# PEOPLE'S REPUBLIC OF CHINA

## BRINGING CHINA'S CRIMINAL PROCEDURE LAW IN LINE WITH INTERNATIONAL STANDARDS

**Memorandum to the National People's Congress of the People's Republic of China by Amnesty International**

**March 2012**

Amnesty International is writing to detail some of the organization's concerns with the Criminal Procedure Law Draft Revisions [hereafter Draft Revisions], issued by the Standing Committee of the National People's Congress (NPC) on 30 August,[1] 2011 and due for approval at the National People's Congress session this month.

It is Amnesty International's assessment that the Draft Revisions, if passed without further amendments, would bring about an overall set-back to the protection of civil and political rights within the criminal justice process in China and to the government's long stated "demand, pursuit and practice" to "govern the country according to law and build a socialist country under the rule of law".[2] While the Draft Revisions introduce a number of positive elements to China's criminal justice system, they fail to address significant areas where current law is not in compliance with internationally recognized standards and some aspects would move China further from compliance with human rights standards including those considered customary international law binding on all states whether or not they have ratified relevant treaties.[3]

After nearly 15 years of deliberation, during which nearly all aspects of China's Criminal Procedure Law were discussed extensively in legal circles both within China

---

[1] The NPC invited the public to submit comments on the Draft Revisions between 30 August and 30 September 2011, and reported receiving nearly 80,000 comments.

[2] White Paper on "China's Efforts and Achievements in Promoting the Rule of Law," State Council Information Office, February 2008. Foreword at http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm.

and internationally, overall these Draft Revisions are disappointing. Where the Draft Revisions introduce some improvements which are steps towards protecting internationally recognized rights of persons in detention, they introduce caveats and exclusions. They repeatedly restrict or exclude from the benefit of these provisions suspects or defendants accused of vaguely-defined "serious crimes" including "terrorism", and "endangering national security".

The Draft Revisions propose the significant expansion of the powers of policing and public security organs without introducing corresponding and necessary mechanisms for oversight, monitoring, or restraint in the use of such powers in order to protect the rights of individuals to liberty and security of person, protection against arbitrary detention. The Draft Revisions pay no attention to mechanisms of redress for citizens who allege they have been victims of the abuse of such powers.

The effectiveness of criminal procedure laws in protecting rights is in any case dependent on a broader institutional framework within which the laws operate, one of the key components of this being an independent and impartial judiciary.[4] Regrettably there has been no recognition by the Chinese authorities or the need for reform in this fundamental area. An independent and impartial judiciary is the cornerstone of the right to a fair trial in international standards. It ensures that the interests of justice and the requirements of fairness and rule of law are served in a broad sense, including preventing abuse of power by executive authorities at all levels and other political influences over law enforcement and justice. An independent and impartial judiciary, in turn, relies on adequate checks and balances within the political system more broadly, as well as independence for individual judges within their own courts, a strong code of professional ethics that sets standards of professional conduct for all members of the judicial profession, and adequate financial and human resources within the judicial system.

Unfortunately, serious obstacles continue to undermine the conditions for the independence and impartiality of the judiciary in China. These include the long-established supremacy of the Chinese Communist Party within the body politic as a whole and over the law, which results in judges applying the law in accordance with Party policy, or the interests of local Party interests. Political influence continues to weigh heavily, if not principally, on the overall functioning of the legal system in China, as well as in specific cases. This is institutionalized through the Party's Political and Legal Commissions which have a leading role in judicial work at every administrative level and through which the Party controls the work of the courts. The lack of independence of judges within their own courts on account of the role played by court presidents and adjudication committees continues to undermine judicial

[4] See Amnesty International, *People's Republic of China: Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms*, October, 2002 (AI Index: ASA 17/052/2002); and Amnesty International, *People's Republic of China: Abolishing "Re-education through Labour" and other forms of punitive administrative detention: An opportunity to bring the law into line with the International Covenant on Civil and Political Rights*, May, 2006 (AI Index: ASA 17/016/2006).

independence. Finally, the lack of checks and balances within the system due to the dominant role of the Chinese Communist Party and deeply entrenched corruption within China as a whole that also permeates the judiciary serve to undercut the effectiveness of protection of rights within the law.

## I : INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

The following international human rights law and standards are central to an evaluation of the proposed amendments to China's criminal procedures.

***The right to liberty and security of person***

A key human right recognized in international law and standards is the right of all persons to liberty and security of person. This right is enshrined in Article 9 of the Universal Declaration of Human Rights (UDHR), the cornerstone of international human rights law, which states simply: "No one shall be subjected to arbitrary arrest, detention or exile." This provision is repeated in Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

The prohibition of arbitrary detention is a rule of customary international law.[5] Such rules are binding on all states irrespective of whether or not they have ratified relevant international treaties. The fact that this customary rule applies even in times of war[6] - arguably the direst of national emergencies - attests to the crucial importance that the international community attributes to the human right not to be subject to arbitrary detention. Significantly, the UN Working Group on Arbitrary Detention has more than once addressed the Chinese government specifically to remind it that "prohibition of arbitrary detention is customary international law".[7]

[5] That is, an international legal rule which has emerged from consistent state (legal) practice and consistent consideration by states of it as binding on them (*opinio juris*). See for instance Human Rights Committee, General comment no. 29: States of emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8, Restatement (Third) of Foreign Relations Law of the United States § 702(e) (stating that "prolonged arbitrary detention" practised, encouraged or condemned by a state is a violation of customary international law of human rights).

