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# The Extradition of International Criminals: A Changing Perspective

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# Recent Developments

## The Extradition of International Criminals: A Changing Perspective

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### I. BACKGROUND

On September 5, 1995, Gary Lauck, the infamous neo-nazi publisher and supplier of xenophobic and anti-semitic literature, was taken into custody by German police for violating several of that country's anti-nazi criminal laws.[1] This, by itself, is not a surprising occurrence given Germany's recent crackdown on neo-nazi activity within its borders.[2] However, this arrest was not typical. First, Lauck is a U.S., not German, citizen, residing near Lincoln, Nebraska. Secondly, he has not set foot in Germany for nearly twenty years. How is it, then, that a person can face trial in Germany when he is neither a citizen of, nor present in, that country?

The answer, while complicated in its political detail, is a simple one. Lauck, for the last twenty years, was the most infamous producer and distributor of neo-nazi material in the world.[3] From his base in Nebraska, the "Farm Belt Führer" has earned a reputation of being the most dangerous neo-nazi propagandist alive.[4] His books, magazines, and swastika adorned contraband were smuggled into Europe through many secret

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1. Gary Lauck, *Supplier of Nazi Material, Is Extradited to Germany*, THE WEEK IN GERMANY, Sept. 8, 1995, *available in* LEXIS, Nexis Library, News File.

2. Since 1994, eleven neo-nazi groups have been banned, with their leaders sentenced to jail time and monetary fines. Dominick Wichmann, *Dealing with a Conscience of Shame; Don't Be Lulled Into Complacency by the Leaderless Neo-Nazi movement*, CHIC. TRIB., Sept. 28, 1995, at A1. For a description of the criminal investigation of two of these organizations, *see* Mary Williams Walsh, *Germany Bans 2 Neo-Nazi Groups*, LOS ANGELES TIMES, Feb. 25, 1995, at 5. For a detailed account of hate crimes in Germany, *see generally* PAUL HOCKENOS, FREE TO HATE (1993).

3. The Bulletin of the National Socialist German Workers Party Overseas Organization, Lauck's main publication, is published in ten languages and circulated throughout the U.S. and Europe. *Internet Used as Tool for Neo-Nazi Propaganda*, NATIONAL PUBLIC RADIO, May 1995, *available in* WESTLAW, 1995 WL 2915974.

4. *Text of ADL Report The Skinhead International; A Worldwide Survey of Neo-Nazi Skinheads*, U.S. NEWSWIRE, June 28, 1995, at 105 [hereinafter *ADL Report*].

channels, making their detection by German officials, as Lauck himself brags, virtually impossible.[5] He avoided apprehension by remaining in the United States, where "under the First Amendment, his nazi activities are as legal as they are illegal in Germany."[6] This has been a sore spot in German-U.S. relations for the last two decades. Eckart Wertebach, head of Germany's domestic intelligence agency, stated "time and again we have talked to our American friends, but they tell us there is no way within the American legal system to stop [Nazi propaganda] production."[7]

For this reason, Lauck has successfully avoided the scrutiny of German police, that is, until his recent arrest in Hundige, Denmark. Under the weight of a German sponsored international arrest warrant,[8] Denmark agreed to take Lauck into custody and, after several months of extradition hearings, turned him over to German officials.[9] During his six months confinement in Denmark, Lauck's extradition hearing proceeded to the Danish Supreme Court, where he was denied relief on the grounds that his activities were illegal in both Denmark and Germany.[10] In Germany, Lauck faces up to five years in prison for "distributing illegal propaganda and Nazi symbols, incitement, encouraging racial hatred, and belonging to a criminal group."[11]

## II. EXTRADITION: LAW OR POLICY?

The process of extradition is simply defined as the surrendering of a criminal or accused criminal by one sovereign to another.[12] Throughout its existence, extradition has fluctuated between the blurry line separat-

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5. Andrew Stern, *American Neo-Nazi is prolific Propaganda Publisher*, REUTERS WORLD SERVICE, Jan. 6, 1994, *available in* LEXIS, Nexis Library, News File.

