

L.N. 251 of 2006**FUGITIVE OFFENDERS (GERMANY) ORDER**

(Made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503))

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Procedures in Ordinance to apply between Hong Kong and Germany

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance shall apply as between Hong Kong and the Federal Republic of Germany subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the arrangements.

SCHEDULE

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY FOR THE SURRENDER OF FUGITIVE OFFENDERS[#]

The Government of the Hong Kong Special Administrative Region of the People's Republic of China,
having been duly authorised by the Central People's Government of the People's Republic of China and
the Government of the Federal Republic of Germany,

Note: [#] The Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Federal Republic of Germany for the Surrender of Fugitive Offenders was done in the Chinese, English and German languages, each text being equally authentic. The German text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

Desiring to make provision for the reciprocal surrender of fugitive offenders—
Have agreed as follows:

Article 1

Obligation to Surrender

- (1) The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence under Article 2.
- (2) For the purposes of this Agreement, “sentence” includes a detention order involving deprivation of liberty made following conviction by a criminal court in addition to or instead of a prison sentence.

Article 2

Offences

- (1) Surrender of fugitive offenders shall be granted for offences which are, according to the laws of both Parties, punishable by imprisonment or other form of detention for a maximum period of at least one year, or by a more severe penalty, and which come within any of the descriptions in the Appendix to this Agreement. The Appendix shall form part of this Agreement.
- (2) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that at least six months of the sentence remain to be served.
- (3) In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether, under the laws of the Parties, the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the Requesting Party shall be taken into account.
- (4) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence on the grounds that the person sought has been convicted of an offence for which surrender may be granted under this Agreement, the Requested Party may refuse to return or to keep such person in custody for such a purpose if it appears that the conviction was obtained in his absence.

Article 3

Surrender of Nationals

(1) The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China and the Government of the Federal Republic of Germany reserves the right to refuse the surrender of its nationals.

(2) Where the Requested Party exercises this right, it shall, if asked to do so by the Requesting Party, take all possible measures in accordance with its own law to prosecute the person. The Requesting Party shall be informed of the result of its request.

Article 4

Death Penalty

If the offence for which surrender of a fugitive offender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested Party considers sufficient that this penalty will not be imposed or if imposed will not be carried out.

Article 5

Mandatory Refusal to Surrender

(1) A fugitive offender shall not be surrendered if the Requested Party considers that the offence of which that person is accused or was convicted is a political offence or an offence of a political character.

(2) A fugitive offender shall not be surrendered if the Requested Party has substantial grounds for believing:

1. that the request for his surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, sex, ethnic origin or political opinions; or
2. that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, sex, ethnic origin or political opinions.

Article 6

Non bis in idem

Surrender shall not be granted if the person whose surrender is requested has been finally acquitted or convicted, or has been pardoned, by either Party for the offence for which surrender is requested.

Article 7

Discretionary Refusal to Surrender

(1) The Requested Party may refuse to surrender a fugitive offender for an offence which is regarded by its law as having been committed within the jurisdiction of its courts. If the Requested Party so refuses, it shall if asked to do so by the Requesting Party, take all possible measures in accordance with its own law to prosecute the person.

(2) The surrender of a fugitive offender may also be refused if the Requested Party considers that:

1. in the circumstances of the case, the surrender of the fugitive offender would be incompatible with humanitarian considerations in view of age, health or other personal circumstances; or
2. the surrender would prejudice essential interests of the Requested Party; or
3. the surrender of the fugitive offender may place that Party in breach of its obligations under international treaties.

(3) Before refusing a request for surrender under this Article the Requested Party shall consider whether surrender may be granted subject to conditions. If the Requesting Party accepts surrender subject to those conditions, it shall comply with them.

Article 8

The Request and Supporting Documents

(1) Requests under this Agreement and responses thereto shall be transmitted through the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and the Federal Ministry of Justice of the Federal Republic of Germany.

(2) The request shall be accompanied by:

1. as accurate a description as possible of the fugitive offender, together with any other information which would help to establish his identity, nationality and, if known, his whereabouts;
2. a statement and particulars of the offence for which the surrender is requested unless the facts of the case are apparent from the warrant of arrest or the judgment of conviction;
3. the legal provisions creating the offence, a statement of the punishment which can be imposed therefore and, where applicable, a specification of the time bar that is imposed on the prosecution or on the enforcement of any sentence in respect of that offence.