[6] See the International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 99 (Vol. I pp. 344-353, Vol. II Ch. 32, Sec. L, pp. 2328-2362. This study is updated periodically, see http://www.icrc.org/customary-ihl/eng/docs/home, accessed 22 November 2011.

[7] UN Working Group on Arbitrary Detention, Opinion No. 15/2011 (People's Republic of China), Communication addressed to the Government on 3 February 2011, para. 20; Opinion No. 16/2011

***Implications of the prohibition of arbitrary detention***

The prohibition of arbitrary detention means that anyone detained or arrested by the authorities, whether or not they are facing criminal charges, has the following specific rights:

- The right to be informed immediately or promptly of the reasons for arrest or detention;
- The right to be notified immediately or promptly of their right to legal counsel;
- The right to be informed promptly of any charges against them;
- The right to be held in a recognised place of detention;
- The right to have their family or friends promptly notified of the reasons for and location of their detention;
- The right to remain silent;
- The right to legal assistance/ representation of their own choice;
- The right to take proceedings before a court challenging the lawfulness of detention;
- The right to compensation in case of unlawful detention.

These standards hold for every person arrested and detained. They apply whether or not the person is formally charged for a criminal offence. They apply regardless of the nature of any alleged offence or criminal charge.

***Notification of the right to legal counsel***

Principle 5 of the UN Basic Principles on the Role of Lawyers calls for all persons to be "immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence."[8] Principle 13 of the UN Body of Principles[9] states:

"Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights."

(People's Republic of China), Communication addressed to the Government on 8 February 2011, para. 12.

[8] UN Basic Principles on the Role of Lawyers. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[9] UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (hereafter Body of Principles) adopted by consensus UN General Assembly A/RES/43 1988.

***The right to have access to the outside world and to be held only in a recognizable place of detention***

This is a key mechanism through which to safeguard the security of persons in detention. Notification to family is to take place immediately, according to Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners.[10] According to Principle 16 of the UN Body of Principles:

"Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of okhis arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

To ensure access to the outside world, and to guard against enforced disappearances, torture and other ill-treatment, all detained persons have the right to be held only in a recognizable place of detention.[11]

***The right to legal assistance***

International standards call for a person in detention to have access to legal counsel during all stages of criminal proceedings, including pre-trial questioning. International human rights instruments and monitoring bodies and experts have recognized that the right to a fair trial requires the assistance of a lawyer during detention, interrogation and preliminary investigations. The Human Rights Committee has stated that "all persons arrested must have immediate access to counsel."[12] Principle 1 of the UN Basic Principles on the Role of Lawyers states that "(a)ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in *all* stages of criminal proceedings." (emphasis added). "All" stages of criminal proceedings has been interpreted to include during detention, questioning and preliminary investigation, and to be effective "immediately" or "promptly" after arrest.[13]

One key purpose of this rule is to serve as a safeguard against torture and other ill-treatment, for instance to force a "confession" out of a suspect. For that reason, the

[10] UN Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[11] Principles 11(2) and 20 of the Body of Principles, Article 10 of the Declaration on Disappearances, Rule 7(2) of the Standard Minimum Rules all refer to the right of a detainee and his counsel to be receive prompt and full communication regarding any detention order.

[12] Concluding Observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April, 1997, para. 28.

[13] Principle 7 of the UN Basic Principles on the role of Lawyers states that access to a lawyer must be granted "promptly".

UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment has recommended that anyone arrested "should be given access to legal counsel no later than 24 hours after the arrest."[14] According to Principle 7 of the UN Basic Principles on the Role of Lawyers, a delay in access to counsel is only allowed in "exceptional circumstances", but in no case should access to legal assistance be delayed more than 48 hours from the time of arrest or detention.[15] Those being held in detention have a right to legal counsel regardless of whether or not the person has been charged with a crime or the nature of the crime.

***The right to be brought promptly before a judge or other judicial officer***

Anyone detained or arrested must be brought promptly before a judge or other judicial officer to subject the detention to judicial review.[16]

Principle 11(1) of the Body of Principles states: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority." The purpose of this is to provide an independent assessment of the legal basis for detention, of the need for detention before trial, and to protect the well-being of the detainee. States must establish procedures that are simple and expeditious so as to allow anyone deprived of his or her liberty to challenge the lawfulness of the detention and to be released if the detention is unlawful.

As noted, one key right that is protected by safeguarding the rights of detainees and those facing criminal procedures is freedom from torture and other cruel, inhuman or degrading treatment or punishment. Following his visit to China in 2005, the UN Special Rapporteur on torture, identified factors that facilitated the use of torture including "rules of evidence that create incentives for interrogators to obtain confessions through torture, the excessive length of time that criminal suspects are held in police custody without judicial control, the absence of a legal culture based on the presumption of innocence (including the absence of an effective right to remain silent); and restricted rights and access of defence counsel." [17]

[14] Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para. 272; see also UN Doc. E/CN/4/1995/34, 12 January 1995, para. 926.
[15] Principle 7 of the UN Basic Principles on the Role of Lawyers.
[16] See for instance Article 9(3). 9(4) of the ICCPR and Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988 (UN Body of Principles).
[17] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: mission to China, UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 73.

