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## INFORMATION NOTE

### Arrangements for the surrender of fugitive offenders between Hong Kong and the United States

#### 1. Background

1.1 Surrender of fugitive offenders concerns the return by one jurisdiction to another of fugitives who are accused or convicted of serious criminal offences in the jurisdiction which requests the surrender. This issue has been in the limelight recently after the revelations by Edward Snowden of the United States ("US") government's computer surveillance programmes and the ensuing discussion about whether the US may extradite Snowden from Hong Kong under the *Agreement between the Government of Hong Kong and the Government of the United States of America for the Surrender of Fugitive Offenders* signed in 1996.

1.2 The primary legislation governing the surrender of fugitive offenders between Hong Kong and the US is the *Fugitive Offenders Ordinance* (Cap. 503) ("FOO") and the *Fugitive Offenders (United States of America) Order* (Cap. 503F) ("the United States Order"), which contains the full text of the *Agreement between the Government of Hong Kong and the Government of the United States of America for the Surrender of Fugitive Offenders*.

1.3 Another related legislation is the *Mutual Legal Assistance in Criminal Matters Ordinance* (Cap. 525) ("MLAO") and the *Mutual Legal Assistance in Criminal Matters (United States of America) Order* (Cap. 525F) ("MLA Order").<sup>1</sup> The purpose of the legislation is to facilitate the provision and obtaining of assistance in criminal matters between Hong Kong and places outside Hong Kong. The scope of assistance includes transferring persons in custody and others to assist in a criminal matter outside Hong Kong.

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<sup>1</sup> The MLA Order implements the *Agreement between the Government of Hong Kong and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* signed in 1997.

1.4 Sections 19 and 20 of the *Immigration Ordinance* (Cap. 115) are also relevant for the Snowden case as they provide for removal and deportation of persons under certain circumstances. The *Immigration Ordinance* also provides for, among other things, a process for determining claims made by persons in Hong Kong for non-refoulement protection under Article 3 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A person may claim non-refoulement protection in Hong Kong under the *Immigration Ordinance* only after his or her limit of stay has expired or a surrender request has been made against the person concerned.<sup>2</sup>

1.5 This information note highlights the regulatory framework governing the surrender of fugitive offenders between Hong Kong and the US based on the relevant legislation mentioned above. It covers, among other things, general restrictions on surrender, procedural safeguards for the alleged fugitive, and the circumstances under which a request for assistance in criminal matters shall be refused.

## **2. Fugitive Offenders Ordinance and Fugitive Offenders (United States of America) Order**

2.1 FOO was enacted in April 1997 to provide for:

- (a) the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for imposition or enforcement of a sentence, in respect of certain offences against the laws of those places; and
- (b) the treatment of persons wanted for prosecution, or for imposition or enforcement of a sentence, in respect of certain offences against the law of Hong Kong who are surrendered from places outside Hong Kong.

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<sup>2</sup> See Young, S.N.M. (2013).

2.2 Pursuant to section 3 of FOO, the Chief Executive in Council made the United States Order to implement the bilateral arrangements for surrender of fugitive offenders with the US.<sup>3</sup> FOO and the United States Order set out the principles and procedure of the surrender of fugitive offenders as discussed below.

### Persons liable to be surrendered

2.3 Section 4 of FOO provides that a person in Hong Kong who is wanted in a prescribed place for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place may be arrested and surrendered to that place in accordance with the provisions of FOO. The term "prescribed place" is defined under section 2(1) of FOO to mean a place outside Hong Kong to or from which a person may be surrendered pursuant to prescribed arrangements.

### Relevant offences

2.4 Section 2(2) of FOO<sup>4</sup> and Article 2 of the United States Order define an extraditable offence as a conduct which (a) amounts to an offence in both the requesting Party and Hong Kong, and (b) is punishable under the law of both parties by imprisonment for more than 12 months, or any greater punishment. The United States Order lists 36 offences for which surrender of fugitive offenders shall be granted, which include the offences involving the unlawful use of computers.

### General restrictions on surrender

2.5 Section 5 of FOO provides for general restrictions on surrender. For example, a fugitive shall not be surrendered if it appears to an appropriate authority that:

- (a) the offence in respect of which such surrender is sought is an offence of a political character;

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<sup>3</sup> Under section 3 of FOO, the Chief Executive in Council may, in relation to any arrangements for the surrender of fugitive offenders, by order, direct that the procedures in the *Ordinance* shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in the order.