(3) A request for the surrender of a person for the purpose of prosecution shall be accompanied, in addition to the documents provided for in paragraph (2), by a copy of the warrant of arrest issued by a judge or other competent authority of the Requesting Party, and by such evidence as, according to the law of the Requested Party, would justify his committal for trial if the offence had been committed within the jurisdiction of the Requested Party.

(4) If the request relates to a person already convicted or sentenced, in addition to the documents provided for in paragraph (2), it shall also be accompanied by:

1. a copy of the certificate of the conviction or sentence; and
2. if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
3. if the person was sentenced, a statement that the sentence is enforceable and indicating how much of the sentence has still to be served.

(5) If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.

(6) The request and, if so required by the Requested Party, all documents submitted in support of the request shall be translated into an official language of the Requested Party.

Article 9

Authentication

Documents accompanying a request for surrender shall be admitted in evidence if authenticated. A document is authenticated if it has been:

1. signed or certified by a judge, magistrate or an official of the Requesting Party; and
2. sealed with the official seal of the competent authority of the Requesting Party.

Article 10

Provisional Arrest

(1) In urgent cases the person sought may, in accordance with the law of the Requested Party, be provisionally arrested on the application of the competent authorities of the Requesting Party.

(2) The application shall contain a description of the person sought, an indication of intention to request his surrender, a statement of the existence and terms of a warrant of arrest or a judgment of conviction against the person, a statement of the maximum punishment that can be imposed or the sentence that has been imposed for the offence, and a statement of the acts or omissions (including time and place) alleged to constitute the offence.

(3) The application for provisional arrest shall be in writing and may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (Interpol).

(4) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of his arrest if the request for his surrender, supported by the documents referred to in paragraphs (2) to (4) of Article 8 of this Agreement, has not been received. This provision shall not prevent his re-arrest or surrender if the request for his surrender is received subsequently.

Article 11

Conflicting Requests

A Party which has received conflicting requests for the surrender or, in the case of the Government of the Federal Republic of Germany, extradition of the

same person, either in respect of the same offence or of different offences, shall make its decision having regard to all the circumstances, including the relative seriousness and place of commission of the offence, the respective dates of the requests, the nationality of the person sought and any applicable international obligations as well as, in particular, the possibility of subsequent re-surrender or, in the case of the Government of the Federal Republic of Germany, re-extradition of that person.

Article 12

Representation and Costs

- (1) The Requested Party shall, by all legal means within its power, assist the Requesting Party before the judicial and other competent authorities of the Requested Party.
- (2) The Requested Party shall bear the expenses of the arrest of the person whose surrender is requested, of the maintenance in custody of the person until he is handed over to a person nominated by the Requesting Party and in relation to any legal proceedings before the judicial authorities of the Requested Party arising out of the request for surrender.
- (3) The Requesting Party shall bear the expenses incurred in conveying the person from the jurisdiction of the Requested Party.

Article 13

Arrangements for Handover

- (1) The Requested Party shall promptly communicate its decision on the request for surrender to the Requesting Party. Reasons shall be given for any complete or partial refusal of the request.
- (2) If the surrender of the fugitive offender has been granted, he shall be taken by the authorities of the Requested Party on a date agreed with the Requesting Party to a mutually convenient place of departure within the jurisdiction of the Requested Party. The Requested Party shall inform the Requesting Party of the length of time for which the fugitive offender was detained in connection with the request for his surrender.
- (3) Subject to the provisions of paragraph (4) of this Article, if the Requesting Party does not take custody of the person on the date agreed by the two Parties, he shall be released on the expiry of thirty days thereafter or such lesser period as is provided by the law of the Requested Party. The Requested Party may subsequently refuse to surrender him for the same offence.

(4) If circumstances beyond its control prevent a Party from handing over or taking over the person as agreed, it shall notify the other Party. In that case, the two Parties shall agree on a new date for the handover, and the provisions of paragraph (3) of this Article shall apply.

Article 14

Deferred or Temporary Surrender

(1) If the fugitive offender is being proceeded against or is under punishment in the jurisdiction of the Requested Party for any offence other than the offence for which surrender is requested, his surrender may be deferred until the conclusion of the proceedings and the execution of any punishment awarded to him.

(2) Alternatively, the Requested Party may temporarily surrender the person sought to the Requesting Party for the purpose of prosecution. The person so surrendered shall be kept in custody by the Requesting Party and shall be returned to the Requested Party after conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the Parties.

