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SECOND DRAFT FOREIGN
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MANAGEMENT LAW

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Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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Amnesty International, a global movement of more than 7 million people who take injustice personally and campaign for a world where human rights are enjoyed by all, welcomes the opportunity provided by this public consultation and hereby submits comments on the second draft of the Foreign Non-Governmental Organization Management Law (hereafter: draft FNGOL).

Upon careful examination of the provisions of the proposed law, Amnesty International's position is that the draft law would run counter to China's national and international obligations to safeguard the rights to freedom of association, peaceful assembly and expression.

The law would also jeopardize the activities or existence of numerous organizations that are advancing the realization of economic, social, cultural, civil and political rights of people in China.

Amnesty International therefore urges the Chinese government to withdraw this draft. Should the government decide that a law is truly needed, it should introduce a new draft that is compatible with human rights obligations.

Amnesty International's specific concerns include:

Infringement to the Right to Freedom of Association.

Article 35 of the Constitution of the People's Republic of China states that, "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."

China, as a current member of the United Nations Human Rights Council, has also pledged its commitment "to the promotion and protection of the human rights and fundamental freedoms of the Chinese people".¹

The Universal Declaration of Human Rights proclaims that all people have the right to freedom of expression and association (Articles 19 and 20). Similarly, the International Covenant on Civil and Political Rights (ICCPR), which China has signed, and on numerous occasions has stated the intention to ratify, also states that people have the right to freedom of expression and association (Articles 19 and 22).

The only allowable restrictions on the Freedom of Association in Article 22(2) of the ICCPR are those that are necessary "in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." However the Human Rights Committee, the body overseeing implementation of this treaty, has noted that "the existence of any reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and

¹ Note verbale dated 5 June 2013 from the Permanent Mission of China to the United Nations addressed to the President of the General Assembly, A/68/90 6 June 2013, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/90 (accessed 30 May 2015).

not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.”²

In addition to these laws and standards regarding the right to freedom of association, the United Nations Human Rights Council adopted without a vote a resolution in 2014, while China was a member, aimed at supporting an enabling environment for civil society. The resolution expressed concern regarding regulation efforts similar to the draft FNGOL, noting that, “in some instances, domestic legal and administrative provisions, such as national security and counter-terrorism legislation, and other measures such as provisions on funding to civil society, have sought to or have been misused to hinder the work and endanger the safety of civil society in a manner contrary to international law[.]”³ In light of this, the resolution called upon “[s]tates to ensure that provisions on funding to civil society actors are in compliance with their international human rights obligations and commitments and are not misused to hinder the work or endanger the safety of civil society actors, and underline[d] the importance of the ability to solicit, receive and utilize resources for their work.”⁴

This means that, first, the need for the law as such based on alleged “national security” must be explained in detail. Secondly, any draft FNGOL should contain safeguard provisions, including that written explanations must be given when denying the registration of an association, and that associations should be able to challenge any rejections, suspensions or other interference before an impartial and independent court.⁵

Imprecise definitions of NGOs and activities.

The vague provisions of the draft FNGOL lack legal certainty and fail to define exactly what type of organizations and what types of activities are covered under the law. Many organizations and activities as varied as academic exchanges; professional and athletic association meetings; art exhibitions; and disaster relief efforts could be included and their activities could be negatively impacted by the registration and management provisions of the draft FNGOL. Any lack of sufficient clarity and foreseeability may amount to a breach of the principle of legality, which is an essential element of the rule of law and an important protection against arbitrariness.

² Human Rights Committee, *Lee v. South Korea*, Communication No. 1119/2002, Views adopted on 20 July 2005, para 7.2, <http://www1.umn.edu/humanrts/undocs/1119-2002.html>, (accessed 31 May 2015).

³ Human Rights Council, Resolution on Civil society space, UN Doc. A/HRC/RES/27/31, preamble, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/179/53/PDF/G1417953.pdf?OpenElement> (accessed 2 June 2015).

⁴ Human Rights Council, Resolution on Civil society space, UN Doc. A/HRC/27/L.24, OP 10,

⁵ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, paras 95, 99, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf (accessed 30 May 2015).

Onerous registration process.

In addition, the registration process as provided for in Articles 6, 7, and 10-17 of the draft FNGOL, is overly complicated and restrictive. Foreign organizations seeking registration would need approval of a sponsor organization from the government, known as a Professional Supervisory Unit (*yewu zhuguan danwei*). However, as in a similar process for the registration of domestic NGOs, there are serious difficulties in finding a willing sponsor organization; there is little incentive for government bureaus and departments to become sponsor organizations for foreign NGOs; and there is a high likelihood that this discretionary approval process will be the main hurdle in achieving legal operating status for foreign NGOs. Likewise the provisions for organizations that do not want to register but instead want to seek permission to carry out temporary activities with a Chinese cooperative partner are equally demanding and the duration of an activity can only be one year (Articles 18-22).