### *Rights to a Fair Trial*

Anyone arrested or detained on a criminal charge is entitled to be tried within a reasonable time or be released and to receive a fair trial.[18]

In 1948, the UDHR proclaimed that "(e)veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his right and obligations and of any criminal charge against him". Since 1948 the right to fair trial has become a rule of customary international law.[19].

In his report following his 2005 visit to China the UN Special Rapporteur on torture recommended that legal reforms should conform to fair trial provisions, as guaranteed in Article 14 of the ICCPR, including "the right to remain silent and the privilege against self-incrimination; the effective exclusion of evidence extracted through torture; the presumption of innocence; timely notice of reasons for detention or arrest; prompt external review of detention or arrest; timely access to counsel; adequate time and facilities to prepare a defence; appearance and cross-examination of witnesses; and ensuring the independence and impartiality of the judiciary."[20]

### *The right to the presumption of innocence and the right to remain silent*

A fundamental component of the right to a fair trial is the right of every person charged with a criminal offence to be presumed innocent until and unless they are proved guilty according to the law after a fair trial. This imposes on the prosecution the burden of proving the charge beyond reasonable doubt. The right to be presumed innocent applies not only at trial but also before trial. It applies to the treatment of suspects before criminal charges are filed, and carries through until a conviction is confirmed following final appeal. This right is generally provided in the domestic laws of many, if not most, countries. Internationally it is provided, for instance, in Article 14(2) of the ICCPR. The rights not to be compelled to testify against oneself or to confess guilt,[21] and the related right to silence are grounded in the presumption of innocence.

The right to silence during police questioning is recognized to be implicit in the right to the presumption of innocence and the right not to incriminate oneself or not to be compelled to confess guilt, even though it is not a right explicitly recognized in international human rights treaties. It is widely recognized that without the right to silence it would be difficult to protect a suspect's right not to incriminate him or herself and to be presumed innocent. Article 55(2)(b) of the Rome Statute of the International Criminal Court (hereafter ICC) provides that when a suspect is to be

---

[18] See for instance Article 9(3) of the ICCPR.

[19] See note 4 above for definition.

[20] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: mission to China, UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 82(j).

[21] ICCPR Article 14 (3)(g), Principle 21 of the Body of Principles.

questioned by the ICC prosecutor or by national authorities, the suspect must be informed of the right to "remain silent, without such silence being a consideration in the determination of guilt or innocence."[22]

## DEATH PENALTY

More than two thirds of all countries have abolished the death penalty in law or are not using it in practice. While 58 countries retain and use the death penalty in recent years less than half were known to have regularly carried out executions. Since 2007, the UN General Assembly has adopted 3 resolutions, supported by an increasing majority, calling for a worldwide moratorium on executions with a view to abolishing the death penalty. [23]

Amnesty International opposes the death penalty as in all circumstances believing that it violates the right to life and is the ultimate form of cruel inhuman and degrading punishment. The view that the death penalty in and of itself is a violation of human rights has progressively been gaining ground within the international community. The organization has on numerous occasions called upon China to declare a moratorium on all executions as a first step towards the total abolition of the death penalty.

### *International standards and the right to a fair trial in death penalty cases*

Sentencing a person to death and executing them following proceedings that do not meet international fair trial standards violates the right to life of that person.

A series of resolutions by the UN Economic and Social Council (ECOSOC) and the jurisprudence of human rights treaty bodies,[24] mainly the Human Rights Committee, have strengthened safeguards to protect the right to fair trial for those facing the death penalty.[25] The Human Rights Committee has stated that in death penalty cases, "[t]he procedural guarantees [in the ICCPR] must be observed including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal".[26]

In a 2010 report, the UN Secretary-General stated that the 1984 ECOSOC Safeguards[27] which were endorsed by the General Assembly, "should be considered

---

[22] Rome Statue of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002.

[23] 62/149 of 18 December 2007, 63/168 of 18 December 2008 and 65/206 of 21 December 2010.

[24] The term treaty bodies refers to committees of independent experts established under respective UN human rights treaties to monitor states' compliance with their treaty obligations. They include the Human Rights Committee which monitors implementation of the ICCPR and the Committee against Torture which monitors implementation of the Convention against Torture.

[25] Resolution 1984/50, Resolution 1989/64, Resolution 1996/15.

[26] Human Rights Committee General Comment 6, para. 7.

[27] "Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty". Approved by ECOSOC resolution 1984/50 of 25 May 1984.

the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty."[28] The ECOSOC Safeguards include (paragraph 5) a requirement for a "legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR…including the right to adequate legal assistance at all stages of the proceedings".

The ECOSOC Safeguards are based on the premise that there should be special protection of the rights of those facing charges carrying the death penalty "above and beyond" the protections normally afforded to people facing criminal charges.[29] This is because death penalty cases involve the right to life, and the arbitrary deprivation of life is prohibited under Article 6 of the ICCPR.

