

TABLE OF CONTENTS

1.Introduction	1
2.Background	4
2.1The applicability of the human rights covenants to Macao	4
2.2Procedures for international monitoring and reporting of human rights violations	5
3.Amnesty International's recommendations on the continued application of the ICCPR in the Macao Special Administrative Region	7
4.Human rights and the Draft Basic Law	11
4.1Torture and other cruel, inhuman or degrading treatment or punishment	11
4.2Right to freedom from the imposition of the death penalty	13
4.3Right to a fair trial	15
4.3.1 The independence of the Judiciary	15
4.3.2 Fair trial procedures	16
4.4Protection against the imprisonment of prisoners of conscience	18
4.5Limitations clause	22
4.6Provisions concerning a state of emergency	23
5.Summary of Amnesty International's Recommendations	25

£Macao: @Strengthening Human Rights Safeguards

Memorandum from Amnesty International to the Basic Law Drafting Committee

1. Introduction

This memorandum highlights Amnesty International's concerns about the Draft Basic Law proposed to be implemented in the Special Administrative Region (SAR) of Macao when the People's Republic of China (PRC) resumes sovereignty over that territory on 20 December 1999.

The analysis examines selected provisions of the Draft Basic Law which appear in their present form to be incompatible with international standards for human rights. It also makes recommendations for amendments to these provisions with the goal of ensuring that the Basic Law enacted in the Macao SAR will afford maximum protection for human rights.

Upon publication of the *The Draft Basic Law of the Macao Special Administrative Region of the People's Republic of China (for Solicitation of Opinions)*, 13th July 1991, the Macao Basic Law Drafting Committee invited opinions from the general public on the Draft Basic Law for the Macao SAR. The Draft Basic Law provides the structure for the governmental, legal, economic, and social system of the future Macao SAR.

Amnesty International is an international non-governmental organization which seeks the release of prisoners of conscience (people held anywhere for the non-violent exercise of their conscientiously-held beliefs or on account of their ethnic origin, sex, colour or language), advocates fair and prompt trials for all political prisoners and prisoners threatened with the death penalty; opposes torture and other cruel, inhuman or degrading punishment or treatment of prisoners, including the death penalty, "disappearances" and extrajudicial executions. As part of its work, Amnesty International promotes the adoption of constitutions and other legal instruments which protect internationally-recognized human rights and the ratification by governments of international and regional standards for the protection of human rights.

Those internationally recognized human rights are embodied in international treaties and other instruments. The principal foundation of international human rights law is the International Bill of Human Rights, which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations (UN) General Assembly in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted 1966) and the first Optional Protocol to the ICCPR (adopted 1966). The International Bill of Human Rights is an authoritative statement of the principal human rights obligations of all UN Member States under the UN AI Index: ASA 27/01/91 Amnesty International November 1991

Charter. The ICCPR and the ICESCR have been ratified by more than 95 nations with a wide variety of legal systems. The Covenants and the first Optional Protocol presently apply to Macao by virtue of their ratification by the Government of Portugal and have the status of domestic law under the Portuguese Constitution. In addition, Portugal has ratified the second Optional Protocol to the ICCPR, thus pledging to abolish the death penalty in Macao during peace time.

Amnesty International's main concerns are:

- (1) that all people in the Macao region continue to be protected by the provisions of the ICCPR and its two Optional Protocols, the ICESCR and other human rights treaties which currently apply to Macao;
- (2) that all people in Macao be afforded effective guarantees against torture and other cruel, inhuman or degrading treatment or punishment;
- (3) that the right to life be guaranteed to all people in Macao;
- (4) that all people in Macao be guaranteed the right to a fair trial;
- (5) that all people in Macao be afforded those rights which will safeguard them against being detained as prisoners of conscience; and
- (6) that during any declared state of emergency all people in Macao retain all rights which are non-derogable under the ICCPR, including the right to be free from torture and cruel, inhuman or degrading treatment or punishment, the right to be free from arbitrary deprivation of life, and the right to freedom of thought, conscience and religion.