6. Scott Canon, *Nebraska Neo-Nazi's Work Creates Friction Between U.S., Germany*, DALLAS MORNING NEWS, Jan. 30, 1994, at A1. "Extremists' speech 'however despicable, is rightly protected by the constitution.' " Louis Freeh, U.S. FBI director, *quoted in*, Marc Fisher & Steve Coll, *Farm-Belt Hitler Sows Seed of Hate; The US is Finally Realizing the Threat Posed by Groups Sending Neo-Nazi Propaganda Abroad*, THE GUARDIAN, May 13, 1995, at pg. 12.

7. *Id.* "I have great respect for the American system . . . [b]ut its effects on us have been catastrophic." Heinrich Sippel, Federal Office for the Protection of the Constitution (Germany), *quoted in*, Thom Shanker, *U.S. Hands Tied in Neo-Nazi Fight; Nebraska Man Spreading Propaganda to Germany*, THE TIMES, December 22, 1993, at A16.

8. Germany, through INTERPOL, distributed arrest warrants to fifteen European countries where Lauck was thought to have supporters. *American Neo-Nazi Arrested in Europe*, CHIC. TRIB., March 24, 1995, at 3. Likewise, Lauck's arrest was coordinated by a police raid of 80 apartments throughout Germany, confiscating weapons and neo-nazi propaganda. *Id.*

9. Wichmann, *supra* note 2, at 17.

10. Jan M. Olsen, *Extradition to Germany Cleared for U.S. Neo-Nazi*, ASSOCIATED PRESS, August 25, 1995, *available in* LEXIS, Nexis Library, News File.

11. *American Neo-Nazi Arrested in Europe*, CHIC. TRIB., March 24, 1995, at 3.

12. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1 (1974).

ing international law and diplomacy.[13] Extradition agreements originally grew out of peace and alliance treaties, where the return of one sovereign's criminals was a sign of friendship and co-operation, not duty.[14] However, from this informal beginning independent extradition treaties grew to a legal significance where states became reluctant to grant extradition in the absence of a formal treaty.[15] With the predominance of formalized treaties also came the enlightened attempts at protecting not only the sovereign interests of the states, but the rights of the individual as well.

As the last decade of the twentieth century unfolds, it is becoming exceptionally clear, however, that the legal framework defining extradition has become more of a burden in today's atmosphere of international crime, leaving individual countries the task of finding ways around the treaties that were once so important. From the apex of international law, extradition has once again sunk to the nebulous region between law and policy. Despite earlier efforts at codifying basic legal principles with which to govern extradition, the international community has chosen to keep its application discretionary.

## III. THE EUROPEAN CONVENTION ON EXTRADITION

As mentioned above, most countries require formal extradition treaties to allow the surrendering of persons to a requesting state.[16] Germany and Denmark are both parties to the Council of Europe's European Convention on Extradition (ECE).[17] The ECE is the most successful multilateral treaty of its kind, accounting for more extraditions than any other.[18] This treaty supersedes other bilateral treaties,[19] however, leaving them as supplementary to the broader ECE.[20] In form, the ECE follows an orthodox pattern, although liberalizing the earlier bilateral treaties on which it

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13. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971). "The whole history of extradition has been little more than a reflection of the political relations between the states in question. Van den Wijngaert, *The Political Offense Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*, REVUE BELGE DE DROIT INT'LE 740, 745-46 (1993), *citing* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 6 (1987).

14. *Id.* at 6.

15. *Id.* at 24-25. The question as to whether any customary international law on extradition exists has been a long standing and yet unresolved legal debate.