### *The Right to Seek Clemency*

In a capital case, once all judicial appeals have been exhausted, an accused has the right to seek clemency – the right to seek pardon or commutation of sentence. This right is provided in the ICCPR and other international instruments,[30] and the domestic practice of almost every country applying the death penalty. This right is so widespread it is considered a rule of customary international law.[31]

The Human Rights Committee has stated that this right requires the state to put in place procedural guarantees to ensure its meaningful exercise.[32] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the right to seek clemency requires there to be procedural guarantees if it is not to become a meaningless formality without genuine consideration of the case. An individual making such an application should be able to raise any considerations which they consider relevant, including matters that may not have been brought before the courts, and should be informed of the process and timing of consideration of their request.[33]

ECOSOC Safeguards (paragraph 8) also stipulate that executions must not take place before appeal, pardon or commutation proceedings are concluded.

---

[28] Eighth quinquennial report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. E/2010/10, December 2009, para 136.

[29] See UN Doc. ECOSOC 1989/64, para.1(a).

[30] Article 6(4) of the ICCPR, ECOSOC resolution 1984/50, para. 7.

[31] The Inter-American Court of Human Rights in the Case of Fermín Ramírez v. Guatemala, Judgement of 20 June 2005 (Merits, Reparations and Costs), at http://www.corteidh.or.cr/docs/ casos/articulos/seriec_126_ing.doc, para. 109 concluded that "the right to grace forms part of the international corpus juris."

[32] Kennedy v Trinidad and Tobago, 845/1998, 26 March 2002, para 7.4.

[33] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/9/3, May 2008, para. 59-67.

Under Chinese legislation, prisoners under sentence of death do not have the right to seek pardon or commutation of their sentence from the executive branch.

## II: THE DRAFT REVISIONS AND KEY HUMAN RIGHTS CONCERNS:

## POSITIVE CHANGES, NEGATIVE SETBACKS AND SIGNIFICANT GAPS

### THE RIGHTS OF PERSONS IN DETENTION:

***Right to information and notification to family***

The Draft Revisions would fail to protect key human rights of persons in detention, including the right to inform or to have family members promptly notified of their detention, to be immediately informed of the right to legal assistance, and the right to legal assistance at all stages in the detention or criminal procedure, whether or not one is criminally charged. They not only fail to correct deficiencies of the existing law with regard to these rights but also introduce added circumstances under which these rights could be violated.

Amended Articles 84 and 92 [current articles 64 and 71], would continue to give police up to 24 hours in all cases to notify the family of the reasons for a detention or arrest and the location of detention. This is not in line with international standards for notification to family to take place "immediately" according to the UN Standard Minimum Rules "promptly" or "without delay", according to other standards.

Current law provides a potential catch-all exemption from such notification as it does not require police or prosecutors to notify the family "where such notification would hinder the investigation or there is no way of notifying them." (Current Article 64). Whilst amended Articles 84 and 92 somewhat tighten the wording of the exemption from notification, they fail to bring the law in line with international standards as they continue to retain potentially broad exemptions from notification based on the type of crime involved and impact on the investigation. Amended Article 84 provides that family members "shall be notified of the reason for the detention and location of custody within 24 hours after the detainee has been detained" except in two situations: 1) where there is no way of notifying family members and 2) where crimes of endangering national security, terrorism, or other "serious crimes" are involved and where notification may hinder investigation. Amended Article 92 uses similar language regarding notification to family in the case of arrest (*daibu*).

The permitted delay of up to 24 hours in notifying family members in all cases also denies this important protection to anyone subjected to a category of short term detention for interrogation known as "summonsing" (*chuanhuan*) or "coercive summonsing" (*juchuan)*. It is used against criminal suspects the police consider do not need to be formally arrested (*daibu*) or detained (*juliu*). Existing article 92 allows such detention for 12 hours. Amended Article 116 would extend it up to 24 hours in "major complicated" cases. It is unclear from CPL provisions alone whether "summonsing" should be considered the first interrogation or the onset of "coercive measures" which is critical for the onset of the right to appoint a lawyer (existing and amended article 33, see below: ***The right to access legal counsel and to be informed of this right).*** In any event, persons subject to this form of detention may still be questioned prior to being able to designate legal counsel.

Maintaining any type of custody, even of a short duration, which is not protected by all the rights due to all persons in detention outlined in Section I above is contrary to international human rights standards which hold for every person deprived of liberty through the action of an authority.

Even a 12 or 24 hour detention without notification to family or a suspect's lawyer allows for a first, crucial, police interrogation to take place without the presence of a lawyer, making the suspect vulnerable to torture and other ill-treatment. Given copious available documentation of the torture and ill-treatment of suspects in the early stages of investigation in China, the potential impact of these omissions is clear and may undermine the utility of other Draft Revisions directed at combating torture detailed below.

The prohibition retained in the amended Article 116 against police using "successive summons" or "compulsory summons" as a disguised way to keep suspects in extended detention highlights the known risks experienced by those held in this type of detention, as does the new clause stipulating that they should have necessary food, drink and rest time guaranteed.

