

L.N. 43 of 2010**FUGITIVE OFFENDERS (SOUTH AFRICA) ORDER**

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

1. Commencement

This Order comes 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 South Africa

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 apply as between Hong Kong and the Republic of South Africa 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
REPUBLIC OF SOUTH AFRICA CONCERNING SURRENDER
OF FUGITIVE OFFENDERS**

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised to conclude this agreement by the Central People's Government of the People's Republic of China and the Government of the Republic of South Africa;

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 pursuant to the provisions of this Agreement and in accordance with their respective laws 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 described in Article 2.
- (2) References in this Agreement to “surrender” shall for the purposes of South African law be interpreted as having the same meaning as “extradition” or “extradite”.

ARTICLE 2

OFFENCES

- (1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:
 - (1) murder or manslaughter including criminal negligence causing death; culpable homicide; assault with intent to commit murder;
 - (2) aiding, abetting, counselling or procuring suicide;
 - (3) maliciously 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;
 - (4) offences of a sexual nature including rape; sexual assault; indecent assault; unlawful sexual acts on children; statutory sexual offences;
 - (5) gross indecency with a child, a mentally defective or an unconscious person;
 - (6) kidnapping; abduction; false imprisonment; unlawful confinement; dealing or trafficking in slaves or other persons; taking a hostage;

- (7) criminal intimidation;
- (8) offences against the law relating to dangerous drugs including narcotics and psychotropic substances and precursors and essential chemicals used in the illegal manufacture of narcotic drugs and psychotropic substances and offences related to the proceeds of drug trafficking;
- (9) 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;
- (10) offences against bankruptcy law or insolvency law;
- (11) offences against the law relating to companies including offences committed by officers, directors, and promoters;
- (12) offences relating to securities and futures trading;
- (13) any offence relating to counterfeiting; any offence against the law relating to forgery or uttering what is forged;
- (14) an offence against the laws relating to protection of intellectual property, copyrights, patents or trademarks;
- (15) an offence against the law relating to bribery, corruption, secret commissions, and breach of trust;
- (16) perjury and subornation of perjury;
- (17) offences relating to the perversion or obstruction of the course of justice;
- (18) arson; criminal damage or mischief including mischief in relation to computer data;
- (19) an offence against the law relating to firearms;
- (20) an offence against the law relating to explosives;
- (21) an offence against laws relating to environmental pollution or protection of public health;
- (22) mutiny or any mutinous act committed on board a vessel at sea;
- (23) piracy involving ships or aircraft, according to international law;

- (24) unlawful seizure or exercise of control of an aircraft or other means of transportation;
- (25) genocide or direct and public incitement to commit genocide;
- (26) facilitating or permitting the escape of a person from custody;
- (27) an offence against the laws relating to the control of exportation or importation of goods of any type, or the international transfer of funds;
- (28) smuggling; offences against the laws relating to import and export of prohibited items, including historical and archaeological items;
- (29) immigration offences including fraudulent acquisition or use of a passport or visa;
- (30) arranging or facilitating for financial gain, the illegal entry of persons into the jurisdiction of the Requesting Party;
- (31) an offence relating to gambling or lotteries;
- (32) offences relating to the unlawful termination of pregnancy;
- (33) stealing, abandoning, exposing or unlawfully detaining a child and any other offences involving the exploitation of children;
- (34) offences against the laws relating to prostitution and premises kept for the purposes of prostitution;
- (35) offences involving the unlawful use of computers;
- (36) 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 the Requesting Party;
- (37) offences relating to the unlawful escape from custody or mutiny in prison;
- (38) bigamy;
- (39) an offence relating to women and girls;
- (40) any offence against the law relating to false or misleading trade descriptions;
- (41) 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;

- (42) 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;
 - (43) offences for which fugitive offenders may be surrendered under international conventions binding on the Parties or offences created as a result of decisions of international organisations which are binding on the Parties;
 - (44) conspiracy to commit fraud or to defraud;
 - (45) conspiracy to commit or any type of association to commit any offence for which surrender may be granted under this Agreement;
 - (46) 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; and
 - (47) any other offence which each Party has confirmed to the other, by notice in writing, is an offence for which surrender may be granted in accordance with its laws.
- (2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.
 - (3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the Requesting Party.
 - (4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the Requesting Party at the time it was committed and an offence against the law of the Requested Party at the time the request for surrender is received.
 - (5) Where the surrender of a fugitive offender is requested for the purpose of carrying out a sentence the Requested Party may refuse to surrender the fugitive if it appears that the conviction was obtained in the fugitive's absence, unless the fugitive has the opportunity to have the case retried in the fugitive's presence, in which case the fugitive shall be considered as an accused person under this Agreement.

