The Daschner case and the rehabilitation of torture in Germany

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13 December 2004

Last month, the trial opened of Frankfurt Deputy Police Chief Wolfgang Daschner. Daschner is accused of having threatened a kidnapper with torture two years ago.

Subsequently, it was revealed that torture was being employed by the German army "for training purposes." A connection exists between the two cases. This is shown by the arguments employed by Daschner and those who defend him. In the name of the "fight against terrorism," the police and military are to be allowed to act outside the law and the constitution, and utilize methods not seen since the Nazis ruled Germany.

In October 2002, Daschner had threatened to inflict severe pain on Magnus Gaefgen, the kidnapper of 11-year old banker's son Jakob von Metzler, if Gaefgen did not reveal where he had hidden the child. Gaefgen promptly admitted that the boy was already dead. Gaefgen was later sentenced to life imprisonment for murder.

Proceedings were initiated against Daschner for threatening torture. However, it was more than a year before the public prosecutor's office finally filed charges against him.

He was not charged with having extorted statements, which is a felony, but with coercion, which is regarded as a misdemeanour. In a television interview, the public prosecutor made clear that even this charge was an embarrassment for him. The indictment expressed understanding for Daschner and adopted his justification for the crime: that he was "only concerned with saving the boy's life." There is no mention of the word torture in the indictment.

Despite the public prosecutor's reluctance to pursue the indictment, statements were made during the first days of the hearing that undermine the image of Daschner as portrayed by the media. Conservative newspapers had presented the deputy police chief as a tragic hero—a man of principle torn by internal conflicts, who followed his conscience out of concern for an innocent child, for which he was now being crucified.

Daschner candidly admitted to the court that he had ordered Gaefgen "to be questioned after previously threatening to inflict pain under medical supervision (without causing injuries)." He had even recorded this instruction in writing in a memorandum. However, he vehemently opposed calling this torture. Rather, it was a "coercive measure" adopted as a last resort to avert danger.

Daschner even advanced his own definition of torture. According to him, torture was "the pre-meditated imposition of severe physical pain, causing serious and cruel suffering which cannot be justified in the given situation."

This definition of torture echoes the notorious August 1, 2002 memo linked to Alberto Gonzalez—at the time, President Bush's legal counsel (now Bush's nominee to become attorney general)—providing a legal justification for the abuse of prisoners at Abu Ghraib prison in Iraq and the US prison camp in Guantanamo. In that memo, it was asserted that inflicting severe pain constituted torture only if the perpetrator knowingly acted for the express and sole purpose of causing agony. (In other words, electric shocks, beatings, psychological abuse, etc. were legal and did not constitute torture if inflicted for the purpose of extracting information). The memo further declared: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death."

In contrast, the definition of the United Nations Convention Against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person (...) when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

This definition accurately describes Daschner's actions. Daschner's subordinates also understood his instructions in this way. This is why he had to overcome the considerable legal doubts of his colleagues. A police lieutenant colonel at that time stated he had reluctantly instructed the leader of a mobile unit to designate an officer who could "torture" Gaefgen. Asked how he came to use the word "torture," he said that he had spontaneously associated the word torture with a measure that was intended to "cause pain to a person in custody in the presence of a physician."

The deputy police chief had even wanted to recall an officer from vacation who was prepared to undertake this task and have him transported by helicopter.

Daschner seems to have refused to use other means to get the kidnapper to talk. A police psychologist had recommended confronting Gaefgen with Jakob's relatives, in particular his 15-year-old sister. Gaefgen knew the sister and also had a 16-year-old girl friend. Although the sister waited several hours at police headquarters, Daschner rejected this course and insisted vehemently on using threats and then the application of torture.

According to Daschner's statement—and this could help explain his insistence on torture—Daschner had obtained the backing of his superiors. During the trial, however, he refused to name these superiors—and the public prosecutor's office refused to investigate this matter.

The self-assurance with which Daschner testified is not accidental. Shortly after the accusations of torture became public, he received sympathy and support from the highest levels—for example, from the Hesse state premier, Roland Koch; the federal justice minister, Brigitte Zypries (in whose opinion a justifiable exceptional circumstance existed); and from the then-chair of the judges' federation and present justice minister of Saxony, Geert Mackenrooth.