Article 15

Handing Over of Property

(1) When a request for surrender of a fugitive offender is granted the Requested Party shall, at the request of the Requesting Party and in so far as its law allows, hand over to the Requesting Party all articles, including sums of money, found within its jurisdiction:

1. which may serve as proof of the offence; or
2. which have been acquired by the fugitive offender as a result of the offence and are in his possession or discovered subsequently.

(2) If the articles in question are liable to seizure or confiscation within the jurisdiction of the Requested Party the latter may, in connection with pending criminal proceedings, temporarily retain them or hand them over on condition that they are returned.

(3) These provisions shall not prejudice the rights of the Requested Party or of any person other than the person sought. When such rights exist the articles shall, on request, be returned to the Requested Party without charge as soon as possible after the end of the proceedings.

Article 16

Rule of Specialty

(1) A fugitive offender who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the Requesting Party for any offence committed prior to his handover other than:

1. the offence or offences in respect of which his surrender was granted;
2. an offence, however described, based on substantially the same facts as that in respect of which his surrender was granted, provided such offence is one for which he could be surrendered under this Agreement, and provided further such offence is punishable by a penalty no more severe than the penalty for the offence for which he was surrendered;
3. any other offence for which surrender may be granted under this Agreement and in respect of which the Requested Party consents to his being dealt with;

unless he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and he has not done so within forty days or has voluntarily returned to that jurisdiction having left it.

(2) A Party whose consent is requested under paragraph (1) number 3 of this Article may require the submission of any document or statement referred to in Article 8 of this Agreement, and a statement made by the surrendered person on the matter.

Article 17

Re-Surrender or Re-Extradition

(1) A fugitive offender who has been surrendered shall not be re-surrendered or, in the case of the Government of the Federal Republic of Germany, re-extradited to another jurisdiction for an offence committed prior to his handover unless:

1. the Requested Party consents to such re-surrender or re-extradition;
or
2. he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and has not done so within forty days or has voluntarily returned to that jurisdiction having left it.

(2) A Party whose consent is requested under paragraph (1) number 1 of this Article may require the submission of any document or statement referred to in Article 8 of this Agreement, and a statement made by the surrendered person on the matter.

Article 18

Transit

To the extent permitted by its law, transit through the jurisdiction of a Party may be granted on a request in writing. The Party through whose jurisdiction transit will occur may request the information referred to in paragraph (2) of Article 10 of this Agreement. The Party requesting transit shall bear the expenses thereof.

Article 19

Result of Criminal Proceedings

The Requesting Party shall, upon request, inform the Requested Party of the result of the criminal proceedings against the person surrendered and shall send a copy of the final and binding decision to that Party.

Article 20

Surrender by Consent

(1) If the person consents voluntarily and in writing to surrender to the Requesting Party, the Requested Party may, subject to its law, surrender the person as expeditiously as possible without further formal proceedings.

(2) The provisions of Articles 16 and 17 shall apply to a person surrendered pursuant to this Article.

Article 21

Personal Data

(1) In this Article “personal data” means any information about an identified or identifiable natural person.

(2) Personal data transmitted on the basis of this Agreement shall be used for the purposes for which the data were transmitted and subject to such conditions as the transmitting Party determines. In addition such data may be used by the Party which has received it for the purpose of warding off substantial dangers to its security. Use of the data for other purposes requires the prior consent of the Party transmitting the data.

(3) Subject to the respective law of each Party, the following provisions shall apply to the transmission and use of personal data transmitted for the purpose of a request for surrender under this Agreement:

1. only data that relates to the request shall be transmitted;
2. upon request, the Party which has received the data shall identify the data received and inform the transmitting Party of the use made of the data and the results achieved therefrom;
3. if it appears to the transmitting Party that incorrect data have been transmitted or that data have been transmitted that should not have been, the transmitting Party shall notify without delay the Party that has received the data; the Party that has received the data shall without delay rectify any errors or destroy the data;
4. the Parties shall keep records in a readily retrievable form concerning the transmission and receipt of data;
5. the Parties shall protect personal data against unauthorised access, unauthorised alteration and unauthorised publication.

Article 22

Settlement of Disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Parties are themselves unable to reach agreement.

