

Assessment of the case version that the child was still alive when Gaefgen was threatened with use of force

Punishability on grounds of para 240 (1) GCC (Using threat or force to cause a person to do, suffer or omit an act)

(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender

1. causes another person to engage in sexual activity;
2. causes a pregnant woman to terminate the pregnancy; or
3. abuses his powers or position as a public official.

1. Definitional elements of the offense

1.1. objective

- causing another person (+)
- by physical force (-), but by threatening adverse and inadequate treatment (+)
- to do or omit sth (+)

Conclusion: objective definitional elements (+)

1.2. subjective

- intent (+)

2. Wrongfulness

2.1. general wrongfulness

2.1.1. priority or even exclusivity of powers resulting from police law as grounds for negating wrongfulness? (+) / (-)

2.1.2. general grounds for excluding wrongfulness

2.1.2.1. self-defense

2.1.2.1.1. situation of self-defense

- attack not directed against oneself (-), but against somebody else (+)
- illegal (+)

- current (+) [btw (-) if the boy was already dead]

2.1.2.1.1. action in self-defense

- defense directed against the attack. Problem! When third person is being defended, the defensive action needs to be directed against the attack, in our case the kidnapping that is endangering the life of the boy; here, the defensive action is excessive: it targets the body of the kidnapper to force him to reveal the whereabouts of the boy.

- suitable? Problem whether torture in general is suitable to force someone to make truthful statements; in the given case, the goal was to obtain information that could be verified easily; not inducement to say something according the wishes of the torturer.

- required, meaning is it from among several equally suitable means the mildest one? Problem whether the confrontation with his own parents or the parents of the victim, as suggested by police psychologists, could have led to the same result; the life of the boy was in danger and it was unclear how little time there was left. He or she who acts in self-defense need not accept a milder means if it carries less chances for success.

- proportionate? Problem whether the threat of torture comes under art 3 ECHR and the UN-Anti-torture Convention. Merely threatening pain may still be below a margin of appreciation, but there is a psychological threat that courts have accepted to constitute an equally grave „inhuman treatment“. Thus, if threatening pain constitutes torture, then will the absolute prohibition of torture speak against accepting any proportionality? Danger of putting the absolute prohibition of torture into jeopardy. Human dignity needs to be absolutely protected.

Conclusion : (-)

2.1.2.2. Necessity, para § 34 GCC

Para. 34: A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.

2.1.2.2.1. situation of justification

- absolutely protected legal interest is in danger (+)

- danger cannot be averted in any different way (+) /(-); possibly confrontation with parents could have averted the danger

2.1.2.2.2. action in justification

- action to avert the danger from somebody else (+)

- is the legal interest to be protected significantly more important? (+) /(-) protection of life or limb vs. protection of human dignity?

2.1.2.2.3. intent to come to rescue (+)

2.2. Assessment of intolerability

- although torture may be suitable as a means for protecting somebody's life
- and the purpose of saving life is in line with the legal order
- but using torture for the purpose of saving life (ratio between means and goal) is ethically unacceptable

2.1.2.2.4. Conclusion +/-

3. Culpability

3.1. Duress, para 35 Abs 1 GCC

A person who, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply if and to the extent that the offender could be expected under the circumstances to accept the danger, in particular, because he himself had caused the danger, or was under a special legal obligation to do so; the sentence may be mitigated pursuant to section 49(1) unless the offender was required to accept the danger because of a special legal obligation to do so.

3.1.1. Situation of duress

- danger to an absolutely protected legal interest (+)
- that cannot be averted in any different way (+) / (-)

3.1.2. Action in duress

- Commitment of an illegal act in order to avert the danger from oneself, from a relative or another close person (-) victim is not part of this privileged circle of persons

3.1.3. Conclusion: (-)

3.2. Super-legal duress (*übergesetzlicher entschuldigender Notstand*)

Allowed in principle because *nullum crimen nulla poena sine lege scripta* prohibits the use of analogy in criminal law only for norms to found or increase criminal liability. Here, the ground for exclusion of culpability is acknowledged by customary law.

3.2.1. Situation of duress

- danger to an absolutely protected legal interest (+)
- that cannot be averted in any different way (+) / (-)

3.2.2. Action in duress

- if illegal action is unavoidable, then action must be in favour of the lesser evil in light of all moral circumstances; Problem: how to balance human dignity vs. right to life.

3.2.3. intent to come to rescue (+)

4. Conclusion: probably (+)