16. Some countries do not require treaties to be in force for extradition to possible. For example, France and Switzerland statutorily provide for extradition where no treaty exists. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 26 (1991). Common law countries are more likely to require more formalistic treaty obligations. *Id.*

17. European Convention on Extradition, December 13, 1957, UNTS 5146 [hereinafter ECE]. The Federal Republic of Germany, the original signor to the convention, was replaced by Germany in 1991.

18. GILBERT, *supra* note 16, at 21. By the end of 1990, twenty-one states had ratified the ECE.

19. ECE, *supra* note 17, at art. 28.

20. GILBERT, *supra* note 16, at 22.

is based.[21] One of the principle goals of the ECE is to assist in the "achiev[ment] of greater unity between its members . . . [c]onsidering the acceptance of uniform rules with regard to extradition [a]s likely to assist th[is] work . . . ."[22] Despite the legal framework of the ECE, as well as the stated intentions of its member countries, Lauck's extradition to Germany illuminates the devaluation of an international legal extradition standard.

### A. *Reciprocity*

Reciprocity, the notion that one sovereign will surrender fugitives so long as its own requests for fugitives will be honored,[23] is one of the fundamental bases on which extradition is possible. While the text of the ECE does not specifically address reciprocity, it can be inferred from the preamble's reference to greater cooperation, along with the nature of treaties in general, that reciprocity is assumably met by simple ratification. In the past, the concept of reciprocity has been thought to limit the objectives of extradition by giving states a legal opportunity to refuse extradition. Many view extradition, even without reciprocity, as a benefit, stating that the best interests of both countries are to return criminals. Not only does the requesting party benefit by being given the opportunity to punish those who violate its laws, but the requested party also benefits by not having to house another country's criminals.[24] For this reason, reciprocity has become a blanket concern, arising either where no treaty exists, or where one requesting party to a treaty is consistently refused extradition by the requested party.

### B. *Double Criminality*

Article 2 of the ECE provides that "extradition shall be granted in respect of offenses punishable under the laws of the requesting party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty."[25] The types of crime for which extradition is available are limited to crimes that carry a potential sentence of one year incarceration or more.[26] Double criminality, like reciprocity, has become a burden to

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21. I.A. Shearer, *The Current Framework of International Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties in* 2 M. CHERIF BASSIOUNI & VED P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 326 (1973).

22. ECE, *supra* note 17, at preamble

23. BASSIOUNI, *supra* note 12, at 8.

24. Parry, 6 BRITISH DIGEST INT'L L. 805-806 (1965), *cited in* Gilbert, supra note 16, at 26. "No State could desire that its territory should become a place of refuge for the malefactors of other countries." SHEARER, supra note 13, at 29.

25. ECE, *supra* note 17, at art. 2.

26. The ECE's eliminative approach is in sharp contrast to the more traditional enumerative one, which required treaties to list all the extraditable offenses. This represents the common trend in most bilateral and multilateral extradition treaties. GILBERT, *supra* note 16, at 38.

states which are trying to extradite criminals under their laws. What has arisen in many instances is a willingness to create general categories into which crimes can be classified, thus avoiding the classic statutory language comparisons which made it difficult to meet double criminality requirements in the past. This section of the treaty seems to have been wholly disregarded by the Danish court in allowing the extradition of Lauck to Germany.

Because of its history, German criminal law has developed many prohibitions against outward manifestations of racial hatred. For instance, Germany's Penal Code provides for incarceration for the production, showing, or distribution of specific writings to those under eighteen.[27] While many loopholes exist in German law affording limited protection to neo-nazi groups, it is the most developed legal attempt at preventing racially motivated activity in the world.[28] Denmark, on the other hand, is much more like the United States in its protection of neo-nazi groups under the ideals of freedom of expression. While stat. 266(b) of the Danish Penal Code makes it a crime to utter racist remarks, the punishment imposed by that law does not exceed one year and, therefore, does not fall within the category of crimes extraditable to Germany.[29] This was tested by the failed 1988 German extradition attempt of Thies Christophersen, who fled to Denmark from Germany to escape incarceration.[30] He was allowed to stay in Denmark on grounds of freedom of expression. However, art. 266(b) was amended this spring, giving it teeth by increasing the punishment of these crimes to two years.[31] This increased sentence would allow extradition under the ECE. However, this law was amended after Lauck's extradition hearing had already begun. There is little doubt that if Lauck was arrested today, his extradition would not violate international treaty obligations. However, barring retroactivity of the statute, double criminality was not present in Lauck's case. While Lauck's actions may have been illegal in two states, the disparity in punishments would not allow extradition.

