

The Administration's response to the issues raised and information sought at the joint meeting of the Panel on Security and Panel on Administration of Justice and Legal Services on 17 January 2003

Introduction

This note sets out the Administration's response to issues raised and information sought at the joint meeting of the Panel on Security and Panel on Administration of Justice and Legal Services on 17 January 2003 in relation to treason, as listed in Appendix I of the Background brief on the Bill prepared by the Legislative Council (LC Paper No. CB(2)1378/02-03(03)).

Responses

- C2. To explain the meaning of “levying war” and the activities that would amount to levying war, and the meaning of “joining forces to levying war”.

Administration's response to C2

As Members will note, the National Security (Legislative Provisions) Bill uses the term “at war” and “engage in war”, in which “war” is defined in Section 2(4)(c) of Clause 4 to mean open armed conflict between armed forces or publicly declared war. The term “levying war” does not appear in the Bill.

As regards “levying war”, which is a term used in existing statutory offences and originally proposed to be retained in the Consultation Document, we set out below its meaning under the common law.

The term includes “any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a 'general' character”. It would be sufficient if there be assembled a large body of people who intend to debar the government from the free exercise of its lawful powers and are ready to resist with violence any opposition. On the other hand, it does not include a rising for a limited, local or private purpose.

The expression used in the Consultation Document is “levying war by joining forces with a foreigner” which appeared in paragraph 2.8 of the Document. It refers to collusion with a foreigner to levy war, as defined above.

- C3. To explain the meaning of “to instigate any foreigner with force to invade the entire territory of the state”, in particular the definition of “foreigner” and whether it includes armed forces in Taiwan, what amounts to “invasion”, the meaning of “acts of instigation”, “entire territory of the state” and whether to invade a small part of the territory constitutes invasion.

Administration's response to C3

For the meaning of the term “instigate”, there does not appear to be any judicial authorities. The Black's Law Dictionary (7th ed.) defines “instigate” as “goad or incite (someone) to take some action or course”. The Ballentine's Law Dictionary (3rd ed.) defines “instigate” as “stimulate or goad to an action, especially a bad act”. The Collins Cobuild English Language Dictionary (1992) suggests “someone who instigates an event or situation causes it to happen by their own effort or work”. This accords with the definition in the Oxford Dictionary which gives the meaning “urge on; incite (person to action, to do something esp. something evil); bring about (revolt, murder etc)”. In the absence of a judicial interpretation the term would be given its ordinary dictionary meaning.

In the consultation document it was proposed that “foreigner” be given the meaning “armed forces which are under the direction and control of a foreign government or which are not based in the PRC”. In the Bill the term “foreign armed forces” is defined as -

- (i) armed forces of a foreign country;
- (ii) armed forces which are under the direction or control of the government of a foreign country; or
- (iii) armed forces which are not based in, and are not armed forces of, the People's Republic of China”.

Taiwan is part of China and therefore would not constitute a “foreign country”.

“Invade” has an ordinary dictionary meaning of “making hostile inroad into (country etc)”. The proposed intention in the consultation document was to adopt the existing law where the act of invasion is qualified by “with force”. This qualification is adopted in the corresponding provision in the Bill and reinforced by the use of “foreign armed forces”. Invasion into any part of the PRC with force should constitute “invasion of the PRC with force”.

- C4. To clarify the policy intent of making “assisting public enemy at war” an offence, the definition of “public enemy” and whether it is targeted at the nationals or the foreign country concerned, the acts that would be considered as “assistance” and would be prohibited, and how the line would be drawn in terms of “assistance”.

Administration's response to C4

The intent is to adopt the existing provisions of the existing treason offence, which is widely adopted in common law jurisdictions, with necessary clarifications. There are a number of authorities for the term “public enemy” in common law. It could include both a foreign state (including its subjects) which is in actual hostility against the PRC (whether or not war has been formally declared) and any alien who comes into the PRC in open hostility (e.g. to invade the PRC).¹ To clarify the meaning, the Bill has used the term “public enemy at war with the PRC” which is defined as -

- (i) the government of a foreign country at war with the People's Republic of China; or
- (ii) foreign armed forces at war with the People's Republic of China.