<sup>4</sup> Schedule 1 to FOO provides a detailed description of offences for the purposes of the *Ordinance*.

- (b) the offence in respect of which such surrender is sought was prosecuted in his or her absence and a conviction obtained; and the fugitive has not had an opportunity of being tried in his or her presence for that offence, and if surrendered, would not have an opportunity of being re-tried in his or her presence for that offence;
- (c) the request for surrender has been made for the purpose of prosecuting or punishing the fugitive on account of his or her race, religion, nationality or political opinions;
- (d) the fugitive might, if surrendered, be prejudiced at his or her trial or punished, detained or restricted in his or her personal liberty by reason of his or her race, religion, nationality or political opinions;
- (e) the fugitive has already been tried or acquitted – or convicted and served his or her sentence – for the offence in question (i.e. the double jeopardy rule);
- (f) there is no guarantee that the fugitive would not be tried for a crime other than that for which his or her surrender was ordered (i.e. the requirement of specialty); and
- (g) there is no guarantee that the fugitive would not be surrendered to a third jurisdiction.

2.6 The United States Order also provides for similar grounds for refusing the surrender of fugitive offenders to prescribed places. In particular, Article 6(1) provides that "a fugitive offender shall not be surrendered if the offence of which that person is accused or was convicted is an offence of a political character". In addition, Article 16 (entitled "Specialty") stipulates that "a fugitive offender who has been surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence for any offence committed prior to his surrender".

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## Procedural safeguards

2.7 Part II of FOO sets out the procedure for the surrender of persons from Hong Kong to places outside Hong Kong pursuant to prescribed arrangements. A magistrate may issue a warrant for the arrest of a person on the receipt of an authority to proceed issued by the Chief Executive. A person arrested shall be brought as soon as practicable before a magistrate.

2.8 The court of committal shall hear the case. Neither the court of committal nor any other court shall remand on bail the person arrested unless it is satisfied that there are special circumstances justifying such remand. Where the court of committal refuses to make an order of committal in respect of a person, the prescribed place seeking that person's surrender may question by way of appeal the proceeding on the ground that it is wrong in law by making an application to the court to state a case for the opinion of the Court of First Instance on the question of law involved. If the Court of First Instance dismisses the appeal, the prescribed place may appeal to the Court of Appeal and may further appeal to the Court of Final Appeal. A person in relation to whom an order of committal has been made shall not be surrendered if an application for habeas corpus is made in his or her case, so long as proceedings on that application are pending.

2.9 After the person has been committed, the Chief Executive may order the surrender of that person. Nevertheless, under section 13(2A) of FOO, an order for surrender must not be made for the surrender of a torture claimant to a prescribed place if the claimant's torture claim is made in respect of that prescribed place. Section 13(2B) further provides for the suspension of a surrender order which may have been made until the torture claim is finally determined under the *Immigration Ordinance* and for the rescission of the surrender order if the torture claim is accepted as substantiated on final determination.

2.10 The Chief Executive has a general discretion to make no order for surrender where a person has been committed pursuant to an order of committal. An order for surrender may not be made if the offence is punishable with death and the requesting Party fails to give an assurance which satisfies the Chief Executive that the death sentence will not be imposed or carried out. The Chief Executive may also decide to make no order for surrender in the case of a person committed in consequence of a request for surrender if:

- (a) another request for surrender has been made in respect of the person; and
- (b) it appears to the Chief Executive, having regard to all the circumstances of the case and in particular the prescribed arrangements pursuant to which either request is made, that preference should be given to that other request.

### Notice to the Central People's Government

2.11 Section 24 of FOO requires the Chief Executive to notify the Central People's Government of any surrender proceedings in Hong Kong. In addition, under section 24(3), the Central People's Government may issue an instruction to the Chief Executive to take or not to take an action in relation to those proceedings. Where the instruction is issued on the ground that if the instruction "were not complied with the interests of the People's Republic of China in matters of defence or foreign affairs would be significantly affected", the Chief Executive shall comply with that instruction. However, no such instruction shall operate to affect the responsibilities that the Chief Executive shall discharge in accordance with law in dealing with any case to which the above subsection applies.