The above concerns are not adequately addressed in the Draft Basic Law. Amnesty International is also concerned that one particular provision of the Draft Basic Law should be amended in order not to place a broad limitation on the exercise of human rights in Macao. Amnesty International's recommendations for amendments to the Draft Basic Law of Macao appear in detail in the following text and are summarized in Part 5 of this memorandum.

2. Background

An organic statute of Portugal enacted in 1976 granted Macao administrative, economic, financial, and legislative autonomy from Portugal. The legal system was excepted from the grant of autonomy. Consequently, the judicial system of Macao is administered directly from Portugal, independent of the territorial government. The President of the Republic of Portugal retained powers to deal with "matters relating to foreign relations, international agreements or conventions, and the powers to represent Macao".¹

2.1 The applicability of the human rights covenants to Macao

Portugal has ratified the ICCPR and its two Optional Protocols; the ICESCR; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture); the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention); and 65 of the 171 treaties of the International Labour Organization. The first Optional Protocol to the ICCPR and the European Convention both provide a mechanism for considering individual complaints of human rights violations. By ratifying the second Optional Protocol to the ICCPR Portugal has further pledged to abolish the death penalty in peace time. Under Article 8 of the Portuguese Constitution, these treaties assumed the status of Portuguese domestic law upon ratification and publication.²

The Portuguese Government has taken an ambiguous position before the Human Rights Committee regarding the applicability to Macao of the international treaties it has ratified. It has argued that the Covenants to which Portugal is a party are not in force in Macao because no request had been made to publish them in the official Macao Government Gazette, as required by the organic statute governing Macao. However, a representative of Portugal told the Human Rights Committee that, as in other territories administered by Portugal, the people in Macao "[enjoy] the exercise of fundamental rights and freedoms and access to the bodies that [are] responsible to protect such rights and freedoms." Indeed, the Human Rights Committee has stated that the ICCPR applies to Macao because Article 2 of that Covenant provides that a State Party will ensure its protections to all individuals "within its territory and subject to its jurisdiction".

Amnesty International considers that, under international law and despite statements to the contrary by Portuguese officials, the people of Macao currently enjoy the protection provided by the ICCPR, and its second Optional Protocol, as well as that provided by other international treaties to which Portugal is a party.

There does not appear to be any requirement in Portuguese law making the applicability of international conventions to Macao subject to their publication in the Macao Government Gazette. International commercial agreements signed by Portugal and affecting Macao, for example, are routinely considered to apply to the territory independently of their publication in the Macao Government Gazette. Nevertheless, the Portuguese Government's position that the non-publication of the ICCPR in the Macao Government Gazette precludes its application to Macao maintains a degree of ambiguity.

¹See Law No. 1/76 of the Republic of Portugal, enacted on February 10, 1976 (Article 3).

²Article 8 provides that:

"1. The rules and principles of general or ordinary international law shall be an integral part of Portuguese law.

2. Rules derived from international conventions duly ratified or approved shall, following their official publication, apply in municipal law in so far as they are internationally binding on the Portuguese state."

AI Index: ASA 27/01/91 Amnesty International November 1991

Amnesty International recommends that the Macao authorities publish in the Macao Government Gazette the ICCPR and the other international human rights instruments to which Portugal is a party, in order to remove any ambiguity as to their current application in Macao.

By taking this action the Macao authorities would ensure that the ICCPR and other international conventions on human rights currently in force in Macao would apply unequivocally in two distinct and complementary ways: as part of the domestic law of Macao; and by enshrining in Macao law the right of the people of Macao to complain about violations of human rights under the relevant international conventions.

2.2 Procedures for international monitoring and reporting of human rights violations

Under Article 40 of the ICCPR, every State Party is obliged to submit periodic "reports on the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights". As required by Article 40, reports by States Parties are examined by the Human Rights Committee.

