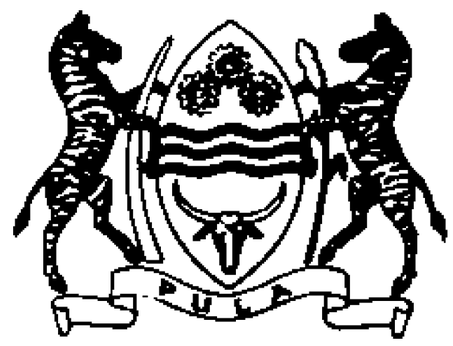
EXTRADITION ACT, 1990

No. 18  **of 1990**

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An Act to re-enact with amendments the law relating to the extradition of persons accused or convicted of crimes committed within the jurisdiction of other countries

Date of Assent: 25th October, 1990.
Date of Commencement: 2nd November, 1990.
ENACTED by the Parliament of Botswana

PART I. *Preliminary*

Short title

1. This Act may be cited as the Extradition Act, 1990.

Interpretation

2. (1) In this Act, unless the context otherwise requires —

"arrangement" includes a convention, protocol, agreement, scheme or treaty;

"fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any other country who is in or is suspected of being in Botswana;

"magistrate" means any person appointed as Magistrate Grade I or over in accordance with the Magistrates' Courts Act; Cap. 04:04

"related offence" has the meaning assigned to it under section 6(2);

"requesting country" means any country to which this Act applies which requests the surrender of a fugitive criminal;

"warrant", in the case of any country, includes any judicial document authorising the arrest of a person accused or convicted of a crime.

(2) Subject to the provisions of section 3, for the purposes of this Act "extradition crime" means a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty, and includes an offence of purely fiscal character.

PART II. *General Provisions Relating to Extradition*

Application of Act

3. (1) Where an arrangement has been made with any country, with respect to the surrender to that country of any fugitive criminal, the Minister may, having regard to reciprocal provisions under the law of that country, by order published in the Gazette, direct that this Act shall apply in the case of that country subject to such conditions, exceptions and qualifications as may be specified in the order.

(2) An order made under subsection (1) shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement.

(3) Any order under subsection (1) may prescribe what crimes shall be deemed to be extradition crimes for the purposes of the order and this Act.

Discontinuance

4. If it appears to the Minister that the law of a country to which section 3 applies no longer contains reciprocal provisions or that an arrangement with any country referred to in the said section 3 is no longer

in force, the Minister may by statutory instrument discontinue the application of this Act to that country.

Liability of criminal to surrender

5. Where this Act applies in the case of any country, every fugitive criminal of that country who is in or suspected of being in Botswana shall be liable to be apprehended and surrendered in the manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the commencement of this Act or the application of this Act to that country, and whether there is or is not any concurrent jurisdiction in a court of Botswana over that crime.

Liability of accessories to be surrendered

6. (1) Every person who is accused or convicted of having counselled, procured, commanded, aided or abetted the commission of any extradition crime, or being an accessory before or after the fact to any extradition crime, shall be deemed, for the purposes of this Act, to be accused or convicted of having committed that crime, and shall be liable to be apprehended and surrendered accordingly.

(2) For the purposes of this Act, "related offence" means aiding and abetting, counselling or procuring the commission of, being an accessory before or after the fact to, or attempting or conspiring to commit that offence.

Restrictions on surrender of criminals

7. (1) Subject to the provisions of subsection (2), the following provisions shall be observed with respect to the surrender of fugitive criminals, that is to say —

(*a*) a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if it appears to a court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character ;

(*b*) a fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions;

(*c*) a fugitive criminal shall not be surrendered to any country if the offence in respect of which his surrender is demanded is punishable by death in that country and if under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by an arrangement with that country for securing that he will not be punished by death in respect of that offence;

(*d*) a fugitive criminal who has been accused of some offence within the jurisdiction of Botswana, not being the offence for which his surrender is asked, or who is undergoing sentence under any conviction in Botswana, shall not, unless the President otherwise directs, be surrendered until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise;

(*e*) a fugitive criminal shall not be surrendered if such surrender would be contrary to the terms of any arrangement as recited or embodied in any order made under the provisions of section 3;

(*f*) a fugitive criminal shall not be surrendered if final judgment has been passed by any court in Botswana upon him in respect of the offence for which his surrender is sought.