The Brandenburg minister of the interior, Joerg Schoenbohm, immediately referred to the "fight against terrorism." He said that if a multitude of people were threatened by terrorists, "torture should be considered."

A similar stance was taken by Wolfgang Bosbach, spokesman on domestic affairs and deputy chairman of the Christian Democratic Union (CDU) Bundestag (federal parliament) faction. In a talk show, he said he was not in favour of torture, but there could be "some situations where the life of thousands weighs against the physical well-being of an individual. At that moment there would be a process of consideration, for which legislators cannot find legal norms." As for the Daschner case, it was a "classic case of an extra-legal emergency."

In the same programme, with Bosbach's support, Rolf Jaeger of the Federation of German Detectives advanced the opinion that to avert danger the police are permitted to do literally anything: "Here we are in the legal sphere of danger prevention. We are absolutely opposed to the term torture. If we must use any term, then it is the term 'direct coercive measure,' which is governed as part of the authority to carry out danger prevention by police regulations, which the police can legitimately employ right up to the final rescue shot in hostage cases."

In other words, this prominent representative of the police does not oppose the use of torture, but only the action of calling it by its right name.

Jaeger also referred to the current political situation: "We live in times of a threat from Islamic terrorism, which is current in Holland today, and we have experienced criminal offences against foreigners. (...) What I would wish myself is not that we permit the police such direct means of pressure as to influence expressions of will, but that we create possibilities, obviously through a clear formulation of what constitutes emergency aid and justifiable emergency." The deputy chairman of the Federation of German Detectives, Bernd Carstensen, expressed similar views.

This discussion is not new. In the 1970s, the government of Helmut Schmidt (Social Democratic Party—SPD) invoked an "extra-legal state of emergency" to justify acting completely outside the law, the constitution, and express judicial decisions when it temporarily imposed a total "contact ban" on imprisoned Red Army Faction terrorists. It held them incommunicado, without contact with lawyers or the external world. The Federal High Court and the Federal Constitutional Court later supported the government's actions.

However, the origins of these legal constructs go back to the 1920s. At that time in Germany, against the provisions of the Versailles Treaty, which enjoyed constitutional status, former Freikorps men secretly formed the so-called "Schwarze Reichswehr" (Black Imperial Army). Anybody who exposed its existence or activities was murdered. The culprits were for the most part acquitted, on the grounds that they had been acting on behalf of the state "in an emergency," since the state's hands were bound by law.

Such precedents resonate further in regard to another current torture scandal, involving the army and its practice of testing out "torture to prevent danger." It was recently admitted that between June and September of this year, in an army company in Coesfeld, recruits were trained this practice.

According to what has been revealed, recruits had to kneel in their barracks, where they were sprayed with water. Two such soldiers were tortured through the application of electric cables to their neck, groin and stomach, procedures that were, in part, filmed and photographed. The public prosecutor has refused to call these procedures torture.

According to the *Sueddeutsche Zeitung*, this case did not involve spontaneous actions, but was a planned part of basic training. The exercise was scheduled on a roster by the company commander, a captain, who has since been suspended from duty.

Coesfeld is not an isolated case. Preparations for international military missions now include similar exercises as part of the training programme. A number of individual trainers have made themselves liable in law, according to the *Sueddeutsche Zeitung*.

In the spring of 2004, for example, an air force non-commissioned officer was convicted because, on more than fifty separate occasions, he struck, pinched or bound subordinates. In 2000, a private-first-class was interrogated for nine hours as part of a role-play exercise in which he had the part of prisoner-of-war.

In 1999, a technical sergeant was demoted because he literally interpreted the remarks of his superior and mistreated a fellow soldier captured in military manoeuvres. His superior had ordered "torture, while respecting the Geneva Convention."

Three years ago, a first lieutenant at the Army Academy in Munich, who had written a "training aid in torture methods," was demoted. Among other things, this recommended cutting off the eyelids of prisoners-of-war in order to extort information from them.