

**National Security (Legislative Provisions) Bill :
The Position of non-Chinese Nationals
under the Mainland Law of Subversion**

This note examines whether non-Chinese national members of invading enemy forces can be convicted of subversion under the Mainland Law.

The Mainland offence of Subversion

2. The offence is provided under Article 105 of the Criminal Law of the PRC (see Annex). The provisions of Article 105 do not refer to the nationality of the offender.

3. The issue of whether a non-Chinese national can be prosecuted for the offence is subject to Articles 6 and 8 of the Criminal Law. Article 6 provides that “the Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the PRC”. Under Article 8, it is specified that “the Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of the PRC against the State of PRC or its citizens.” Article 8 is however subject to the requirements of minimum imprisonment term and dual criminality of the relevant offence at the place of occurrence.

Prosecution of foreign nationals

4. Regarding any allegation against a non-Chinese national (who remains in China) for having committed the offence of subversion, the relevant Mainland prosecuting authority must establish the crime, i.e. that he/she has taken part to organize, plot or carry out the scheme of subverting the State power or overthrowing the socialist system or has incited others to do so. The same standard applies to an allegation against a non-Chinese national who is outside Chinese territory.

5. On the offence of subversion, Professor Zhao Bingzhi (a Mainland expert in Criminal Law) also holds the view that it may be committed by foreign nationals. In a book which discusses the Crimes of Endangering National Security under the Criminal Law (Professor Zhao being the chief editor), it is said that the subject of the crime (the offender) can be Chinese nationals, foreign nationals or stateless persons.¹

¹ 《危害國家安全罪》總主編 趙秉志，中國人民公安大學出版社（1999） p.195

Invading enemy

6. The issue of invading enemy forces has not been referred to, nor does it seem to have any bearing on the offence of subversion or other national security offences, under the Criminal Law of the PRC. In the prosecution of an offence under Article 105, one would assume that the same elements of the crime would continue to apply, irrespective of whether the offender is a non-Chinese national of invading enemy forces or otherwise. However, if there is an invasion of China, it is possible that the non-Chinese nationals of the invading enemy involved in subverting the State power may be charged with war crimes.

7. The Geneva Convention Relative to the Treatment of Prisoners of War applies to the PRC and, under the Mainland system, domestic legislation is not needed to give effect to an international treaty.

Department of Justice
June 2003

Article 105 Among those who organize, plot or carry out the scheme of subverting the State power or overthrowing the socialist system, the ringleaders and the others who commit major crimes shall be sentenced to life imprisonment or fixed-term imprisonment of not less than 10 years; the ones who take an active part in it shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; and the other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

Whoever incites others by spreading rumors or slanders or any other means to subvert the State power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.