The Government of the Republic of Portugal has made a declaration under Article 41 of the ICCPR accepting the competence of the Human Rights Committee to receive and consider communications by one State Party to the effect that another State Party is not fulfilling its obligations under the ICCPR. Portugal has also signed and ratified the first Optional Protocol to the ICCPR which enables the Human Rights Committee to consider communications from private individuals who claim to be the victims of violations of rights set forth in the Covenant.

Although Portugal has not submitted a separate report on Macao to the Human Rights Committee, the applicability of the ICCPR to Macao and the necessity for Portugal to report on Macao have been repeatedly stressed by the members of the Committee in their dialogue with the representatives of Portugal.³

Because of the current state of the Draft Basic Law and because the People's Republic of China has not ratified the ICCPR, the safeguards provided by the reporting obligations of Portugal under the ICCPR and the individual complaint procedures may be unavailable to Macao residents after 20 December 1999.

³The record of the meeting of the Human Rights Committee on 1 November 1989 shows that at the close of consideration of the second periodic report of Portugal under Article 40 of the ICCPR, the Chairman of the Human Rights Committee expressed the following: "Turning to the problem of Macao, he had no doubt that the provisions of the Covenant were applicable in that territory... As to whether a special report should be submitted on the subject, it was clear from article 40 of the Covenant that the periodic reports of Portugal should deal also with the situation in Macao, either in a separate annex, or in the report properly speaking." U.N. Doc. CCPR/C/SR.937, 6 December 1989.

3. Amnesty International's recommendations on the continued application of the ICCPR in the Macao Special Administrative Region

As outlined above, the residents of Macao currently enjoy the protections provided by the ICCPR and its two Optional Protocols. The PRC has neither signed nor ratified either of the International Covenants nor the two Optional Protocols to the ICCPR. However, it has ratified the Convention against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, as well as 17 of the 171 treaties of the International Labour Organization.

In the Joint Declaration on the Question of Macao issued in 1987 by the Governments of China and Portugal, the PRC declared its basic policies toward Macao, which include:

"(2) ... The Macao Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication.

"(5) ... The laws currently in force in Macao will remain basically unchanged. All rights and freedoms of the inhabitants and other persons in Macao, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike, of choice of occupation, of academic research, of religion and belief, of communication and the ownership of property will be ensured by law in the Macao Special Administrative Region ..."

The Joint Declaration states in Annex I, "International agreements to which the PRC is not a party but which are implemented in Macao may remain implemented in the Macao Special Administrative Region". The Draft Basic Law stipulates that "the laws currently in force in Macao shall remain basically unchanged".

There is no specific provision in the Draft Basic Law for the continued application of the ICCPR and its two Optional Protocols. For the Covenant to remain in force, all of its interdependent provisions must remain in force, including both the specific rights it protects *and* the mandatory monitoring procedures it provides.

The Draft Basic Law is unclear as to how the status of the ICCPR will "remain basically unchanged" in Macao after 1999. The Draft Basic Law is silent on both the continued application of the Covenant's fundamental human rights protections and the continuation of monitoring and reporting procedures required under the Covenant. These two inseparable aspects are discussed further below.

In order for the ICCPR and the other international human rights instruments currently applicable to Macao to apply after 1999, two things are necessary: that these instruments be effectively recognized now as part of Macao's domestic law; and that international monitoring procedures and monitoring bodies covering Macao before 1999 continue to do so after the Macao Basic Law enters into effect. Both of these criteria must be fulfilled to ensure that the same level of human rights safeguards as currently guaranteed to the people of Macao is to be maintained under the Basic Law.

In view of these criteria Amnesty International recommends that the ICCPR be incorporated into Macao's domestic law by explicit reference to it in the Basic Law. The Draft Basic Law should be revised to reaffirm that the substantive and procedural commitments contained in the ICCPR relating to the human rights of people in Macao are a part of the law of the Macao SAR and will be implemented through all governmental entities of the Macao SAR, including the courts.

While Amnesty International considers it important that the provisions of the Covenants be fully incorporated into domestic legislation or constitutions, such incorporation is not a substitute for the mandatory system of international supervision set forth in the Covenants. A number of states have incorporated provisions of the Universal Declaration of Human Rights and the Covenants in their constitutions and other laws, but this incorporation in itself does not guarantee adequate protection of those rights.