(*g*) a fugitive criminal shall not be surrendered if the offence is an offence only under military law or a law relating to military obligations;

(*h*) a fugitive criminal shall not be surrendered if the facts on which the request is made do not constitute an offence under the laws of Botswana;

(*i*) a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested;

(*j*) a fugitive criminal shall not be surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded;

(*k*) a fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison to await his surrender.

(2) An offence is not an offence of a political character —

(*a*) if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;

(*b*) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or if it is any related offence;

(*c*) if it is murder or any related offence.

PART III *Requests for surrender, warrants, etc. and committal proceedings*

Request for surrender

8. (1) A requisition for the surrender of a fugitive criminal of any country, who is or suspected of being in Botswana, shall be made to the Minister by a diplomatic representative or consular officer of that country.

(2) The requisition shall be accompanied by a warrant for the arrest of the fugitive criminal issued in that country with the request that the warrant be endorsed for the arrest of the fugitive criminal.

(3) The Minister may transmit the warrant to a magistrate to endorse it for the apprehension of the fugitive criminal.

9. (1) Where the surrender of a fugitive criminal is sought under this Act, and it appears to a magistrate that by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be surrendered until after the expiration of the period named in the order, or may make such order in the matter as the magistrate thinks proper.

Refusal to surrender where offence too trivial

(2) Any order or refusal to make an order of discharge under this section shall be subject to appeal.

10. (1) Where in a country to which this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that country and he is or is suspected of being in or on the way to Botswana, a magistrate to whom the warrant has been directed by the Minister under section 8, if satisfied that the warrant was issued by a person having lawful authority to issue it, may, endorse the warrant in accordance with subsection (3), and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate.

Endorsement of warrant

(2) This Act shall apply whatever the date of the warrant and whether the offence is alleged to have been committed before or after the commencement of this Act or the application of this Act to that country.

(3) An endorsement of a warrant shall be signed by the magistrate and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and every police officer, to execute the warrant by apprehending the person named in it and bringing him before the magistrate or any other magistrate.

(4) Where a warrant for arrest has been endorsed in terms of subsection (1), any magistrate may issue a warrant empowering a police officer to search for and seize any property —

(*a*) which may be required as evidence at the trial of the fugitive criminal; or

(*b*) which has been acquired as a result of the extradition crime.

11. (1) A magistrate, before the endorsement in pursuance of section 10 of a warrant for the apprehension of any person, may issue a provisional warrant for his apprehension, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which that person is accused were an offence punishable by the law of Botswana.

Provisional warrant

(2) A person arrested under a provisional warrant shall be discharged unless the original is produced and endorsed within such time as the magistrate thinks reasonable in the circumstances.

Detention

12. A fugitive criminal when apprehended on a warrant endorsed under section 10 or on a provisional warrant issued under section 11 shall be brought before a magistrate within 48 hours of his apprehension and the magistrate may issue a warrant for his further detention.

Hearing of case and evidence

13. (1) When a fugitive criminal is brought before a magistrate, the magistrate shall hold an inquiry with a view to the surrender of such person to the foreign country which has requested his surrender.

(2) Subject to the provisions of this Act, the magistrate shall proceed in the manner in which a preparatory examination is held in the case of a person charged with having committed an offence in Botswana and shall, for the purpose of holding such inquiry, have the same powers, including the power of committing any person for further examination and admitting any person detained to bail, as he has at a preparatory examination so held.

(3) Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the fugitive criminal, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such inquiry if authenticated to enable them to be produced in any court in Botswana or in the manner provided for in the extradition agreement concerned.

(4) The magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is not an extradition crime or is an offence for which the prisoner may not be surrendered.

Committal and discharge of prisioner

14. (1) Subject to the provisions of section 7, in the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of the criminal is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, would, according to the law of Botswana, justify the committal for trial of the prisoner if the crime of which he is accused was committed in Botswana, the magistrate shall commit him to prison.