With the increase of new crimes in the international arena, double criminality has become an unwelcome barrier to extradition.[32] For this

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27. STRAFGESETZBUCH [Penal Code] art. 130, *reprinted in* Juliane Wetzel, *The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany in* UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 83 (Louis Greenspan & Cyrill Levitt eds., 1993).

28. Charles Lewis Nier, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the U.S. and Germany*, 13 DICK. J. INT'L L. 241, 279 (1995).

29. "I think the most [jail time] anybody ever got [under 266(b)] in Denmark was 60 days," Elmquist, Head of the Danish Parliamentary Justice Committee, *quoted in* Walsh, *supra* note 2, at 1.

30. *Id.*

31. *Id.*

32. Jonathan O. Hafen, Comment, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191, 191 (1992).

reason, more general notions of crime have become acceptable as meeting the double criminality requirement, no longer relying on the similarity of statutory language. More than just a solution to a temporary problem of double criminality, Lauck's surrendering represents the willingness of countries to ignore internationally recognized standards in dealing with international criminals.

C. *Political Offenses*

Article 3 of the ECE provides:

> [e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.[33]

The designed effect of this article is "[to] mix inseparably the humanitarian concerns for the fugitive on the one hand and on the other the politically motivated unwillingness of the requested state to get involved in the international political affairs of the requesting state."[34] Likewise, extradition has traditionally focused on returning political prisoners; only later in its history did states adopt the liberalist notion of protection against political offenses.[35] While each country has a different definition of political offense, most systems include not only pure crimes, such as treason and espionage, but also relative offenses which involve common crimes.[36]

This factor, while theoretically large in the scope of neo-nazi activity, has played a surprisingly small role in any of the extradition proceedings thus far. This, in large part, has to do with a statutory interpretation excluding hate groups, such as skinheads and neo-nazis, from the realm of legitimate party politics.[37] German courts have consistently labelled these activities as non-political, requiring neo-nazi groups to show that they have sufficient seriousness in their efforts to influence the political climate of the Bundestag.[38] This approach, however, underestimates the influence of far-right extremism in European and American political systems.[39] Simply stated, the political offense exception does not apply to

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33. ECE, *supra* note 17, at art. 3.

34. Die Auslieferungsausnahme Bei Politischen Delikten (1983); English summary, pp. 377-81, *cited in* GILBERT, *supra* note 16, at 113.

35. 2 BASSIOUNI & NANDA, *supra* note 21, at 312; Nancy P. Kelly, Comment, *The Political Offense Exception to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence*, 66 OR. L. REV. 405, 405 (1987).

36. Different countries view relative political offenses more or less favorably in light of extradition. *See* Kelly, *supra* note 35, at 405-407.

37. "Although willing to connect with far-right [political] parties, the Skinheads themselves reject the parliamentary road to power. Rather, they aim to achieve their goals through destabilizing society through the direct application of violence and intimidation. *ADL Report*, *supra* note 4, at 4.

38. Walsh, *supra* note 2, at 7.

39. For an exhaustive account of neo-nazi political activity throughout the world, *see generally* PETER MERKL & LEONARD WEINGBERG, ENCOUNTERS WITH THE CONTEMPORARY

Lauck because the charges brought against him were non-political in that they focused primarily on the racist, not political, elements of the crime.

