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Dear Chairperson,

OPEN LETTER: AMNESTY INTERNATIONAL COMMENTS ON THE DRAFT REVISION OF THE LAW ON THE PROTECTION OF STATE SECRETS

Amnesty International submits the following comments on the draft revision of the Law on the Protection of State Secrets of the People's Republic of China (draft revision). The organization has grave concerns regarding the draft revision's restrictions on key human rights, in particular, on freedom of expression, including the right to receive and impart information.

The existing vaguely-worded provisions for "state secrets" within China's state secrets system, including the current Law on the Protection of State Secrets (State Secrets Law), have been used to intimidate, detain and otherwise punish many individuals solely for peacefully exercising their rights to freedom of expression and association. Amnesty International would normally consider as a prisoner of conscience someone imprisoned for disclosing state secrets when there was objectively a public interest in revealing the information (such as grave human rights abuses, concerns for public health or government corruption) which outweigh genuine security concerns.

The major proposed revisions are the new measures to protect state secrets stored in all new forms, so that the law now protects "all paper, optical and electromagnetic media" from leaks, including over the internet or other public information networks through wired or wireless communications.

Unfortunately, the shortcomings of current laws, which facilitate limiting and punishing peaceful exercise of human rights, remain in the new draft revision. We urge the Standing Committee of the National People's Congress to use this opportunity to revise the State Secrets Law so as to allow only limitations to the right to freedom of expression that are necessary and proportional to the need for protection of national security, in line with international human rights law and standards.

INTERNATIONAL LAW AND STANDARDS

The right to freedom of expression, including the right to seek, receive and impart information is recognized in Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which China has signed and has repeatedly stated its intention to ratify. While the right of freedom of expression is not absolute, any limitations must be provided by law and be necessary for legitimate aim, such as protection of national security. Article 19 of ICCPR reads:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

As for the issue of classification of information and the criminalization of “leaking” such information, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) have provided some clear standards. Its Principle 11 provides for individuals to have the right to information including that relating to national security. It is the state which shoulders the responsibility to “demonstrate the restriction of access to information is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest”. In addition, Principle 15 prohibits punishment on national security grounds for disclosure of information if “the disclosure does not actually harm and is not likely to harm a legitimate national security interest”, or “the public interest in knowing the information outweighs the harm from disclosure”. In other words, before an individual can be punished for leaking classified information, there should have been an actual finding of objective harm or likelihood thereof. Principle 17 provides that once information has already been made generally available, by lawful or unlawful means, the public’s right to know overrides any invoked justification for stopping further publication of the information. Principle 14 provides for the state’s obligation to establish measures to independently review the denial of access to information on national security grounds to ensure that the purpose is not abused by authorities.

Amnesty International calls upon the Standing Committee of the National People’s Congress to incorporate these principles into the draft revision and ensure that peaceful expression in accordance with them is always protected.

SCOPE OF STATE SECRETS

In Article 2, the draft revision kept, word-for-word, the definition of state secrets in the current State Secrets Law: “matters that are related to state security and national interests and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time”. Article 9, which echoes word-for-word Article 8 of the current State Secrets Law, sets out seven types of matters that are considered as state secrets, including matters of state affairs, national defence, diplomacy, economic and social development, and state security and investigation of criminal offences. The seventh paragraph of this Article authorizes the national State Secrets Bureau to classify “other matters” as state secrets.

In addition, the current regulation providing for the implementation of the State Secrets Law, Article 4 of the Implementation Measures for the Law on the Protection of State Secrets (Implementation Measures, 1990), has expanded the scope of state secrets by allowing retroactive and pre-emptive classification of information which is not already classified as a state secret but may be classified as such if its disclosure could or has a perceived potential to result in any one of the eight consequences listed in the Article.¹ The eight consequences include, among others, “affecting national unity, ethnic unity, or social stability”, “hindering important security or defence work”, and “endangering the ability of the state to consolidate and defend its power”. These are all vaguely-defined terms allowing the national State Secrets Bureau and other government units to elaborate if the disclosure of the information would jeopardize the purpose of protecting state secrets as stated in Article 1 of the State Secrets Law.

Under the current State Secrets Law and the Implementation Measures, the vagueness in the definition of a state secret, the role of subjective perceptions, the possibility of retroactive classification of state

secrets and the extensive use of state secrets crimes in the Criminal Law, and more widely state security rationale have all been used by the authorities to gain convictions for a wide range of individuals peacefully exercising their rights to freedom of expression and information. The draft revision's Article 9(7) will continue to give the national State Secrets Bureau unlimited power to classify, both in advance and retroactively, all information as a state secret in the name of protecting the "state security and national interests".