In fact, these practical obstacles may amount to a curtailment of human rights. International standards on civil society organizations or NGOs stipulate that notification of registration, rather than seeking prior authorization, should be sufficient and that onerous approval and management processes run counter to the right to freedom of association. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has recommended: "A regime of notification to establish an association should be in force. Associations should be established after a process that is simple, easily accessible, non-discriminatory, and non-onerous or free of charge."⁶ He has also stated that the right to freedom of association equally protects associations that are not registered, especially "when the procedure to establish an association is burdensome and subject to administrative discretion [...]".⁷

The registration requirements in the draft FNGOL are likely to further dissuade foreign NGOs from pursuing registration and undertaking activities in China, which runs contrary to the draft law's stated goal of promoting exchange and cooperation (Article 1).

State interference in activities and funding.

Furthermore, under the current draft, onerous management and supervision provisions would make independent operations impossible. Provisions for Regulation of Conduct (Articles 23-38) include restrictions such as a prohibition on accepting donations from within China; to entrust hiring of personnel or recruiting volunteers to the local foreign affairs service units or other units designated by the government; to annually submit work reports including accounting reports and reports on changes of personnel to the foreign NGOs Professional Supervisory Unit for annual inspections; and prohibit individuals, legal persons or other organizations from accepting financial support from non-registered foreign NGOs.

UN treaty bodies overseeing international human rights conventions that China is a State Party

⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 95,

⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 56.

to have emphasized the principle that associations should access funding freely.⁸ The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noted that “the ability for associations to access funding and resources is an integral and vital part of the right to freedom of association.”⁹ He stated that “[w]ithout the ability to access funding, from sources local, regional or international, this right becomes void”. He continued to recommend that “any associations...should be allowed to function freely... in an enabling and safe environment”; they “should be free to determine their statutes, structure and activities and to make decisions without State interference”; and they should also “enjoy the right to privacy” and “be able to access domestic and foreign funding and resources without prior authorization.”¹⁰

In addition, the Special Representative of the Secretary-General on human rights defenders has noted that “[a]ccess to funds, including from foreign sources, for the purpose of defending human rights should be ensured and facilitated by the law.”¹¹

Overbroad police powers.

Unlike domestic NGOs who must register with the Ministry of Civil Affairs, the draft FNGOL provides that foreign NGOs must register through the State Council's Public Security Department and provincial level public security organs (Article 7). In addition, the Public Security Bureau is given significant management, approval and oversight of the NGO operations, further restricting independent operations (Articles 45, 47, 49 and 50). These powers include the responsibility for annual inspection of the foreign NGO offices, supervision of activities, and investigating unlawful conduct. Further provisions on Legal Responsibility allow authorities to order suspension of activities, confiscate unlawful gains, cancel registration and detain individuals for up to 15 days even when a crime has not been committed.

These provisions allow the Public Security organs to have considerable power over foreign NGOs

⁸ Committee on the Elimination of Discrimination against Women, Concluding Observations on Lithuania, UN Doc. A/55/38, para. 155, <http://www1.umn.edu/humanrts/cedaw/lithuania2000.html>, (accessed 31 May 2015); Committee on the Rights of the Child, Concluding Observations on the Central African Republic, UN Doc. CRC/C/15/Add.138, paras. 22 and 23, <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29CRC.C.15.Add.138.En?Opendocument> (accessed 31 May 2015); Committee on the Elimination of Racial Discrimination, Concluding Observations on Ireland, UN Doc. CERD/C/IRL/CO/2, para.12, <http://daccess-ods.un.org/TMP/7718504.07123566.html>, (accessed 31 May 2015).

⁹ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para 67.

¹⁰ Statement by Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association 20th session of the Human Rights Council, Agenda item 3, 20 June 2012, Geneva, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12349&LangID=E>, (accessed 31 May 2015).

¹¹ Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, UN Doc. A/59/401, 1 October 2004, para. 82(t), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement> (accessed 29 May 2015)

and the domestic NGOs that cooperate with them. As the Special Representative of the Secretary-General on human rights defenders has pointed out, “[w]here State authorities are given the right to monitor and interfere in the management of NGOs, defenders have seen their independence and work threatened.”¹² The Special Rapporteur on the rights to freedom of peaceful assembly and of association has pointed out the risk that administrative discretion can be used as a means to quell dissenting views or beliefs.¹³

Vague national security language.

The inherently subjective nature of terms included in the draft FNGOL such as “endangering China’s national unity, security or ethnic cohesion” and “China’s national interest, society’s public interest” (Article 5) do not allow individuals or organizations to predict what behaviour and activity will run afoul of the law.