The Covenants and other human rights treaties ratified by Portugal should already be considered to be a part of the law of Macao. Nonetheless, it would be desirable to reconfirm that status by specific reference to the ICCPR and other international human rights treaties in the Draft Basic Law. Such specific language would partly fulfil the promise of the Joint Declaration that "the laws currently in force in Macao shall remain basically unchanged".

Article 40 of the Draft Basic Law of Macao should be amended to ensure the continued applicability to Macao of the international human rights treaties which currently apply. Article 40 of the Draft Basic Law states:

"The provisions of international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region."

Amnesty International recommends that Article 40 of the Draft Basic Law be amended to include specifically the provisions of the ICCPR and all other international conventions concerning human rights currently applicable in Macao.

Ratification of the ICCPR and the ICESCR by the Chinese Government would ensure that the Covenants apply to all citizens of the PRC including, eventually, residents of Macao. This measure would constitute a major advance in the protection of human rights in the whole of China. If the PRC ratified the covenants, they would automatically continue to apply to Macao.

Amnesty International recommends that the PRC (including the Macao Special Administrative Region) ratify the Covenants and comply with the reporting procedures provided by each Covenant. In this case, after 1999, each of the periodic reports which the PRC would submit to the Human Rights Committee would include a separate section about the Macao SAR presented by the Macao authorities.

In order to ensure that international human rights treaties ratified by the PRC automatically apply to Macao, Article 138 of the Draft Basic Law should be amended. As currently drafted, Article 138 reads:

The application to the Macao [SAR] of international agreements to which the [PRC] is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region and after seeking the views of the government of the Region..."

However, human rights treaties necessarily protect fundamental rights of all individuals, within a country's territory and subject to its jurisdiction, without discrimination. No decision by the Central People's Government in Beijing as to the Covenants' applicability to Macao should be permitted as a precondition to the Covenants applying.

Amnesty International recommends that international human rights treaties be formally excepted from the scope of Article 138 of the Draft Basic Law.

Amending Article 138 as recommended by Amnesty International would also ensure that the Convention against Torture, which currently applies to Macao by virtue of Portugal's ratification, will continue to apply by virtue of China's ratification (see below, Section 4.1).

China's ratification of the ICCPR, however, would not be a comprehensive guarantee of the continuation of all of the rights previously enjoyed by the people of Macao if the PRC failed also to ratify the two Optional Protocols to the ICCPR. Alternatively, the PRC might provide for the Macao SAR to become a party to the two Optional Protocols in its own right. In any case, whether or not China ratifies the ICCPR and the ICESCR, these and other human rights instruments applicable to Macao should remain in force after 1999 as an expression of the most fundamental international human rights guarantees.

Amnesty International recommends that the Macao Draft Basic Law should be amended to state clearly how Macao will be bound by the Covenants, including the obligation to report to monitoring bodies. One solution could be for the Macao SAR to be permitted by the Government of the PRC to become a party to the two International Covenants and the two Optional Protocols in its own right. The PRC has agreed in Annex 1 to the Joint Declaration to permit "Macao, China" to ratify other relevant international agreements, even if the PRC has not become a party to those agreements.⁴ This approach would permit the residents of Macao to enjoy the continued protection of their human rights provided by the two Covenants and their two Optional Protocols.

⁴The Joint Declaration states, "International agreements to which the People's Republic of China is not a party but which are implemented in Macao may remain implemented in the Macao Special Administrative Region. The Central People's Government shall, according to the circumstances and the needs, authorize or assist the Macao Special Administrative Region Government to make appropriate arrangements for the application to the Macao Special Administrative Region of other relevant international agreements. . . ."

4. Human rights and the Draft Basic Law

There are several fundamental human rights guarantees which Amnesty International considers should be strengthened or which are not found in the Draft Basic Law. They include the prohibition of torture and other cruel, inhuman or degrading treatment or punishment; the right to freedom from arbitrary deprivation of life; the right to prompt and fair trials; the right to freedom of expression and association; and the right to be free from arbitrary arrest or detention.