Similar to Article 10 of the current State Secrets Law, in Article 11 of the draft revision, the primary organ for making decisions on the classification of state secrets is the national State Secrets Bureau, together with "other relevant central organs", with the exception of the administration of military secrets, which is the responsibility of the Central Military Commission. Under the current system, this provision enables government bureaus and Chinese Communist Party's organs, together with the national State Secrets Bureau, to codify their systems for information distribution by issuing their own regulations classifying specific types of information as either "top secret", "highly secret", "secret" or "internal" according to the levels of potential harm to state security and national interests if disclosed.

There are already regulations in place that affect all walks of life ranging from family planning to, for example, labour, environmental protection, public health work, and social science research. The state secret system in China classifies much of the information that is important for the protection of human rights in China. Below are some examples:

Top secret:

- Annual or monthly national statistics on the death sentences that Chinese courts handed down, the Supreme People's Court approved, and executions;
- Major criminal cases involving Chinese Communist Party or state leaders.

Highly secret:

- Specific information on the use of the corpses or the bodily organs of prisoners who have been executed;
- Statistics and specific case details regarding the use of torture to extract confessions, physical punishment and other ill-treatment that led to serious consequences;
- Undisclosed statistics and information on the handling of child labour cases nation-wide;
- Undisclosed compiled information and statistical data held by the All-China Federation of Trade Unions concerning collective petitioning, strikes, marches, demonstrations and other major incidents involving workers.

Secret:

- Information on environmental pollution that would, if disclosed, affect social stability;
- Undisclosed compiled information and statistics on individuals that have been arrested or sent for Re-education through Labour or juvenile rehabilitation at the provincial level;
- Compiled data at the provincial level and higher regarding the trafficking of women and children.²

Amnesty International is deeply concerned that, besides information relating to specific individuals and their human rights, such as the right to privacy, none of the above categories may legitimately be classified as a state secret under international human rights standards.

Many of the state secrets regulations formulated by various government branches with the national State Secrets Bureau are not available to the public. It is therefore difficult for individuals to know for sure if they have leaked state secrets. Nowhere in the current State Secrets Law and the draft revision is there a prohibition on retroactive classification which entails prosecution on charges of stealing, gathering, procuring or leaking state secrets, which at the time were not classified as such. The lack of clear provisions to ban retroactive prosecutions is a loophole that potentially allows the authorities to use the law to punish individuals in violation of the *nullum crimen sine lege* (no crimes without law) principle, enshrined in Article 11(2) of the UDHR, which provides:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was

committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

International human rights standards require that any limitation to the right to freedom of expression must be exceptional and narrowly construed. With regards to information of public interest, Principle 13 of the Johannesburg Principles (quote above) states that: “in all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.”

The open circulation of information of public interest and discussion of such information are important for individuals and civil society as a whole to understand the issues that affect them, and for human rights defenders to spread awareness of the issues and advocate solutions. In turn, it is important for the authorities to provide such information to the public, not only to ensure that people enjoy their human right to receive such information, but also in order to engage in meaningful and informed dialogue with the public.

APPEALS AGAINST CLASSIFICATION

Similar to Article 13 of the current State Secrets Law, Article 18(2) of the draft revision provides for the review of the determination and the classification level of state secrets when differences arise. The decision-making power lies with the national State Secrets Bureau and the state secrets bureaus at the provincial level. There is no further mechanism in the current law and the draft revision to allow criminal defendants charged with state secrets offences to appeal state secrets classification decisions. While the 2001 Supreme People’s Court’s Interpretation of Certain Issues Regarding the Specific Application of the Law When Trying Cases of Stealing, Gathering, Procuring or Illegally Providing State Secrets or Intelligence Outside of the Country provides for the need of verification from state secrets bureaus as to “whether or not the matter is a state secret and if so, which level of security classification it belongs to”³, there is no requirement for state secrets bureaus to provide an explanation on why information is classified as a state secret, nor to establish that information was protected prior to the initiation of criminal procedures. Courts have no power to challenge the decisions on classification of state secrets made by this administrative bureau.

Given the arbitrariness and possibility of retroactive classification, this system leaves individuals facing state secrets prosecution with little protection. They are unable to independently challenge the classification of many matters which are not treated as state secrets under international human rights law and standards.

RECENT STATE SECRETS CASES

Amnesty International would like to bring to your attention the following two state secrets prosecutions, to illustrate how the defects of the all-encompassing, vaguely-defined and retroactive state secrets system has been used to crack down on human rights defenders and deny them procedural guarantees in line with international fair trial standards, and which are replicated in the current draft revision.

- Human rights lawyer **Zheng Enchong** has served a three year sentence for “illegally providing state secrets outside of the country” under article 111 of China’s Criminal Law after a closed-door trial. The alleged “state secrets” turned out to be a fax relating his personal account of police action against a workers’ demonstration at a Shanghai food plant and a copy of a published news article covering protests by a group of displaced residents which he sent to the New York-based non-governmental organization Human Rights in China.