(2) Subject to the provisions of section 7, in the case of a fugitive criminal alleged to have been convicted of an extradition crime if such evidence is produced as, subject to the provisions of this Act, would, according to the law of Botswana, prove that the prisoner was convicted of such crime, the magistrate shall commit him to prison.

(3) Where the magistrate is not satisfied with the evidence mentioned in subsections (1) and (2), he shall order the prisoner to be discharged.

Special procedure for committal

15. (1) Notwithstanding the provisions of section 14 where a special arrangement has been made with country to which this Act applies with regard to committal proceedings for the surrender of fugitive criminals to that country, the Minister may by order published in the Gazette direct that committal of fugitive criminals from that country shall be conducted in accordance with the provisions of this section.

(2) The requesting country shall send to the Minister for transmission to the magistrate before whom the fugitive criminal is brought, a record of the case prepared by a competent authority in the requesting country

in accordance with the provisions of subsections (3) and (4).

(3) The record of the case referred to in subsection (2) shall contain—

(*a*) particulars of the description, identity and nationality of the fugitive criminal;

(*b*) the particulars of each offence or the conduct for which the surrender of the fugitive criminal is requested, specifying the date and place of commission, the legal description of the offence and the relevant legal provisions of the law of the requesting country, a copy of which shall be attached to the record;

(*c*) the original or certified copy of any document or process issued in the requesting country against the fugitive criminal;

(*d*) an abstract of the evidence acquired to support the request for the surrender of the fugitive criminal;

(*e*) a certified copy or reproduction of exhibits or documentary evidence.

(4) A magistrate to whom a record of a case has been transmitted in accordance with subsection (2) shall not consider the case unless the record is duly authenticated by —

(*a*) the oath or affirmation of the person who prepared the record of the case, stating that the record was prepared by him or under his direction, and that the evidence has been preserved for use in court; and

(*b*) the certificate of the Attorney- General or his representative in the requesting country that he is satisfied that the evidence establishes a sufficient case to be tried in the courts of the requesting country, and that the evidence specified in the record exists and has been preserved for trial.

(5) A certificate of the Attorney-General or his representative in the requesting country accompanying the record shall be admitted without proof of the signature or authority of the person appearing to have issued it.

(6) Where a record of a case prepared in accordance with the provisions of this section has been transmitted to a magistrate, the magistrate shall consider the whole of its contents and without deciding whether the matters therein contained would be admissible under the laws of Botswana, may commit the fugitive criminal to prison to await his surrender if the matters recited in the record of the case, and any other evidence admissible under the law of Botswana, would be sufficient to warrant a trial of the charges for which the surrender has been requested.

(7) The magistrate shall receive any evidence which may be tendered to show that the surrender of the fugitive is precluded by law.

(8) This section shall not apply with regard to committal proceedings for the surrender of a fugitive criminal who has been convicted of an extradition crime.

Report of committal to Minister

16. Where a fugitive criminal is committed to prison to await his surrender under section 14 or 15, the magistrate shall forthwith send to the Minister notice of the committal together with any report on the case as

he may think fit, and the fugitive criminal shall be so committed to await the warrant of the Minister for his surrender.

Appeal

17. Any person aggrieved by a decision of the magistrate in committal proceedings may, within 15 days of such decision, appeal to the High Court.

PART IV *Surrender or Discharge of fugitive criminals*

Consent order for surrender

18. (1) A fugitive criminal may waive committal proceedings and in that case the magistrate may, subject to the provisions of subsection (2), make an order by consent for the committal of the fugitive criminal to prison or for his admission to bail to await his surrender, as the case may be.

(2) The magistrate shall not make a consent order under subsection (1) unless he is satisfied that the request by the fugitive criminal to waive committal proceedings was made voluntarily and with an understanding of the implications of that waiver.

