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SUBMISSION TO THE NPC
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LEGISLATIVE AFFAIRS
COMMISSION ON THE
DRAFT "NATIONAL
INTELLIGENCE 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.

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Amnesty International welcomes the Chinese Government's practice of conducting public consultation before promulgating laws, and we are submitting the following comments regarding the People's Republic of China (PRC) Draft National Intelligence Law (hereafter Draft Law), issued by the Standing Committee of the National People's Congress (NPC) on 16 May 2017 after initial review at its 25th meeting. Amnesty International would appreciate any opportunity to present further information, in writing or in person, to the Legislative Affairs Commission of the Standing Committee.

As part of our work, Amnesty International promotes the adoption of legal instruments that protect internationally recognized human rights. This submission contains Amnesty International's concerns about selected provisions of the Draft Law, which appear to be incompatible with China's international human rights obligations, whether embodied in treaties and other instruments, or under customary international law.

The Draft Law is clearly part of the national security legal architecture, which also includes the Anti-espionage Law (2014), the Criminal Law Amendments (9) (2015), the National Security Law (2015), the Anti-terrorism Law (2016), the Foreign NGO Management Law (2016) and the Cyber Security Law (2016). Amnesty International has raised similar concerns about the same poorly defined and vague concepts in these laws, and called upon the Chinese government to withdraw or repeal the laws, or alternatively repeal or amend the problematic provisions therein, due to the risk of human rights violations and the high risk of misuse.¹

After careful examination of the Draft Law, and despite Article 7 which states that national intelligence work shall respect and protect human rights, Amnesty International's position is that many provisions of the Draft Law would run counter to China's national and international obligations, in particular to safeguard the right to privacy and the right to freedom of expression. As other laws in this national security legal architecture, the Draft Law would legalize censorship, surveillance and arbitrary detention in the name of national security beyond the requirements set out in international law, including strict tests of necessity and proportionality.

In this submission, Amnesty International provides illustrative and non-exhaustive examples of problems with the Draft Law, while not purporting to submit a comprehensive human rights analysis of the Draft Law. Amnesty International in particular submits concerns and recommendations with regard to the vague and overbroad concepts of "national intelligence" and "national security" as used in this law; concerns about the right to privacy and risk of

¹ For Amnesty International's comments on the draft Foreign NGOs Management Law, the Second Draft of Criminal Law Amendment (9) and the draft Cyber Security Law, see

Amnesty International, *Submission to the NPC Standing Committee's Legislative Affairs Commission on the second draft Foreign Non-Governmental Organizations Management Law* (Index: ASA 17/1776/2015);

Amnesty International, *Submission to the NPC Standing Committee's Legislative Affairs Commission on the Criminal Law Amendments (9) (second draft)* (Index: ASA 17/2205/2015); and

Amnesty International, *Submission to the NPC Standing Committee's Legislative Affairs Commission on the Draft "Cyber Security Law"* (Index: ASA 17/2206/2015).

arbitrary detention and torture or other ill-treatment.

Amnesty International urges the Chinese government to withdraw the present Draft Law. Should the government decide that a “National Intelligence” law is truly needed, it should introduce for public consultation, leaving adequate time for genuine analysis and discussion, a new draft that is compatible with China’s human rights obligations and amend or repeal similar provisions in the whole set of interrelated laws.

1. Vague and Overbroad Usage of Concepts of “National Intelligence” and “National Security”

It is stated in the explanation of the Draft Law that its purpose is to “...handle the relationship between the National Security Law, the Anti-espionage Law, the Anti-terrorism Law, and other such laws, and link up these laws”. The Draft Law is clearly another part of the national security legal architecture composed of laws which contain poorly defined and vague concepts, are prone to misuse and risk violating human rights.