### **3. Mutual Legal Assistance in Criminal Matters Ordinance and Mutual Legal Assistance in Criminal Matters (United States of America) Order**

3.1 MLAO regulates the provision and obtaining of assistance in criminal matters between Hong Kong and places outside Hong Kong. Hong Kong entered into a bilateral agreement with the US on mutual legal assistance in 1997, and the *Agreement between the Government of Hong Kong and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* is set out in Schedule 1 to the MLA Order. MLAO and the MLA Order set out, among other things, the scope of assistance in criminal matters and the circumstances under which assistance shall be refused.

### Scope of assistance

- 3.2 Article 1 of the MLA Order sets out the scope of assistance as follows:
- (a) taking evidence, testimony, or statements of persons;
  - (b) providing information, documents, records, and items;
  - (c) locating or identifying persons or items;
  - (d) serving documents;
  - (e) transferring persons in custody and others to provide assistance;
  - (f) executing requests for search and seizure;
  - (g) confiscating and forfeiting the proceeds and instrumentalities of crime and otherwise assisting in relation thereto;
  - (h) delivering property, including lending exhibits or other items; and
  - (i) any other form of assistance not prohibited by the law of the requested Party.

### Limitations on providing assistance

- 3.3 Article 3(1) of the MLA Order specifies out the circumstances under which a request for assistance in criminal matters shall be refused. In particular, a request shall be refused if:
- (a) the request for assistance impairs the sovereignty, security, or public order (*ordre public*) of the US or, in the case of Hong Kong, the sovereign government responsible for the foreign affairs relating to Hong Kong;
  - (b) the granting of the request would impair the requested Party's essential interests; or

- (c) the request for assistance relates to a political offence or that there are substantial grounds for believing the request was made for the purpose of prosecuting, punishing, or otherwise proceeding against a person on account of the person's race, religion, nationality, or political opinions.

3.4 The request for assistance in criminal matters can also be refused on the justifications similar to those specified for the general restrictions on surrender of fugitive offenders. MLAO stipulates the grounds for refusal of request for assistance, which include:

- (a) the criminal conduct in question would not have constituted an offence in Hong Kong if it had occurred here (i.e. the double criminality rule);
- (b) the request relates to an offence of a political character (i.e. the political offenses rule);
- (c) the request will result in a person being prejudiced on account of his or her race, religion, nationality or political opinions (i.e. the prejudice rule);
- (d) the request relates to prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned for the offence in question in the requested Party (i.e. the double jeopardy rule); and
- (e) the request relates to an offence punishable with death and the requesting Party fails to give an undertaking that the death sentence will not be imposed or carried out.

## **4. Immigration Ordinance**

4.1 Sections 19 and 20 of the *Immigration Ordinance* provide for removal and deportation of persons under certain circumstances. Specifically, section 19(1) stipulates the circumstances that a removal order may be made against a person requiring him or her to leave Hong Kong. For instance, if the person concerned appears to be an undesirable immigrant who has not been ordinarily resident in Hong Kong for three years or more.



4.2 Section 20 of the *Immigration Ordinance* further allows the Chief Executive to make a deportation order against an immigrant if (a) the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than two years, or (b) the Chief Executive deems it to be conducive to the public good.

4.3 An amendment to the *Immigration Ordinance* was passed in July 2012 to provide for a statutory scheme for determining torture claims made by persons in Hong Kong for protection under Article 3 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

4.4 Under section 37W of the *Immigration Ordinance*, a person may claim non-refoulement protection in Hong Kong only if "(a) the person is subject or liable to removal; and (b) apart from a torture risk State, the person does not have a right of abode or right to land in, or right to return to, any other State in which the person would be entitled to non-refoulement protection". Nevertheless, a person whose surrender is requested in surrender proceedings may claim non-refoulement protection in Hong Kong even if the person does not meet the above requirements.

4.5 A person who claims non-refoulement protection in Hong Kong must signify to an immigration officer in writing. The torture claim is initially screened and decided by an immigration officer. The claimant may appeal against the decision of an immigration officer and require a merits review of the case by an independent Torture Claims Appeal Board. Decisions of the Appeal Board are subject to judicial review.

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