Another policy reason why this concept was not a major issue is that a recent trend has been to eliminate the political offense exception entirely.[40] One of the most dramatic changes in extradition law is the attempt to repeal the political offense exception entirely, given its ability to offer defenses for international terrorism and hate crimes. This tendency is even stronger among the ECE countries, where the predominant view is that in democratic states, criminal activity is not necessary to effect political change.[41]

### D. *Speciality*

Speciality, the doctrine that a fugitive shall only be tried in the requesting state for the crimes for which he was surrendered,[42] is another aspect of extradition law which has fallen to the wayside in the hopes of promoting efficient extradition policies. Although this principle is accepted by all states as part of the rules of extradition,[43] it is the aspect most commonly offended by requesting parties.[44] Article 14 of the ECE provides:

> A person who has been extradited shall not be proceeded against . . . for any offense committed prior to his surrender . . . nor shall he be for any other reason restricted in his personal freedom, except . . . (a)When the party which surrendered him consents, [so long as] the offense for which it is requested is itself subject to extradition in accordance with the provisions of the convention.[45]

This is a broad exception, showing that speciality, rather than trying to protect the rights of the person, is in actuality a tool for insuring smooth relations among countries. However, even consent is only permissible when the other offenses would be extraditable. Thus, in conjunction with the double criminality requirement, it would appear that if the fugitive is charged with more than one crime in the requesting country, then only those crimes that are criminal in the requested country could be charged. In Lauck's case, the Danish statute covers only those crimes which stem from racist utterances. Germany's prosecutorial power would be seriously limited if the ECE were to be followed.

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RADICAL RIGHT (1993).

40. *Justice Ministers Hope to Drop Concept of Political Crime in Europe*, EUROPEAN SOCIAL POLICY, April 14, 1994, *available in* LEXIS, NEXIS Library, News File.

41. *Id.*

42. BASSIOUNI, *supra* note 12, at 108.

43. GILBERT, *supra* note 16, at 106.

44. Kenneth Levitt, *International Extradition, The Principle of Speciality, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1018 (1992).

45. ECE, *supra* note 17, at art. 14.

## IV. THE EXTRADITION OF LAUCK

With this overview of the extradition law under the ECE, it is apparent that Denmark's extradition of Lauck may exemplify a new trend in extradition which, if carried to its logical conclusion, would suggest that extradition has returned to solely a diplomatic concern, merely keeping its legal facade as a means of justification.

The extradition of Gary Lauck has shown the sacrifice of international law in the guise of good policy. The neo-nazi threat, especially in Europe, has risen to a level of public outrage. Denmark, who has amended its neo-nazi laws to reflect greater concern for the issue, had both domestic and international pressure to hand-over Lauck to the German authorities. However, in so doing, the German and Danish governments have weakened the authority international law can play in unifying the region. While increased cooperation in the prevention and punishment of neo-nazis should be applauded as a legitimate goal, the inability to utilize legal means in which to do it creates both regret and concern in the author. By reverting extradition to the level of diplomatic relations, the door is flung open to reap the uncertainty of political climate. This is particularly troubling in its far-reaching implications. Both international terrorism and drug trafficking are crimes which threaten the security of the world community. For the most part, the response to these crimes has been directed through legal channels.[46] By forming new laws or revitalizing pre-existing laws, the world community is given both a mandate and direction in which to coordinate its efforts to prevent these threats.

Sovereigns must likewise push extradition law forward by promoting new treaties and agreements which codify a general agreement on the terms and objectives of the world community for two reasons. First, in order for countries to rely upon international criminal law, the terms and restrictions of extradition must be known to all parties. Second, the individuals rights must be protected from overly anxious attempts at expedient extradition. In an era of instantaneous international communications and daily travel, it is unwise to leave the citizen of the world to be exposed to the conflicting laws of every nation on earth without clear standards of extradition.

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46. *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30) 146, U.N. Doc. A/9030 (1974); U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted by consensus Dec. 19, 1988, 28 I.L.M. 493 (1989).