Article 59 lists circumstances where foreign NGOs and their representatives could be subjected to criminal liability and detention including: subversion of state power; undermining ethnic harmony or engaging in separatism; gathering state secrets or intelligence; spreading rumours, engaging in defamation, or publishing or disseminating other harmful information that endangers state security or damages national interest. These provisions could curtail activities and actions based on perceived political risk under the guise of national security, rather than facilitate the work of NGOs or protect their lawful rights.

The opportunity for abuse is significant. In recent years Amnesty International has documented misuse of various criminal charges in China, including, “illegal business operation”, “picking quarrels and provoking trouble”, “inciting ethnic hatred” and various state security crimes to detain and prosecute activists and NGO workers and human rights defenders solely for the peaceful exercise of their right to freedom of expression.¹⁴

As detailed above, the UN Human Rights Committee has said the exercise of the right to freedom of expression may be subject to certain restrictions but only if they meet all elements of a stringent three-part test: 1) they must be provided by law (which must be formulated with

¹² Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani,, para. 63.

¹³ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para 56.

¹⁴ Amnesty International, “China: Drop charges against five women detained for campaigning against sexual harassment”, 12 March 2015, <https://www.amnesty.org/en/articles/news/2015/03/china-drop-charges-against-five-women-detained-for-campaigning-against-sexual-harassment/>; “Liu Ping: jailed for ‘picking quarrels and provoking troubles’”, 10 December 2014, <https://www.amnesty.org/en/articles/news/2014/12/liu-ping-jailed-picking-quarrels-and-provoking-troubles/>; “China: Drop politically motivated charges against prominent human rights lawyer”, 15 May 2015, <https://www.amnesty.org/en/articles/news/2015/05/china-drop-politically-motivated-charges-against-prominent-human-rights-lawyer/>; “China: Deplorable life sentence for Uighur academic”, 23 September 2014, <https://www.amnesty.org/en/articles/news/2014/09/china-deplorable-x-year-jail-sentence-uighur-scholar/> (accessed 29 May 2015); see also Radio Free Asia, “Chinese Blogger Jailed on ‘Illegal Business’ Charges, 23 July 2014, <http://www.rfa.org/english/news/china/charges-07232014165220.html>, (accessed 31 May 2015).

sufficient precision to enable an individual to regulate their conduct accordingly); 2) demonstrably necessary and proportionate (the least restrictive measure to achieve the specified purpose); and 3) for the purpose of protecting specified public interests (national security, public order, or public health or morals) or the rights or reputations of others. Restrictions within this framework must never jeopardize the right to freedom of expression itself.¹⁵ Furthermore, there must be adequate safeguards against abusive imposition of restrictions, including provision for appeal to an independent body with some form of judicial oversight.

International standards, including those outlined in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, promote clear recognition of the limited permissible scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms.¹⁶

The Johannesburg Principles further hold that, among other things, peaceful expression with respect to the government, government policies, government bodies, or public officials should not be considered as a threat to national security.¹⁷

Conclusion and Recommendations

Given the many provisions of the draft FNGOL that are not in compliance with international human rights standards, and given the very real possibility that the law could be misused to curtail and stop NGOs both foreign and domestic from operating and cooperating in China, we recommend that this draft FNGOL be withdrawn or at the very least comprehensively redrafted to guarantee that both domestic and foreign NGOs can exercise their right to freedom of expression and association in line with international standards, and so that exchanges and cooperation are promoted as was the stated goal of the law.

In that regard, we urge you to implement the following:

- Engage with both domestic and foreign NGOs working on a variety of issues in order to understand their views on how this law will affect their operations and how their work contributes to genuine social stability and the rule of law.
- Specify in the law which NGOs and activities are included, define vague terms and circumstances such as “national and public interest”, “undermining ethnic harmony”, “endangering state security” and other national security crimes so that NGOs and activists can predict what behaviour is prohibited, and ensure that restrictions are only used when real and not hypothetical dangers to national security exist, and the least intrusive measures to achieve the purpose are used.

¹⁵ Human Rights Committee, General Comment No. 34, paras. 21, 22, CCPR/C/GC/34, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, (accessed 1 June 2015).

¹⁶ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Preamble, 22 March 1996, UN Doc. E/CN.4/1996/39, <http://www1.umn.edu/humanrts/instree/johannesburg.html>, (accessed 1 June 2015)

¹⁷ Johannesburg Principles, Principle 7 Protected Expression.

- Ensure that provisions on funding to civil society actors are in compliance with international human rights obligations and commitments and are not misused to hinder the work or endanger the safety of civil society actors.
- Ensure authorities do not misuse NGO management laws or other civil or criminal law to unlawfully intimidate and prosecute human rights defenders and NGO workers simply for their legitimate and peaceful exercise of the right to freedom of expression, peaceful assembly and association.
- Engage with relevant experts from the United Nations and international NGOs about good practices with respect to how governments can create an enabling environment for civil society development.

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