4.1 Torture and other cruel, inhuman or degrading treatment or punishment

China and Portugal have both ratified the Convention against Torture. In ratifying this Convention the governments have pledged to "take all effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (Article 2). Every State Party to the Convention against Torture also pledges to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment which do not amount to acts of torture ..." (Article 16).

China's and Portugal's ratification of the Convention against Torture differ in one crucial respect: whereas Portugal has declared under Article 22 of the Convention that it recognizes the competence of the Committee against Torture to consider individual complaints of violations of the Convention, China has made a reservation under Article 28 of the same Convention. As a result, it does not recognize the competence of the Committee against Torture to examine reliable information which appears to indicate that torture is being systematically practised and to undertake a confidential enquiry if warranted.

In these circumstances the residents of Macao will lose in 1999 the right they currently enjoy to make individual complaints to the Committee against Torture under Article 22 of the Convention and the benefit of the Committee against Torture being allowed to formally enquire into the implementation of the Convention in Macao.

To maintain the level of human rights protection currently available in Macao under the Convention against Torture, Amnesty International recommends that the PRC cancel the reservation it entered under Article 28 of the Convention and declare under Article 22 that it recognizes the competence of the Committee against Torture to consider individual complaints of violations of the Convention.

Until such time as the PRC cancels its reservation and makes the declaration as recommended above, Amnesty International further recommends that the Draft Basic Law be amended to state specifically that people in Macao have the right to make individual complaints to the Committee against Torture.

Amnesty International welcomes the inclusion in Draft Basic Law Article 28 of the explicit provision that "torture or inhuman treatment towards any resident shall be prohibited". Although Article 28 of the Draft Basic Law provides a basic right to freedom from torture and inhuman treatment, its wording is less comprehensive than that of Article 7 of the ICCPR which states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

The Human Rights Committee has made the following comment on Article 7 of the ICCPR:

"The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to torture or similar practices. Because such cases nevertheless occur, it follows from Article 7, read together with Article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers, and family members access to the detainees, provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives, provisions making confessions or other evidence obtained through torture or other treatment contrary to Article 7 inadmissible in court, and measures of training and instruction of law enforcement officials not to apply such treatment." (Human Rights Committee, General Comment on the ICCPR, 7(16))

Amnesty International recommends that Article 28 of the Draft Basic Law be amended to conform to the language of international instruments such as the ICCPR and the Convention against Torture, which prohibit not only inhuman treatment but also cruel, inhuman or degrading treatment as well as punishment.

In Amnesty International's experience, torture usually takes place in particular conditions, when detainees are held incommunicado or in secret, without access to relatives, lawyers or doctors, often without charge and without being brought before a judicial authority such as a magistrate or judge. It is, therefore, clearly necessary not only that torture be prohibited, but also that safeguards be introduced to prevent torture and to demonstrate publicly that torture must not take place.

Articles 2 and 16 of the Convention against Torture, ratified by both China and Portugal, oblige State Parties to the Convention to adopt laws to prevent torture and cruel, inhuman or degrading treatment or punishment. Articles 28 and 36 of the Draft Basic Law contain guarantees which may help to prevent torture during detention. Article 28 states, "... To cope with arbitrary arrest or unlawful detention or imprisonment, residents have the right to apply to the court for the issuance of a writ of habeas corpus to prevent the arbitrary use of power ..." Article 36 states that "... Macao residents shall have the right to resort to law, to have access to the courts, and to get help from lawyers for protection of their lawful rights and interests, and to obtain judicial remedies ..."

Amnesty International recommends that Articles 28 and 36 of the Draft Basic Law be strengthened by stating that relatives and legal counsel should be informed of the arrest and whereabouts of detainees and that they and medical personnel should have prompt and regular access to detainees. Amnesty International recommends that, to prevent human rights violations from being committed while suspects are being detained for investigation, provisions of the Draft Basic Law should ensure that all detainees are brought before a judicial authority promptly after being taken into custody; that this judicial authority should be responsible for ensuring that suspects are not ill-treated while in custody; and that acts of torture and ill-treatment should also be made criminally punishable by law.