Surrender or discharge of fugitive criminal

19. (1) Upon the expiration of 15 days from the date of the committal of a fugitive criminal to prison, or if an appeal is made under section 17, from the date of dismissal or lapsing of the appeal, as the case may be, or after such further period as may be allowed by the Minister, the Minister may by warrant order the fugitive criminal to be surrendered to such person as is in his opinion duly authorised by the requesting country to receive the fugitive criminal, together with any property seized under the provisions of section 10(4) and the fugitive criminal and such property shall be surrendered accordingly.

(2) Any person to whom the warrant is directed and any person authorized to receive the fugitive criminal on behalf of the requesting country may receive, hold in custody and convey the fugitive criminal mentioned in the warrant into the jurisdiction of the requesting country.

Discharge of persons apprehended

20. Whenever a fugitive criminal who has been committed to prison is not surrendered and and conveyed out of Botswana within two months after the committal, or, if appeal against such committal has been lodged, after the decision of the court upon the matter, the High Court may —

(*a*) upon an application being made to it by or on behalf of the criminal; and

(*b*) upon proof that reasonable notice of the intention to make the application has been given to the Minister,

order the criminal to be released unless sufficient cause is shown to the contrary.

Transfer of fugitive criminal

21. (1) Notwithstanding the provisions of section 7(1)(*d*) and subject to subsection 2, the President may, subject to the provisions of this Act, order that a prisoner who is serving a sentence under any conviction in Botswana who is also a fugitive criminal whose surrender is requested be released and be surrendered to the requesting country to enable proceedings to be brought against the prisoner in relation to the offence for which his surrender is requested, on such conditions as may be agreed between

the Minister and the requesting country.

(2) A fugitive criminal shall not be surrendered under subsection (1) unless the requesting country has given an undertaking that the fugitive criminal shall be returned to Botswana on the completion of the proceedings in respect of which the surrender is grounded.

PART V *Miscellaneous Provisions*

Transist of persons through Botswana

22. (1) Any person entering or passing through Botswana in custody by virtue of any warrant or order lawfully issued in any country to which this Act applies shall, during his passage through Botswana, be deemed to be in lawful custody if the Minister, at the request of the country in which the warrant or order was issued, authorised such passage in custody.

(2) A certificate by the Minister that such warrant or order was lawfully issued shall be conclusive proof of that fact.

Priority where two or more requests made

23. (1) Where requests for the surrender of a fugitive criminal are made by two or more countries such that they are to be dealt with at the same time, the Minister shall determine to which requesting country the fugitive criminal should be returned and accordingly may refuse the requests from the other country or countries.

(2) For the purposes of subsection (1), in determining which country should be given priority for the surrender of the fugitive criminal, the Minister shall consider all the circumstances of the respective requests and in particular —

(*a*) the relative seriousness of the offences;

(*b*) the relative dates on which the requests were made; and

(*c*) the citizenship or other national status of the fugitive criminal and his usual residence.

Trial of fugitive surrendered by another country to Botswana

24. Where in pursuance of an arrangement with another country any person accused or convicted of any offence committed in Botswana is surrendered by that country, that person shall not, unless the arrangement provides to the contrary, until he has been restored or afforded a reasonable opportunity of leaving Botswana, be triable or tried for any offence committed prior to his surrender to Botswana other than for an offence proved by the facts on which his surrender is grounded.

Execution of warrant

25. A warrant endorsed by a magistrate in pursuance of this Act may be executed in any part of Botswana in the same manner as if it had been originally issued or subsequently endorsed by a magistrate having jurisdiction in the place where it is executed.

Attorney-General may appear

26. The Attorney-General or any person delegated by him may appear at an inquiry held under this Act.

Regulations

27. The Minister may make regulations —

(*a*) prescribing the form of any warrant or other document which is required to be or which may be issued under this Act;

(*b*) generally for the better carrying out of the provisions of this Act.

Repeal and saving

28. (1) The Extradition Act is hereby repealed.

(2) Notwithstanding the repeal effected by subsection (1), any instrument or arrangement made under the repealed enactment and in force immediately before the commencement of this Act shall continue in force as if made under this Act.

PASSED by the National Assembly this 21st day of September, 1990.

C.T. MOMPEI,
Acting Clerk of the National Assembly.