanctioned incommunicado detention and torture dissolve the very idea of the rule of law. Ideologically, state

policies resting on the belief that some individuals are less worthy of dignity and rights than others, corrode all the ethical, moral, social, and legal norms of society.

Black sites' legacy

The first and most pressing legacy of black sites is Guantánamo Bay: 39 men are still detained in Guantánamo today, and 24 of them passed through CIA black sites. When they have been charged, the torture that the CIA subjected them to in black sites makes it impossible to try them according to fair trial standards and yet, the continued violation of their rights and denial of their dignity persist.

The lack of meaningful accountability for black sites means that the harm to the victims and to the rule of law was never remedied. While human dignity is breached in fact, this breach must be remedied in law. But, in the post-9/11 world, the law was used to violate values rather than preserve them. Following the attacks of 9/11, whether torture was considered good or bad suddenly stopped depending on legal or moral considerations. Rather, the debate turned to whether it "worked", i.e., produced life-saving intelligence. This general acceptance by the American population of torture as a lesser evil in relation to the greater evil of terrorism is, in part, what distinguished the US war on terror from other instances of state torture or counter-terror wars. The paradigm shift was embodied in the two

infamous Bybee-Yoo "Torture Memos" of 1 August 2002. The first authorised the use of "enhanced interrogation techniques" (EITs) amounting to torture by the CIA against suspected terrorists. The other complemented it by dismantling, through dubious legal interpretation, the prohibition of torture in US and international law, and finding a novel use of the necessity defence under US law "to avoid prosecution of US officials who tortured to obtain information that saved many lives". Torture was thus redefined so as to invite its use with impunity. Later memoranda (here and here) from the Office of Legal Counsel (OLC) reinforced this mentality by determining that the EITs were legal in part because they (allegedly) produced "specific, actionable intelligence" and "substantial quantities of otherwise unavailable intelligence" that saved lives.

The result of this process was that the legal obligations of the US were redefined so narrowly that there were hardly any to comply with anymore, and US officials could therefore almost truthfully proclaim that they complied with them. To quote George Orwell, "Nothing was illegal since there were no longer any laws". This distortion of the role of law eroded the very idea of human dignity and the rule of law, and the legal remedy never came. Instead, the legal justifications put forward in the OLC memos likely shaped the US' legal position more widely, including through the official, judicial, and academic practice of the drafters, fur-

ther undermining the normative strength and content of US and international law. Worse still, international law evolved to reproduce some of the trade-offs-based legal moves, notably through the legislative action of the UN Security Council. This globalisation of counter-terrorism then permeated the domestic laws of most states, entrenching the trade-off mentality deep into societies around the world.

The CIA rendition, detention and interrogation programme, and especially black sites, seemed so unconscionable and unacceptable after 9/11 that, even at the height of the crisis, it was to remain fully secret. Yet, it is still remarkable for the complete impunity of the perpetrators. By violating the rights and denying the dignity of the *others* and then failing to remedy it, we eroded our values, institutions, and laws. We will be paying the price for a long time and, crucially, we are no safer than we were on September 10, 2001.