Article 23

Entry into Force, Suspension and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their respective requirements for the entry into force of this Agreement have been complied with. The date of receipt of the second notification shall be decisive.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of the commission of the offence or offences set out in the request.

(3) This Agreement shall be of unlimited duration. Each of the Parties may suspend or terminate this Agreement at any time by giving notification to the other. Suspension shall take effect on receipt of the relevant notification. In the event of termination the Agreement shall cease to have effect six months after the receipt of the relevant notification.

Done at Hong Kong, this 26th day of May 2006 in two originals in the Chinese, English and German languages, each text being equally authentic.

Appendix to the Agreement between the Government
of the Hong Kong Special Administrative Region
of the People's Republic of China and the
Government of the Federal Republic of
Germany for the Surrender of
Fugitive Offenders

Description of offences referred to in Article 2 paragraph (1)

1. murder or manslaughter, including criminal negligence causing death, culpable homicide, assault with intent to commit murder
2. malicious wounding, maiming, inflicting grievous or actual bodily harm, assault occasioning actual bodily harm, threats to kill, intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise, offences relating to unlawful wounding or injuring
3. offences of a sexual nature including rape, sexual assault, indecent assault, unlawful sexual acts on children, statutory sexual offences
4. gross indecency with a child, a mental defective or an unconscious person
5. kidnapping, abduction, false imprisonment, unlawful confinement, dealing or trafficking in slaves or other persons, taking a hostage
6. criminal intimidation
7. offences against the law relating to dangerous drugs including narcotics, psychotropic substances, precursors and essential chemicals used in the illegal manufacture of narcotics and psychotropic substances, offences relating to the proceeds of drug trafficking

8. obtaining property or pecuniary advantage by deception, theft, robbery, burglary (including breaking and entering), embezzlement, blackmail, extortion, unlawful handling or receiving of property, false accounting, any other offence in respect of property or fiscal matters involving fraud, any offence against the law relating to unlawful deprivation of property
9. offences against bankruptcy law or insolvency law
10. offences against the law relating to companies including offences committed by officers, directors and promoters
11. offences relating to securities and futures trading
12. offences relating to counterfeiting, offences against the law relating to forgery or uttering what is forged
13. offences against the law relating to protection of intellectual property, copyrights, patents or trademarks
14. offences against the law relating to bribery, corruption, secret commissions and breach of trust
15. perjury and subornation of perjury
16. offence relating to the perversion or obstruction of the course of justice
17. arson, criminal damage or mischief including mischief in relation to computer data
18. offences against the law relating to firearms
19. offences against the law relating to explosives
20. offences against the law relating to environmental pollution or protection of public health
21. mutiny or any mutinous act committed on board a vessel at sea
22. piracy involving ships or aircraft
23. unlawful seizure or exercise of control of an aircraft or other means of transportation
24. genocide or direct and public incitement to commit genocide
25. facilitating or permitting the escape of a person from custody
26. offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds

27. smuggling, offences against the law relating to import and export of prohibited items, including historical and archaeological items
28. immigration offences including fraudulent acquisition or use of a passport or visa
29. arranging or facilitating for financial gain, the illegal entry of persons into the jurisdiction of the Requesting Party
30. offences relating to gambling or lotteries
31. offences relating to the unlawful termination of pregnancy
32. stealing, abandoning, exposing or unlawfully detaining a child, any other offences involving the exploitation of children
33. offences against the law relating to prostitution and premises kept for the purposes of prostitution
34. offences involving the unlawful use of computers
35. offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax duty or customs regulation of the same kind as that of the Requesting Party
36. offences relating to unlawful escape from custody, mutiny in prison
37. bigamy
38. offences relating to women and girls
39. offences against the law relating to false or misleading trade descriptions
40. offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement
41. impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement
42. offences for which persons may be surrendered under multilateral international conventions binding on the Parties, offences created as a result of decisions of international organizations which are binding on the Parties
43. conspiracy to commit fraud or to defraud

44. conspiracy to commit, or any type of association to commit, any offence for which surrender may be granted under this Agreement
45. aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement
46. any other offence for which surrender may be granted in accordance with the laws of both Parties

LAM Chik-ting, Tony
Clerk to the Executive Council

COUNCIL CHAMBER
14 November 2006

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Federal Republic of Germany. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and the Federal Republic of Germany and signed in Hong Kong on 26 May 2006. The terms of those arrangements are recited in the Schedule to the Order. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.