The scope of national intelligence work covered by the Draft Law is overly broad and could conceivably cover anything of interest to the “national intelligence work institutions”. Article 2 states that “National intelligence work shall provide intelligence support to prevent and mitigate threats endangering national security, shall preserve the national political power, sovereignty, unity, independence and territorial integrity, the welfare of the people, sustainable social and economic development and other major national interests”.

These terms are either not defined at all or only defined broadly and vaguely in other laws of the national security legal infrastructure. The definition of “national security” found in the National Security Law Article 2 is also virtually limitless, and echoes the wording in the Draft law, “the welfare of the people, sustainable economic and social development, and other major national interests”.

The broad and vague authority to “safeguard national security and interests” is open to subjective interpretation by the “national intelligence work institutions”, allowing these institutions to collect and process information in essentially all circumstances on individuals and organizations whenever these intelligence authorities consider it necessary.

Internationally recognized human rights standards, as reflected, for instance, in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (hereafter “Johannesburg Principles”),² allow governments to restrict the exercise of some rights, including freedom of expression, on the ground of national security in order to “protect a country’s existence or its territorial integrity against the use or threat of force, or its

² Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles), adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand in Johannesburg, www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf

capacity to respond to the use or threat of force”, whether from an internal or external force.³ However, the same Principles emphasize that such restrictions are not legitimate if “their genuine purpose or demonstrable effect is to protect interests unrelated to national security”, including to protect a government from embarrassment or exposure of wrong-doing, or to entrench a particular ideology.⁴

In recent years, Amnesty International has documented misuse of national security charges in China, such as “inciting ethnic hatred” and “inciting subversion”, to detain and prosecute activists, NGO workers and human rights defenders solely for the peaceful exercise of their right to freedom of expression and other rights.

Amnesty International would like to reiterate its concerns that the proposed terminology would breach China’s obligations under international human rights law by failing to satisfy the necessary requirements of clarity, accessibility and foreseeability as prescribed by the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the Universal Declaration of Human Rights (UDHR). Among other things, this means that laws must not confer unfettered discretion on authorities, but rather provide sufficient guidance to those charged with their application to enable them to ascertain the conduct falling within their scope.

2. Concerns about Privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence. “Arbitrary interference” can extend to state interference provided for under national law, if the law is not in line with the ICCPR. China signed the ICCPR in 1998 and has repeatedly stated the intention to ratify; in addition, under Article 18 of the Vienna Convention on the Law of Treaties, China is obliged to refrain from acts that would defeat the object and purpose of the signed treaty.

Moreover, according to international human rights laws and standards, the government is obliged to detail which authorities and organs within the legal system are competent to authorize such interference and how individuals concerned may complain of a violation of the right to privacy.⁵ While Articles 14, 15 and 16 state that detailed activities and measures can be carried out by national intelligence work institutions after acquiring approval, nowhere is the process for this approval outlined. For instance there is no requirement that the approval should be granted by an independent and impartial court, and on a case-by-case basis.

Articles 3 and 5 of the Draft Law only vaguely state that the government will establish a united

³ Johannesburg Principles, Principle 2(a).

⁴ Johannesburg Principles, Principle 2(b).

⁵ Human Rights Committee, General Comment 16, The Right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17 of the International Covenant on Civil and Political Rights) (General Comment 16), UN Doc. HRI/GEN/1/Rev.9 (Vol.1), para1, 4 & 6.

national intelligence system, where the intelligence institutions of state security organs and public security organs, as well as military intelligence institutions will be collectively referred to as national intelligence work institutions, and will do intelligence work that is “is centralized and united, has a coordinated division of labor, and is scientific and highly effective”. The Draft Law does not specify clearly the powers of different authorities and organs authorized to conduct intelligence work. As many of the powers the authorities hold have the potential to infringe upon human rights, especially the right to privacy, without outlining in law all the powers of different intelligence institutions, individuals do not know how different agencies will use these powers and how they may be used against individuals. This makes it impossible for individuals to protect themselves from national intelligence work institutions’ abuse of power infringing on their human rights, contrary to international standards.⁶