ARTICLE 3

SURRENDER OF NATIONALS

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. The Government of the Republic of South Africa reserves the right to refuse the surrender of its nationals.

ARTICLE 4

DEATH PENALTY

- (1) 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.
- (2) In instances in which a Requesting Party provides assurances in accordance with this Article the death penalty if imposed by the courts of the Requesting Party, shall not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence is found to be sufficient according to the law of the Requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the Requested Party or to prove that the person sought is the person convicted by the courts of the Requesting Party.

ARTICLE 6

REFUSAL OF SURRENDER

- (1) A fugitive offender shall not be surrendered if the Requested Party has substantial grounds for believing:
 - (a) that the offence of which that person is accused or was convicted is an offence of a political character;
 - (b) that the request for 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 prosecution or punishment on account of race, religion, gender, nationality or political opinions; or
 - (c) that the person might, if returned, be prejudiced at that person's trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, gender, nationality or political opinions.
- (2) Surrender may be refused if the Requested Party considers that:
 - (a) the offence is, having regard to all the circumstances, an offence of a trivial nature;
 - (b) there has been excessive delay, for reasons which cannot be imputed to the person sought, in bringing charges, in bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;
 - (c) the offence for which surrender is sought was committed within the jurisdiction of its courts and the Requested Party has indicated that the person sought will be proceeded against;
 - (d) in the case of a person whose surrender is sought for the purposes of trial, that person would not receive at trial in the Requesting Party the minimum guarantees contained in Article 14 of the International Covenant on Civil and Political Rights or, in the case of a person whose surrender is sought for an offence of which that person has been convicted, that person did not receive such guarantees at trial;
 - (e) there are substantial grounds for believing that the person whose surrender is sought would be in danger of being subjected in the Requesting Party to torture or cruel, inhuman or degrading treatment or punishment; or

- (f) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.
- (3) The Requested Party shall refuse surrender for offences under military law that are not offences under ordinary criminal law.

ARTICLE 7

PRIOR PROCEEDINGS

- (1) A fugitive offender who has been finally acquitted, convicted or pardoned or whose conviction has been set aside under the law of the Requesting or Requested Party for any offence set out in the request shall not be surrendered for that offence.
- (2) Surrender may be refused if the competent authorities of the Requested Party have decided—
 - (a) not to prosecute the person sought for the acts or omissions for which surrender is requested;
 - (b) to discontinue any criminal proceedings which have been instituted against the person sought for those acts or omissions; or
 - (c) to investigate the person sought for the same acts or omissions.

ARTICLE 8

POSTPONEMENT AND TEMPORARY SURRENDER

- (1) If the person sought is being proceeded against or is under punishment in the jurisdiction of the Requested Party for any offence other than that for which surrender is requested, surrender may be granted or deferred until the conclusion of the proceedings and the execution of any punishment imposed.
- (2) (a) If the request to surrender is granted in the case of a person who is being prosecuted or is serving a sentence in the Requested Party, that Party may temporarily surrender the person sought to the Requesting Party for the purpose of prosecution.

- (b) Where a person so surrendered is serving a sentence, the person shall be kept in custody in the jurisdiction of the Requesting Party and shall be returned to the Requested Party after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement between the Requesting and Requested Parties.
- (3) A person serving a sentence in the Requested Party who is surrendered under this Article shall, whilst in custody in the Requesting Party, be regarded as continuing to serve the sentence imposed in the Requested Party.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

