

**National Security (Legislative Provisions) Bill :  
Subversion by foreign armed forces?**

It has been pointed out that non-Chinese nationals who are members of foreign armed forces at war with the PRC –

- (a) cannot commit treason; but
- (b) are not excluded from the offence of subversion.

The Administration agreed to reconsider whether this is appropriate.

**Differences between treason and subversion**

2. The essence of the proposed offence of treason is betrayal of the PRC in times of war or by instigating a foreign invasion. For that reason, it is limited to Chinese nationals. A non-Chinese national who is a member of foreign armed forces cannot therefore commit the offence.

3. The essence of the proposed offence of subversion is the overthrow of the basic system of the PRC or the CPG, or the intimidation of the CPG by specified unacceptable means. The offence is not limited to wartime situations and is not based on betrayal. For those reasons, it is like most other offences in that it could be committed in Hong Kong by a person of any nationality. For example, a non-Chinese national might commit the offence if he joined an army of mercenaries in Hong Kong that was engaging in open armed conflict with the PLA, as part of a conspiracy to overthrow the CPG. In addition, the offence of subversion could be committed outside Hong Kong by any Hong Kong permanent residents.

4. Although the offence of subversion is not specifically targeted at foreign invasions, it does include those who achieve certain objectives by engaging in war with the PRC. However, a member of foreign armed forces who is not a Hong Kong permanent resident would only be subject to the offence for conduct committed in Hong Kong. Moreover, if such a person was acting in the course of duty as a member of foreign invading armed forces, the situation would be governed by the Geneva Convention, which provides protection for prisoners of war.

## **Exceptions not needed**

5. On the face of it, members of invading foreign armed forces would appear to commit many existing offences, including murder and criminal damage. However, no exceptions are made for such combatants in the statutory provisions creating those offences. Instead, the matter is regulated by the Geneva Convention. It is proposed to adopt the same approach in respect of the proposed offence of subversion. There is therefore no need for an express exception for non-nationals who are members of foreign armed forces.

6. It is noted that other common law jurisdictions that have similar offences of overthrowing the government by force (such as the USA, Canada and Australia) do not restrict those offences, when committed within the jurisdiction, to nationals and do not provide express exemptions for foreign invading troops.

Department of Justice  
April 2003