Amnesty International also recommends that Article 138 of the Draft Basic Law be amended to ensure that the Convention against Torture continues to apply to Macao without the precondition of a decision to that effect by the Central People's Government. (See above, Part Three)

4.2 Right to freedom from the imposition of the death penalty

The death penalty was abolished by Portugal in 1867 and is currently unconstitutional in Macao by virtue of Article 25 of the Portuguese Constitution, which states that human life is inviolable and that under no circumstances should the death penalty be imposed. Portugal has also ratified the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, which states in Article 1, "No one within the jurisdiction of a State Party to the present Protocol shall be executed" (the Protocol provides for possible exceptions for crimes committed in war time). The Legislative Council of Macao has been granted the authority to create categories of criminal punishment only up to a maximum penalty of eight years' imprisonment.⁵

In the PRC, however, the death sentence is widely imposed and widely carried out, after trials which fall far short of international standards for fairness. Amnesty International, on the basis of public media and official reports, has recorded more than 1,300 death sentences in China in the first ten months of 1991 and believes the actual number of death sentences -- which is reportedly considered a "state secret"-- to be much higher, between 5,000 and 20,000 according to some sources.

Extensive research has failed to provide any conclusive evidence to suggest that the death penalty is a deterrent to crime. Indeed, a UN study prepared for the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1980 found that "despite much more research effort mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy". In practice, the death penalty is an arbitrary punishment. It is irrevocable and always carries the risk that the innocent may be put to death. It is, in Amnesty International's view, not only a violation of the right to life but also the ultimate form of cruel, inhuman and degrading punishment. Amnesty International opposes the death penalty in all circumstances.

The Draft Basic Law does not explicitly deal with the death penalty. Indeed, the Draft Basic Law does not even provide for any of the *procedural* guarantees against deprivation of life contained in Article 6 of the ICCPR. In light of the current constitutional prohibition of the death penalty in Macao, the silence of Chapter III of the Draft Basic Law (entitled "Fundamental Rights and Duties of the Residents") on this issue significantly weakens the fundamental rights of the people of Macao.

Article 6 of the ICCPR states that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ... and not contrary to the provisions of the present Covenant ..." The relevant "provisions of the present Covenant" include Article 14, which details important procedural rights in "the determination of any criminal charge." For example, "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... Everyone charged with a criminal offence shall have the right be presumed innocent until proved guilty according to law ... In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees ... not to be compelled to testify against himself or to confess guilt ..." Article 6 requires that anyone "sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases". Article 6 further provides, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Many of these safeguards are not currently provided in the PRC where legal procedures, including trials which impose the death penalty, fall far short of international standards for fair trial.

Amnesty International recommends that the Basic Law be revised specifically to protect the right to

⁵Law No. 1/76, 10 February 1976, Article 31.

Amnesty International November 1991AI Index: ASA 27/01/91

life by reaffirming the present prohibition on the use of the death penalty with regard to offenses committed in Macao. The Draft Basic Law would also be considerably strengthened by the inclusion of language from the Second Optional Protocol to the ICCPR which states, "No one within the jurisdiction of a State Party to the present Protocol shall be executed."

Amnesty International recommends further that the procedural safeguards detailed in Articles 6 and 14 of the ICCPR be incorporated in the Draft Basic Law.

4.3 Right to a fair trial

4.3.1 The independence of the judiciary

The judicial system of Macao is presently administered directly from Portugal under the Portuguese Civil Code.⁶ The Sino-Portuguese Joint Declaration on the Question of Macao stipulated that "after the establishment of the Macao Special Administrative Region, the laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, save for whatever therein may contravene the Basic Law or subject to any amendment by the Macao Special Administrative Region legislature."