- (1) Requests for surrender and related documents shall be transmitted—
 - (a) in the case of requests by the Hong Kong Special Administrative Region, directly to the Minister for Justice and Constitutional Development in South Africa; or
 - (b) in the case of requests by the Republic of South Africa, directly to the Secretary for Justice in Hong Kong,or through such channels as may be agreed upon by the Parties from time to time.
- (2) The request shall be accompanied by:
 - (a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;
 - (b) a statement of each offence for which surrender is sought and a statement of the acts and omissions which are alleged against the person in respect of each offence; and
 - (c) the text of the legal provisions, if any, creating the offence, and a statement of the law setting out the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.
- (3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the Requesting Party and by such evidence

whether taken in the jurisdiction of the Requesting Party or elsewhere as, according to the law of the Requested Party, would justify 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, it shall also be accompanied by:
- (a) a copy of the judgment or a record of the conviction or sentence or, if a copy is not available, a statement by a judicial officer or other competent authority that the person has been convicted or a copy of any record of conviction that reflects the charge and the conviction;
 - (b) 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
 - (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has been carried out.

ARTICLE 10

AUTHENTICATION

- (1) Documents supporting a request for surrender shall be admitted in evidence as proof of the facts contained therein if duly authenticated. Documents are duly authenticated if they are signed or certified by a judge, magistrate or an official of the Requesting Party and sealed with the official seal of a competent authority of the Requesting Party.
- (2) Any translation of documents submitted in support of a request for surrender provided by the Requesting Party shall be admitted for all purposes in proceedings for surrender.

ARTICLE 11

LANGUAGE OF DOCUMENTATION

All documents submitted in accordance with this Agreement shall be in, or translated into, a language acceptable to the Requested Party.

ARTICLE 12

ADDITIONAL INFORMATION

- (1) 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.
- (2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the Requesting Party from making a fresh request for the surrender of the person.

ARTICLE 13

PROVISIONAL ARREST

- (1) In urgent cases the person sought may, at the discretion of the Requested Party and in accordance with its law, be provisionally arrested on the application of the Requesting Party.
- (2) The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought, a statement of the existence of a warrant of arrest or a judgment of conviction against that person, information concerning identity, nationality and probable location, a description of the person, a brief description of the offence and the facts of the case and a statement of the sentence that can be or has been imposed for the offence and, where applicable, how much of that sentence remains to be served.
- (3) An application for provisional arrest may be transmitted in writing in the same manner as provided for in Article 9(1). The facilities of the International Criminal Police Organization (INTERPOL) may also be used to transmit such a request.
- (4) The provisional arrest of the person sought shall be terminated upon the expiration of 60 days from the date of arrest if the request for surrender and supporting documents have not been received. The release of a person pursuant to this paragraph shall not prevent the institution or continuation of surrender proceedings if the request and the supporting documents are received subsequently.

ARTICLE 14

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and another jurisdiction with whom the Hong Kong Special Administrative Region or the Republic of South Africa, whichever is being requested, has agreements or arrangements for the surrender of accused and convicted persons, the Requested Party shall make its decision having regard to all the circumstances. These circumstances shall include whether the concurrent request was made pursuant to an agreement for the surrender of fugitive offenders, the relevant provisions of the agreements or arrangements, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the victim and the possibility of subsequent surrender to another jurisdiction. The Requested Party shall notify the Requesting Party of its decision.

ARTICLE 15

REPRESENTATION AND COSTS

- (1) The Requested Party shall make all necessary arrangements for, and meet the costs of, any proceedings arising out of a request for surrender and shall otherwise represent the interests of the Requesting Party.
- (2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to deciding how these expenses will be met.
- (3) The Requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered. The Requesting Party shall bear all subsequent expenses.
- (4) The Requesting Party shall pay all the expenses incurred in the translation of documents relating to the surrender of a fugitive offender and in conveying the person from the territory of the Requested Party.

ARTICLE 16

ARRANGEMENTS FOR SURRENDER

- (1) The Requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the Requesting Party.
- (2) If the request for surrender is granted, the relevant authorities of the Requesting and Requested Parties shall agree on the date and place for the surrender of the person sought.
- (3) Subject to the provisions of paragraph (4) of this Article, the Requesting Party shall remove the person within the period specified by the Requested Party and if the person is not removed within that period the Requested Party may refuse to surrender that person for the same offence.
- (4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree on a new date for surrender and the provisions of paragraph (3) of this Article shall apply.