***The right to access legal counsel and to be informed of this right***

A helpful development in the Draft Revisions is the resolution of inconsistencies regarding access to legal counsel in the current law. Current Article 33 grants the criminal suspect the right to designate a defender, including a lawyer, only once the case file is submitted to review for prosecution, in other words, only after the initial police investigations are concluded, while current Article 96 provides that suspects have the right to designate a defender after the suspect is interrogated for the first time, or from the date compulsory measures[34] are first imposed on him or her. The Draft Revisions resolves this inconsistency by providing, in amended Article 33, for suspects' access to legal counsel at the earlier stage in the process, i.e., after the initial

[34] Whilst compulsory measures are not fully defined in the law, they include, arrest, detention, residential surveillance, bail and, ambiguously, summons.(CPL chapter 6) ,

interrogation or upon imposition of coercive measures. Once a suspect is a defendant, amended article 33 retains from current article 96 that he or she has the right to designate a defender at any time.

Regrettably, these revisions would still not bring the law into full compliance with international human rights standards on the right to information and legal assistance promptly following arrest or detention and the right of anyone accused of a criminal offence to legal assistance at all stages of the criminal proceedings including the preliminary investigations.[35] They would allow the first, often crucial, interrogation to take place without the suspect's lawyer present or without the benefit of a lawyer's advice. leaving detainees vulnerable to torture or other ill-treatment, particularly to extract "confessions".

To be effective in practice, the right of criminal suspects to appoint legal counsel should trigger duties on the part of the detaining authorities to facilitate such appointments. However, both the current law and Draft Revisions remain silent on this issue, except for cases involving the death penalty and life imprisonment.

Where the right to family notification is delayed or denied, as in cases involving suspected "terrorism", crimes of "endangering national security", and other "serious crimes", in practice, in most cases the suspect's ability to access legal representation will also be fundamentally undermined. As discussed below, in the case of "residential surveillance", the Draft Revisions would deny the rights to notification to family of suspects held in non-recognized places of detention for certain types of crimes, thereby effectively cutting them off from all contact with the outside world. These exclusions will clearly facilitate incommunicado detention and the associated risks of torture and ill-treatment.

The new proposed requirement in amended Article 33 that only an "attorney-at-law" may be designated as a "defender" during the interrogation phase potentially undercuts the value of providing suspects access to legal counsel or advice during this phase. Most suspects will not be able to afford to retain a lawyer and will not qualify for legal aid unless they face a life sentence or death penalty. In most countries, such a provision would prevent counterfeit or unqualified lawyers exploiting detainees in time of need. However, in China the authorities have often refused to renew the licences of qualified and competent lawyers who defend political dissenters, human rights defenders and others whom the authorities consider subversive.[36] As long as this situation persists, Amnesty International is concerned that this restriction would leave certain defendants deprived of their right to appoint a legal representative of their choice, in particular qualified and competent lawyers who have had their licenses revoked for political reasons.

[35] ICCPR article 14(3)(d), Principle 1 of the Basic Principles on the Role of Lawyers, Article 67 (1)(d) of the ICC Statute.

[36] See Amnesty International, "*China: Against the Law: Crackdown on China's Human Rights Lawyers Deepens*, 30 June 2011 (AI Index 17/018/2011).

In terms of informing detainees or arrested persons of their right to appoint a defender, including a lawyer, Amended article 33 introduces a new provision that the investigating organs should inform the suspect at the first interrogation or on first imposing coercive measures. However the existing provision is also retained which gives the procuratorate up to three days following receipt of the case materials for review to inform the criminal suspect of the right to appoint a defender.

Such procedures would continue, like the current law, to deny detained persons the right to be immediately informed of their right to legal assistance and to prompt access to legal counsel and allow for the questioning of persons in detention without access to legal counsel, in violation of international human rights standards.

Amended Article 84 would also continue to give detention centres up to 48 hours to arrange for meetings between a defendant and his or her legal counsel under routine circumstances (amended Article 37). It should be noted that the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that "Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention."[37]

The Draft Revisions further use the vaguely-defined concepts of "endangering state security", "terrorism" and "major bribery cases" in which more than one individual is involved, to restrict the rights of suspects to meet with their defence lawyers. In such cases defence lawyers require the approval of investigating authorities before being allowed to meet with their clients. However, the amended Article 37 does not specify how promptly such approval should be given. Amnesty International considers that the right to legal counsel must not be subject to limitations based on the suspected crimes of the detainees. Moreover, from Amnesty International experience worldwide it is clear that it is precisely such detainees – arrested as suspected "terrorists" or for "endangering national security" that are likely to be tortured and otherwise ill-treated, which actually increases the need for safeguards such as access to lawyers.

***"Enforced disappearance"***

Of grave concern is the Amended Article 73 which Amnesty International fears could legalize the practice by police, already in evidence in China, of detaining individuals suspected of certain crimes for long periods of time in unknown locations without notification to families and without any contact with the outside world. Amended article 73 states:

> "Where there is suspicion of the crime of endangering national security, the crime of terrorism or major crimes of bribery, and residential surveillance at the domicile may impede the investigation, it may, upon approval by the next higher people's prosecutor's office or public security authority, be enforced at

[37] Report of the Special Rapporteur on the question of torture, UN Doc. E/CN.4/2003/68, 17 December 2002 para. 26(g).

> a designated place of residence, provided that the place of residence under surveillance is not a detention facility or an investigation facility."

When such crimes are suspected and a notice may impede the investigation, police would not be obliged to notify family members of the reasons for or the location of detention.