The section of the Draft Basic Law which outlines the structure for the judicial system of Macao after 20 December 1999 (Articles 84 to 96) provides for courts of law to "exercise judicial power independently" and "free from any interference" (Article 85), and a Procuratorate which shall "independently" perform the prosecuting function "free from any interference" (Article 92). These statements of principle are complemented by provisions in Articles 89 to 91 which provide guidelines on the implementation of these principles. Articles 89 to 91 and Articles 94 and 95 afford some protection for the independence of the judiciary in regard to appointment, tenure and removal. Articles 89 to 91 cover such issues as the removal of judges, their selection and qualifications. In this respect, these articles reflect some of the provisions of the UN Basic Principles on the Independence of the Judiciary.⁷

However, the Draft Basic Law fails to guarantee conditions of service and tenure of judges that are in conformity with the UN Basic Principles. For example, Basic Principles 11 and 12 stipulate that:

"11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

"12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

Amnesty International recommends that provisions reinforcing the independence of the judiciary be incorporated in the Draft Basic Law, in particular, a provision making the terms of office and conditions of service of judges subject to legislation and a provision granting guaranteed tenure to judges until a mandatory retirement age or the expiry of their term of office.

4.3.2 Fair trial procedures

There are no specific provisions which guarantee that the rights currently enjoyed by Macao residents and

⁶Organic Statute of Macao, Law No. 1/76, February 10, 1976, Article 3(1).

⁷The Basic Principles on the Independence of the Judiciary were adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the UN General Assembly in 1985.

AI Index: ASA 27/01/91 Amnesty International November 1991

the principles currently applied in the judicial system administered by Portugal will be maintained, except that Article 87 provides that "former courts of criminal prosecution shall be maintained". Articles 86 and 92 stipulate only that "the structure, powers and functions as well as the operation" of the courts and the procuratorate "shall be prescribed by law".

Chapter Three of the Draft Basic Law which concerns Macao residents' fundamental rights and duties does contain a number of provisions directed toward the protection of the right to fair trial:

Article 28 of the Draft Basic Law states,

"The freedom of the person of Macao residents shall be inviolable... No Macao resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. To cope with arbitrary arrest or imprisonment, residents have the right to apply to the court for the issuance of a writ of habeas corpus to prevent the arbitrary use of power. Unlawful search of the body of any resident, deprivation or restriction of the freedom of the person will be prohibited. The torture of any resident or inhuman treatment towards the resident will be prohibited".

Article 29 of the Draft Basic Law also provides,

"Macao residents shall not be punished by law, except for those whose acts are prescribed as a crime in accordance with the provisions of the law and shall be punished... When they are charged with criminal offences, Macao residents shall enjoy the right to be tried by the court as early as possible and, before convicted, shall be presumed innocent".

Article 36 of the Draft Basic Law further provides,

"Macao residents shall have the right to resort to law, to have access to the courts, and to get help from lawyers for protection of their lawful rights and interests, and to obtain judicial remedies... Macao residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities or their personnel".

In addition, Article 41 of the Draft Basic Law provides that "Macao residents shall enjoy the other rights and freedoms safeguarded by the laws of the Macao SAR".

Hence, it appears that the Draft Basic Law contains a significant number of provisions directed toward the protection of the right to a fair trial in all cases, including those cases which might involve political prisoners. However, the ICCPR (Article 14) provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This very fundamental provision would provide minimum standards for the Legislative Council of Macao when the "structure, powers, functions, and operations" of the courts and the Procuratorate are "prescribed by law", as anticipated by Articles 86 and 92 of the Draft Basic Law. The provision of such standards within the Draft Basic Law would strengthen, support, and reinforce the more detailed fair trial provisions found in the Draft Basic Law's section on residents' fundamental rights and duties. It would also help establish fairness as the overriding principle against which all trial procedures may be measured, particularly when the more specific provisions of the law are silent on a particular aspect of a trial or are in themselves inadequate to ensure the fundamental fairness of a trial.