ARTICLE 17

SURRENDER OF PROPERTY

- (1) To the extent permitted under the law of the Requested Party, when a request for surrender of a fugitive offender is granted, the Requested Party:
 - (a) shall seize and hand over to the Requesting Party all articles, including sums of money which may serve as proof of the offence, or which have been acquired by the person sought as a result of the offence and are in that person's possession or are discovered subsequently;
 - (b) may, if the articles in question are liable to seizure or confiscation within the jurisdiction of the Requested Party in connection with pending proceedings, temporarily retain them or hand them over on condition they are returned.

- (2) The provisions of paragraph (1) of this Article 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 practicable after the end of the proceedings.
- (3) The articles in question shall, if the Requesting Party so requests, be surrendered to that Party even if the surrender cannot be carried out due to the death or escape of the person sought.

ARTICLE 18

SPECIALTY AND RESURRENDER

- (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 that person's surrender other than:
 - (a) the offence or offences in respect of which surrender was granted;
 - (b) an offence, however described, based on substantially the same facts in respect of which surrender was granted, provided such offence is one for which the fugitive offender 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 the fugitive offender was surrendered;
 - (c) any other offence for which surrender may be granted under this Agreement in respect of which the Requested Party may consent to the fugitive offender being dealt with;

unless the fugitive offender has first had an opportunity to exercise the right to leave the jurisdiction of the Party to which that person has been surrendered and has not done so within 40 days or has voluntarily returned to that jurisdiction after having left it.

- (2) A fugitive offender who has been surrendered shall not be resurrendered to another jurisdiction for an offence committed prior to the fugitive offender's surrender unless:
 - (a) the Requested Party consents to such surrender; or

- (b) the fugitive offender has first had an opportunity to exercise the right to leave the jurisdiction of the Party to which that person has been surrendered and has not done so within 40 days or has voluntarily returned to that jurisdiction having left it.
- (3) A Party considering requests for consent under paragraphs (1)(c) or (2)(a) of this Article may require the submission of any document or statement referred to in Article 9, and any statement made by the surrendered person on the matter.

ARTICLE 19

WAIVER

If the person sought consents to be surrendered to the Requesting Party the Requested Party shall, subject to its domestic law, surrender the person as expeditiously as possible. Article 18 shall apply to a person surrendered pursuant to this Article.

ARTICLE 20

TRANSIT

- (1) Either Party may authorize transportation through its jurisdiction of a person surrendered to the other Party by a third Party.
- (2) A request for transit shall be transmitted in the same manner as provided for in Article 9(1).
- (3) The request for transit shall contain—
 - (a) a description of the person together with any information that may help to establish his or her identity and nationality; and
 - (b) a brief statement of the facts of the case, and a list of the offences for which the person was surrendered by the third Party.
- (4) Permission for the transit of a person shall, subject to the law of the Requested Party, include permission for the person to be held in custody during transit. If transportation is not continued within 48 hours the executive authority of the Party in whose jurisdiction the person is being held may direct that the person be released.

- (5) Authorization is not required when air transportation is used by one Party and no landing is scheduled on the territory of the other Party. If an unscheduled landing does occur, the Party in whose jurisdiction such landing occurs may require a request for transit to be made pursuant to paragraph (2) of this Article, and it may detain the person subject to the provision of its law, until the request for transit is received and the transit is effected.

ARTICLE 21

CONSULTATION

The Departments of Justice of the Hong Kong Special Administrative Region and the Republic of South Africa or persons designated by the respective Departments of Justice may consult each other directly in connection with processing of individual cases and in furtherance of efficient implementation of the Agreement.

ARTICLE 22

ENTRY INTO FORCE, SUSPENSION AND TERMINATION

- (1) This Agreement shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.
- (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) Either Party may suspend or terminate this Agreement at any time by giving notice to the other in the same manner as provided for in Article 9(1). Suspension shall take effect on receipt of the relevant notice. In the case of termination the Agreement shall cease to have effect six months after the receipt of notice to terminate; provided that the Parties may by mutual consent agree to terminate the Agreement with immediate effect.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done at Hong Kong this 20th day of February, Two thousand and Nine in the Chinese and English languages, each text being equally authentic.

Manda CHAN

Clerk to the Executive Council

COUNCIL CHAMBER

20 April 2010

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 Republic of South Africa. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of South Africa and signed in Hong Kong on 20 February 2009. 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.