"When residential surveillance is enforced at a designated domicile, the family members of the person under surveillance shall be informed of the reason for and the place under residential surveillance within 24 hours upon enforcement, save where a notice cannot be furnished or where crimes of endangering national security or crimes of terrorism are suspected and a notice may impede the investigation."

If revised as proposed, the new law would, for the first time, make it legal for police to detain suspects in unofficial places of detention, and would allow them to hold suspects for up to six months. Persons detained under such conditions would have no access to family, to legal counsel, or to the courts. The Draft Revisions would thus take a form of detention – residential surveillance – which in the current law is designed as a form of more lenient detention for suspects deemed not to pose a threat to society during the period of investigation, and utilize it to legalize a form of detention under which persons are considered fully "disappeared" in violation of international human rights standards.

Furthermore, despite depriving detainees of their fundamental right, the Draft Revisions would require a less stringent approval process – i.e., by only the "next higher" people's prosecutor's office or public security authority, which could be the police at a level below the county – than is required for detention prior to or following arrest.[38]

***Two-track justice: Use of vaguely defined crimes to restrict or deny rights***

As outlined above, the relevant international human rights standards are applicable to all those arrested and detained without exception, and regardless of whether or not they are charged with a criminal offence. The Draft Revisions do not bring the Criminal Procedure Law into compliance with these standards. The above analysis demonstrates that the Draft Revisions would furthermore develop and entrench a two-track criminal procedure where suspects or defendants in cases involving "serious crimes", including endangering national security, terrorism, and major bribery cases would not be granted the same protections as suspects and defendants in other cases. There is no legitimate basis in international human rights law for such differential treatment.

[38] Approval for detention prior to or following arrest requires approval at the county level or above for officials suspected in cases of dereliction of duty, including embezzlement, bribery and violations of citizens' rights.

Internationally recognized human rights standards, as reflected in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information ('Johannesburg Principles')[39] 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" whether from an internal or external force.[40] However, the same principles, emphasize that such restrictions are not legitimate if "their genuine purpose or demonstrable affect is to protect interests unrelated to national security", including to protect a government from exposure of wrong-doing, or to entrench a particular ideology.[41]

Any use of concepts such as "endangering national security" and "terrorist activities" in the Draft Revisions must be used with these concepts narrowly and clearly defined as offences which are internationally recognizable, and in line with the genuine purpose of protecting national security. In the context of national security laws, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has explained that the principle of legality (the requirement the crimes must be enshrined in laws that are clear, ascertainable and predictable[42]) means that legal provisions "must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[43] Analogously, the UN Working Group on Arbitrary Detention (WGAD) has expressed particular concern about "extremely vague and broad definitions of terrorism in national legislation". It states that the requirement for precise definition of crimes is key to the whole modern penal system. Absence of such definition or failure to specify precisely what acts or omissions someone is charged with violates the principle of lawfulness "with the attendant risk to the legitimate exercise of fundamental freedoms".[44]

Laws criminalising acts that endanger national security or the public order must not, under any circumstances, be used to deter or punish individuals for the legitimate exercise of their rights, in particular to freedom of expression, association and peaceful assembly.

---

[39] Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 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
[40] *Ibid.*, Principle 2(a).
[41] *Ibid.*, Principle 2(b).
[42] For instance Article 9(1) of the ICCPR provides that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."
[43] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the Commission on Human Rights, UN Doc E/CN.4/2006/98, 28 December 2005, para. 46.
[44] Working Group on Arbitrary Detention, Report to the Commission on Human Rights, UN Doc E/CN.4/2004/3, 15 December 2003, paras. 64-65.

Amnesty International calls upon the Chinese authorities to ensure that the new Criminal Procedure Law fully respects the right to freedom from arbitrary detention, including the principle that "It shall not be the general rule that persons awaiting trial shall be detained in custody".[45]

## RIGHTS DURING INVESTIGATION AND RIGHTS TO A FAIR TRIAL

### *Presumption of innocence*

The Draft Revisions take a positive step in introducing a new article which clearly places the burden of proving that a defendant is guilty on the prosecutor.

Amended article 48 provides that "(t)he onus of proof that a defendant is guilty shall be on the public prosecutor in a public prosecution case". However, the article provides for an exception: "except where otherwise stipulated by law," which is not further elaborated or specified, therefore leaving it open to broad interpretation.

Amended article 35 removes the word "proving" from the responsibility of the defender. It now reads: "The responsibility of the defender is, according to the facts and the law, to present materials and opinions on the innocence, reduction or exclusion of criminal responsibility of the suspect or defendant." However, the Draft Revisions fail to explicitly provide for the right of those charged with a criminal offence to be presumed innocent until proved guilty through a fair trial and through all levels of appeal. In this regard they would fail to bring China's criminal procedure law into line with international human rights standards. And, in the absence of a clear articulation of the presumption of innocence, a shift on the wording of the responsibility of the defender from "proving the innocence" to "show(ing) the suspect or defendant has committed no crime or a lesser crime" may have very limited practical impact.

### *The right to remain silent and to not incriminate oneself*

A positive aspect of the Draft Revisions is inclusion for the first time in national law of the principle that in the course of the investigation and evidence gathering, no suspect or defendant "may be forced to prove his or her guilt" (amended Article 49).