Article 24 of the Draft Law provides that people have the right to report and accuse instances of “national intelligence work institutions” or their personnel exceeding their powers, abusing their powers or other unlawful acts to higher-level organs or related departments. However, as the Draft Law does not clarify the roles and powers of different national intelligence work institutions, it lacks specificity, and the public lack information, of how, where and what one could complain about with regard to specific intelligence institutions, activities or personnel. This is contrary to China’s general obligation under international law to provide effective remedies for alleged human rights violations.⁷

Human Rights Committee’s General Comment on Article 17 of the ICCPR provides that the law must specify in detail the precise circumstances in which interference to privacy may be permitted. A decision to make use of the authorized interference on privacy must be made only by the authority designated under the law, and on a case-by-case basis.⁸ This includes that any authorization is based on the reasonable suspicion that a targeted individual is involved in the commission of an offence, and the search is strictly necessary and proportionate to a stated and legitimate aim, and is non-discriminatory.

The Draft Law fails to meet the requirement of human rights law to respect, protect and promote the right to privacy. It allows “national intelligence work institutions” to arbitrarily interfere into others’ privacy, home and correspondence.

3. Risk of Arbitrary Detention and Torture or other ill-treatment

Article 6 requires all public institutions, social groups, enterprises and individuals to support, assist and cooperate with national intelligence work, and protect the state secrets of the national intelligence work. Article 26 stipulates that when state secrets related to national intelligence work are leaked, and Article 25 stipulates that when national intelligence work is obstructed, relevant units can give administrative detention of up to 15 days. Both articles also

⁶ Report to the UN Human Rights Council, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/31/65.

⁷ See, among others, International Covenant on Civil and Political Rights, Article 2(3).

⁸ General Comment 16, para 8.

say where a crime is committed, criminal liability should be pursued in accordance with law.

These articles not only turn every organization and individual into the government's agents of surveillance, but also through the possibility of administrative detention, place individuals at risk of arbitrary detention, as well as torture and other ill-treatment.

All forms of administrative detention for security purposes are arbitrary detention and should be abolished. They deprive individuals of their liberty without due process, including the rights to judicial review, and safeguards against torture and other ill-treatment.

The "state secrets" are also broadly and vaguely defined in the State Secrets Law and are frequently used to punish activists for the legitimate exercise of their rights. Many criminal charges under the State Secrets Law fail to satisfy the necessary requirements of clarity, accessibility and foreseeability as prescribed by the principle of legality. With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous language that narrowly defines the punishable behaviour to enable an individual to regulate conduct accordingly.

The UN Human Rights Committee, the body mandated with interpreting and monitoring compliance with the ICCPR, has stated that with regard to "...security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty."⁹

4. Conclusion and Recommendations

The Draft Law continues to use vague and overly broad concepts of national security that are reflected in the larger national security legal architecture, it grants unchecked powers to national intelligence work institutions with unclear roles and responsibilities, and lacks safeguards to protect against arbitrary detention, and risks to the rights to privacy, freedom of expression, and other human rights.

Given that many provisions of the Draft Law are not in compliance with international human rights law and standards, and risk that the adopted Law could be misused to violate human rights, ***Amnesty International calls on the Standing Committee to withdraw or repeal the Draft Law, or alternatively repeal or amend the problematic provisions therein, due to the risk of human rights violations and the high risk of misuse. And this should be done with all other relevant laws recently introduced to serve the stated purpose of protecting national security and interests, including the Anti-espionage Law, the National Security Law, the Anti-terrorism Law, the Foreign NGO Management Law and the Cyber Security Law. The Chinese Government should ensure the laws introduced to protect national security have provisions that are clearly and strictly defined and conform to international human rights law and standards.***

⁹ Human Rights Committee, General Comment 35, The Right to liberty and security of persons (Article 9 of ICCPR), UN Doc. CCPR/C/GC/35, para 15 (references omitted).

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