Upon completion of his sentence on 5 June 2006, the local authorities placed him and his family under tight surveillance, limited their movement and subjected Zheng Enchong to frequent interrogations and brief periods of detention for alleged criminal investigation.

During his trial, Zheng Encong had no avenues to challenge the classification of his account of the workers demonstration and the news article on protests of forced evictees. The current state secrets system gave him no avenues to appeal, for instance on the grounds that the classification of the information as secret was unreasonable, or that the leakage of the information had not resulted in any actual harm to national security.

Zheng Enchong was first detained on 6 June 2003. During his pre-trial detention, he was only allowed to meet with his lawyer twice on 22 and 26 August 2003, six and two days before his trial, respectively. This was because according to the Criminal Procedure Law and related regulations, there are numerous provisions to limit criminal suspects' and defendants' right to access to legal counsel and their lawyers' access to case documents. While these provisions have been, in theory, superseded by the revised Law on Lawyers which came into effect in June 2008, Amnesty International still received reports of denial of the rights of lawyers to access their clients and case files on state secrets grounds. Moreover, all cases involving state secrets are tried behind closed doors. The vagueness and broadness of the definition of "state secrets" allows prosecutions against individuals including journalists, researchers, academics and scientists, who may have only exposed matters of public interest such as corruption, pollution and public health risks that officials want to cover up.

- Gansu environmental activist **Sun Xiaodi** and his daughter **Sun Haiyan** (also known as **Sun Dunbai**) are currently held in arbitrary detention without trial under administrative orders – Re-education through Labour (RTL) – for two years and 18 months respectively since 16 July 2009. In the RTL sentencing decision, the authorities accused Sun Xiaodi of stealing classified information on the state-owned No. 792 Uranium Mine in Gansu province and then passing it on to his daughter to supply to "overseas organizations". The authorities also accused Sun Xiaodi of distorting facts, spreading rumours, and inciting the public with libellous slogans of "nuclear pollution" and "human rights violations".

Sun Xiaodi had recently reported to the Central Government in Beijing and some human rights organizations that certain local officials in Gannan Tibetan Autonomous Prefecture and Diebu county had exaggerated the economic loss caused by the May 2008 Sichuan earthquake in order to receive more reconstruction funds.

Sun Xiaodi was a worker at No. 792 Uranium Mine. For years, he has been documenting and exposing nuclear contamination from the mine despite harassment by the authorities. He was awarded the 2006 Nuclear-Free Future Award.

As a member of the UN Convention Against Corruption, which China ratified on 13 January 2006, the Chinese government is obliged to respect, promote and protect "the freedom to seek, receive, publish and disseminate information concerning corruption" as provided in Article 13.1.d of the Convention. The information Sun Xiaodi and his daughter were reporting to the Central Government would fit within the legitimate corruption investigation frameworks.

RECOMMENDATIONS

Amnesty International urges the Standing Committee of the National People's Congress to use this opportunity to revise the State Secrets Law so that it fully accords with international human rights law and standards and specifically to:

- narrow the definition of state secrets so that restrictions of the right to freedom of expression on the grounds of national security can only be imposed if the government can demonstrate that the restriction is prescribed by law and is necessary and proportionate to protect a legitimate national security interest;
- include in the revision the establishment of an independent system to review and appeal decisions to classify a matter as a state secret and its classification level;
- include in the revision that no individual would be punished if the disclosure of information does not actually harm or is not likely to harm a legitimate national security interest or the public interest in knowing the information outweighs the harm from disclosure; and
- ratify the International Covenant on Civil and Political Rights and incorporate its

provisions into domestic law to ensure that the right to freedom of expression and other human rights are protected.

Yours sincerely,

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¹ National State Secrets Bureau [国家秘密局], Implementation Measures on the Law of the Protection of State Secrets of the People's Republic of China [国家秘密保护条例实施办法], promulgated and effective on 25 May 1990, art. 4, available at: http://www.stats.gov.cn/tjgl/swdcglgg/xfgf/t20041118_402209111.htm, accessed 13 July 13, 2009.

² For more information and for an analysis of some selected regulations on state secrets in specified activities, see Human Rights in China, State secrets: China's legal labyrinth (New York: Human Rights in China, 2007), Section II(C), (D) & (E).

³ Supreme People's Court [最高人民法院], "Supreme People's Court's Interpretation of Certain Issues Regarding the Specific Application of the Law When Trying Cases of Stealing, Gathering, Procuring or Illegally Providing State Secrets or Intelligence Outside of the Country" [最高人民法院司法解释关于审理窃取、收买、非法提供国家秘密或者情报案件具体应用法律若干问题的解释], Legal Interpretation no.4 (2001) [法释(2001)4号], promulgated 17 January 2001, effective 22 January 2001, available at: <http://www.court.gov.cn/lawdata/explain/penal/200303210002.htm>, accessed 16 July 2009.