However, Amnesty International is concerned that the risk of coerced self-incrimination remains, as the Draft Revisions do not explicitly provide for the right to remain silent. In practice the provision against coerced self-incrimination is weakened by the Draft Revisions that would continue to allow for questioning of suspects and defendants to begin before they had been informed of their right to designate a lawyer or before they had access to their lawyer, as discussed above. For this new provision to be effective in practice, the law would need to be revised to insure that suspects and defendants are promptly informed of their right to remain silent, their right to legal

[45] ICCPR, Article 9(3).

counsel, and have prompt access to their legal counsel. It should be noted that both the Human Rights Committee[46] and the UN Committee against Torture[47] have consistently criticised states for not allowing lawyers to be present during the questioning of suspects. Amnesty International urges the Chinese authorities to explicitly provide for lawyers' presence during all questioning.

***The exclusion of illegal evidence***

Amnesty International commends revisions which would incorporate into national law and extend to all criminal cases provisions on the exclusion of illegally obtained evidence that currently exist only in lower level regulations, rules, and judicial directives. It is hoped that these measures will strengthen the mechanisms for effectively excluding such evidence in practice. For example, the revisions would, for the first time in law, provide for an explicit role for lawyers to challenge the admissibility of evidence on the basis that it was illegally obtained. Amended Article 53 provides that

"Confessions collected from a suspect or defendant by illegal means like torture, as well as statements of witnesses and victims collected by the use of force, threats and other illegal means shall be excluded."

According to amended Article 53, illegally obtained evidence should be excluded during the investigation, prosecution and trial stages, and "shall not be used as the basis for opinions or decisions on prosecution and court judgments." Article 53 further states that "(p)hysical and documentary evidence collected in violation of the provisions of the law and severely affecting judicial justice shall also be excluded." It would be helpful if this amended article were revised to detail at least the most salient forms of human rights violations used to collect 'evidence', namely provide that such "violations of the provisions of the law" include "physical and documentary" material collected through torture or other ill-treatment, including any form of coercion, as well as illegal searches, surveillance, arrest or detention.

Amended Article 55 would give a defendant and his or her lawyers the right to apply to the court to exclude evidence which they allege was gathered illegally. Amended Article 54 requires the prosecutor's office to "investigate and verify the allegation" if

[46] See for instance Concluding Observations of the Human Rights Committee: Venezuela, Report of the Human Rights Committee UN Doc. A/56/40, Vol. I (2000-1), para. 77(9); Russian Federation, UN Doc. A/59/40, Vol. I (2003-4) para. 64(12); Republic of Korea, UN Doc. A/62/40, Vol. I (2006-7), para. 82(14). See also the Committee's views in individual cases, for instance *Grindin v. Russia*, Communication No 770/1997. Views adopted 20 July 2000, UN Doc. CCPR/C/69/D/770/1997, para. 8.5.; *Aliev v. Ukraine*, Communication No. 781/1997. Views adopted 7 August 2003, UN Doc. CCPR/C/78/D/781/1997, para. 7.2.

[47] See for instance Conclusions and Recommendations of the Committee against Torture: Republic of Korea, UN UNGAOR Supp. A/52/44 (1997), para. 68; Australia, UNGAOR Supp. A/63/44 (2007-8), para. 39(10(a); Austria, UNGAOR Supp. A/65/44 (2009-10), para. 57(9); Liechtenstein, *ibid*. para. 61(11).

it receives a report, an accusation or other information that investigators collected evidence illegally. Courts are also called on to conduct an investigation if the court, or the judge, "is of the opinion that illegally obtained evidence" may exist (amended Article 55).

In what Amnesty International views as an important break-through, the Draft Revisions would for the first time require, in amended Article 56, police investigators and others notified by the court to appear in court to "make an explanation" of allegations of illegally obtained evidence. Amnesty International is hopeful that allowing courts to call investigators to explain the legality of evidence, to call on prosecutors to provide evidence of the legality of evidence, and to require a witness statement to be examined and verified in court before it can serve as the basis for deciding a case (amended Article 58) would communicate to police the seriousness of engaging in illegal methods to gather evidence.

While these provisions considerably strengthen existing law in calling for a more pro-active approach to investigating allegations of coerced confessions or other illegally obtained evidence, their efficacy depends on the professional code of ethics, qualities and impartiality of the responsible judicial organs. The lack of judicial independence within the Chinese criminal justice system, which has been widely recognized, could in practice undermine the efficacy of these safeguards, especially in politically sensitive cases.

**Death Penalty Cases**

Amnesty International welcomes the inclusion in the Draft Revisions some enhanced procedural protections for suspects and defendants in capital cases, and some clarification of the role of lawyers in the final review process conducted by the Supreme People's Court (SPC). However the measures do not bring detainees rights or trial proceedings into full conformity with international human rights standards. They are particularly insufficient when it is recognized within China that "false confessions are the largest source of miscarriages of justice" and quality control should start at the outset, during investigation, not wait until the trial proceedings and the final review stage.[48]

The Draft Revisions (amended Article 34) require not only the Courts, but also the Procuratorate and the Police to inform legal aid organs to provide a defence lawyer for all suspects or defendants who potentially face life imprisonment or the death penalty and have not themselves designated a defender. There is no concomitant responsibility of the legal aid organization or time frame for their compliance stipulated in the amended law. Legal scholars within China have called for greater

[48] http://www.legaldaily.com.cn/rdlf/content/2011-11/26/content_3127063.htm

clarification to establish beyond doubt in the law that legally aided defence is available at all stages of the process in capital cases. They have also called for clearer delineation of the role and responsibility of defence lawyers in the appeal and final review process.