In the corresponding English law the term “adherent to” is used in place of “assist”. On the other hand, the term “assist” is used in the equivalent provision in Canada, where an authority has pointed out that “there is no reason to suppose that [assists] has any more than the ordinary dictionary meaning”², but that “[u]nder the Treason Act 1351, the phraseology was 'be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere....’”³

The relevant English authorities on “adherent to” are as follows:⁴

- (i) An overt act which strengthens or tends to strengthen the enemies in war;
- (ii) An overt act which weakens or tends to weaken the powers of the country to resist or attack the enemies;

¹ See , for example, Smith and Hogan, *Criminal Law* (6th ed.) (London, Butterworths, 1988), at pp. 828-9 which discusses “Queen's enemies”; Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes*, Vol. 1, 4th ed., by Ben R. Bell, (Edinburgh, 1844), at p.529; *Archbold 2002* (London, Sweet & Maxwell), at para. 25-31; and Gerald H. Gordon, *The Criminal Law of Scotland* (Edinburgh, W. Green & Son Ltd., 1978), at para. 37-13.

² Mewett and Manning, *Mewett & Manning on Criminal Law* (3rd ed.) (Butterworths Canada Ltd., 1994), at p. 601

³ *ibid*, note 11.

⁴ See the explanation of “adherent to” in Halsbury's Laws of England.

- (iii) Provision of aid or comfort to the enemies which, when given to a rebel within the realm, would make the subject guilty of levying war; or
- (iv) Commission of hostile acts in conjunction with the enemies upon an ally of the country who is also at war with the enemies.

Furthermore, the interpretation of the words “giving aid and comfort to” may also be of reference to explain what is meant by being “adherent to”⁵. The followings are precedents of “giving aid and comfort to” an enemy according to an authority⁶:

- (i) joins the enemies in acts of hostility against the country;
- (ii) raises troops for the enemy;
- (iii) whilst a state of war exists, endeavours in an enemy country to persuade prisoners of war in that enemy country to join the armed forces of the enemy;
- (iv) takes part in an attempt to land arms and ammunition in any part of the country for use of the enemy;
- (v) delivers up the castle, forts or ships of war to the enemies through treachery or in combination with them;
- (vi) detains the castles, etc from the Sovereign if it is done in confederacy with the enemy; and
- (vii) sends money, arms, intelligence of the like to the enemies.

There are also precedents that propaganda broadcasting at war time for an enemy⁷, and assisting nationals of an enemy country to leave one's country⁸, could constitute “assisting public enemy”.

Nevertheless, under English law, it is not treason if a British subject is in a foreign country when war breaks out between that country and England, and continues to reside there, or if during a truce he goes to a foreign country, and returns before the truce expires, unless he actually conspires with the enemy, or aids him in forwarding his measures in hostility.⁹

The intention of the defendant in carrying out the relevant overt

⁵ Smith and Hogan, *Criminal Law* (6th ed.) (London, Butterworths, 1988), at pp. 828-9

⁶ *Archbold 2002*, at para. 25-28

⁷ *Joyce v. D.P.P.* [1946] A.C. 347

⁸ A Canadian case, *Re Schaefer* 31 C.C.C. 22 (1918)

⁹ *Archbold 2002*, at para. 25-29

acts is also important. That the acts in fact assisted the enemy is not enough to constitute treason without proving the accused intended to do so to aid and comfort.¹⁰

For avoidance of doubt, the Bill clearly specified the intention element of the offence. Only if the accused is proven to have an intention to prejudice the position of the PRC in the war in assisting the public enemy could he be considered guilty.

- C5. To explain the scope of “non-violent attack”, the meaning of “electronic sabotage”, and whether e-mail “spam” would fall under the scope of “non-violent attack”, and to clarify whether “non-violent attack” is the same as “non-violent threat”.

Administration's response to C5

The terms as used in paragraph 2.12 of the Consultation Document refer to the common understanding of the term. “Non-violent attack” and “non-violent threats” refers to acts that does not directly involve violence, such as electronic sabotage. The paragraph give a general description that if such acts are done as part of the conspiracy to commit treason or to aid the commission of treason, then they would be caught under the corresponding conspiracy offence or accomplice offences under common law. These terms are not used in any proposed provisions in the Consultation Document, nor in any clauses in the Bill.

Security Bureau
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¹⁰ See *Archbold 2002*, at para. 25-29, and McLean and Morrish, *Harris's Criminal Law* (22nd ed.) (London, Sweet & Maxwell, 1973) at p. 126. Also see the case of *R v. Ahlers* [1915] 1 K.B. 616 in Gerald H. Gordon, *The Criminal Law of Scotland* (Edinburgh, W. Green & Son Ltd., 1978), at para. 37-12.