The Draft Revisions (amended Article 120) propose that interrogations of all suspects may be recorded or videoed, however for suspects facing a potential death sentence or life imprisonment interrogations should be recorded, and recorded in full. Regrettably suspects would still not have the right to have a lawyer in attendance during such interrogations.

The Draft Revisions require a court of second instance to hold a hearing in all capital case appeals and other cases where the defence and prosecution disagree on the facts or evidence (amended article 222).

Concerning the procedure for final review and approval of the death sentence by the SPC, the Draft Revisions provide very limited clarification on the requirements and conduct of the process. The Draft Revisions (amended Article 238) broaden the SPC power so that in addition to remanding a case for retrial if it does not approve a death sentence, it may also, in all cases, hold a hearing itself and revise the sentence (*tishen yu gaipan*). The revisions also require the SPC to question the defendant during the review process, and also listen to the arguments of the defence lawyer if requested to by the lawyer (amended article 239). Meanwhile the Supreme People's Procuratorate can also submit its opinions to the SPC during the final approval process. These are limited enhancements to procedures in capital cases, which international standards demand must incorporate the most stringent fair trial safeguards. However they have generated significant controversy, viewed as introducing something akin to a third instance trial which considers the input of all parties, and there are early signs that the NPC may water them down.

**Increased police powers of surveillance, without monitoring or judicial oversight**

The Draft Provisions propose a new section that would legalize, for the first time, the police and security forces' use of covert investigatory powers, including electronic surveillance and wire-tapping without, however, introducing adequate constraints on these new powers. Amended Article 147 stipulates:

"After the public security organ has opened a case, technical investigation measures can be used on crimes that endanger national security, crimes involving terrorist activities, organized crime of a triad nature, drug crimes or other criminal cases that seriously endanger the society, based on the requirement for the investigation of the crime, and after having passed through stringent approval procedure."

Procurator's offices would be given the authority to utilize special "technical investigative" measures in "major corruption and bribery" cases, or cases in which public authority has been abused or citizens' rights and interests "seriously harmed". Whereas time limits on surveillance are specified, repeated recourse is not outlawed. Amended Article 150 proposes to give public security organs at the county level or above the authority to approve secret investigations. The amended articles refer several times to a "rigorous approval procedure", but provide no details of what this is. Nor do they guarantee that "enhanced technical investigative" powers will only be used with the permission of an independent judicial body based on good and sufficient cause shown. Local police would, essentially, be given the power to initiate secret investigations without judicial oversight. To be in conformity with international human rights standards, the Draft Revisions should be amended to ensure that the use of enhanced technical powers is strictly regulated, subject to the approval of an independent judicial authority, and provides clear procedures for redress for those who allege they are victims of abuse of these powers.

Under current Chinese legislation, prisoners under sentence of death do not have the right to seek pardon or commutation of their sentence from the executive. The Draft Revisions do not address this avenue required by international human rights standards.

## CONCLUSIONS AND RECOMMENDATIONS

Amnesty International considers that acceptance by the National People's Congress of many of the above discussed articles would bring China further from compliance with international legal standards as found in customary international law and a wide variety of international treaties and covenants including the ICCPR which China has signed and indicated it intends to ratify.

**Recommendations:**

Amnesty International calls on the National People's Congress to:

- Revise all proposed amendments to the criminal procedure law which fail to comply with international standards regarding the rights of persons in detention.

More specifically:

- Include explicit recognition of the presumption of innocence and of the defendant's right to silence;

- Revise amended Articles 33, 37, 73, 84, 92 and 116 to be in compliance with the right of all persons in detention to be immediately, or promptly, informed of their right to legal assistance, to immediately or promptly have their family notified of the reasons for and location of their detention, and to prompt access to legal counsel and adequate legal counsel at all stages of the proceedings.

- Amend the same articles such that any exceptions to the above-mentioned rights based on the unusual circumstances of a crime conform to international standards that access to information, notification to family, and access to legal counsel shall not, under even exceptional circumstances, be delayed for more than a matter of days.

    - Specifically, this would require either rejection of amended Article 73 which allows for detention of persons for up to 6 months without notification to family of either the reasons for or location of detention, or the substantive revision of the amendment to comply with international standards.

    - Ensure that any use of concepts such as "endangering state security" and "terrorist activities" be grounded in definitions of these crimes that are in line with international human rights standards.

    - Amend Article 116 such that individuals could not be held under a form of summons or coercive summons without protection of their rights.

- Establish a moratorium on the use of the death penalty as provided by UN General Assembly resolutions, as a step towards the total abolition of the death penalty. Pending such abolition: Clarify in greater precision the procedures through which the SPC should conduct its final review of death penalty sentences in line with international standards requiring the most stringent procedural safeguards in such cases; including, among other aspects, whether such final reviews would necessarily allow the defendant and his or her defence lawyer to make their case to the SPC in person.

- Include a procedure for defendants whose death sentence is confirmed to seek clemency or pardon in line with international standards.