The ICCPR also states that all trials should be public, with any exceptions to this principle limited and clearly defined. It also provides the following minimum guarantees in relation to the determination of a criminal charge against anyone:

Amnesty International November 1991AI Index: ASA 27/01/91

- (i) to be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them;
- (ii) to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing (it is important that the right to legal assistance should be available both during the preparation of the defence and during hearings before judicial authorities);
- (iii) to examine or to have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- (iv) not to be compelled to testify against themselves or to confess guilt;
- (v) to have their conviction and sentence reviewed by a higher tribunal;
- (vi) not to be held guilty of any criminal offence on account of acts which did not constitute a criminal offence at the time when they were committed.

The ICCPR also contains specific provisions relevant to fair trials for criminal defendants, such as a guarantee of the free assistance of an interpreter if the defendant cannot understand the language of the court, and the right to free legal assistance. The Draft Basic Law in Article 36 provides only the right to "get help from lawyers"; it does not assure that the government will provide legal assistance or interpretation to criminal defendants.

Amnesty International recommends that the safeguards of the right to a fair trial in the Draft Basic Law be strengthened by incorporating all the guarantees recognized in Articles 9, 10, 14 and 15 of the ICCPR, and that the Draft Basic Law state clearly that the fair trial provisions of the ICCPR shall form a part of the law of the Macao SAR.

4.4 Protection against the imprisonment of prisoners of conscience

The Draft Basic Law provides some protection for the rights of those persons who might otherwise be detained as prisoners of conscience. The Draft Basic Law, however, still poses significant risks to human rights defenders, journalists, religious teachers, politically active individuals, the leaders of minorities, and others who might become prisoners of conscience.

Article 25 of the Draft Basic Law contains a significant protection for human rights in stating, "All Macao residents shall be equal before the law and shall be free from discrimination, irrespective of their nationality, descent, sex, race, language, religion, political or ideological belief, educational level, economic status or social conditions". Article 26 guarantees the right to vote and to stand for election for all permanent residents of Macao over the age of 21. Article 27 provides for "freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions and to strike". Article 32 states that, "The freedom and privacy of communication of Macao residents shall be protected by law. No department or individual may, on any grounds, infringe upon the residents' freedom and privacy of communication except that the relevant authorities may inspect communication in accordance with the provisions of the law to meet the needs of public security or of investigation of criminal offences". Article 34 states that "Macao residents shall have freedom of conscience. Macao residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public".

Despite those important protections, there are several provisions in the Draft Basic Law which give cause for concern. For example, while Article 27 protects freedom of speech, press and publication, it does not provide as much protection for individual rights as does Article 19 of the ICCPR. The latter states, "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..."

As mentioned above, Article 34 of the Draft Basic Law provides for "freedom of conscience ... freedom of religious belief and the freedom to preach and to conduct and participate in religious activities in public." Article 18 of the ICCPR provides more ample protection by defining "the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". Hence, Article 18 of the ICCPR establishes a more explicit human rights foundation for individual religious believers, teachers, and others who manifest their religious beliefs and covers a broader range of activities.

Article 26 of the Draft Basic Law provides another illustration of the contrast between the protections provided under the Draft Basic Law and those rights provided by the Covenant. Article 26 of the Draft Basic Law guarantees the right to vote and to be elected for all permanent residents of Macao over the age of 21. Article 25 of the ICCPR, however, affords greater protection for those persons who wish to "take part in the conduct of public affairs, directly or through freely chosen representatives". Hence, the Draft Basic Law protects only the act of voting while the Covenant protects direct participation in public affairs. The lack of an explicit protection for persons who wish to engage in a broader range of legitimate political activity represents an important shortcoming in the guarantees of freedom of expression in the Draft Basic Law.

Although Article 42 of the Draft Basic Law states that "The interests of residents of Portuguese descent in Macao shall be protected by the Macao SAR in accordance with the law, and their customs and cultural traditions shall be respected", there is no provision in the Draft Basic Law equivalent to the broader protection for minorities found in Article 27 of the ICCPR. The Covenant's Article 27 provides,

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Amnesty International recommends that Article 42 of the Draft Basic Law be amended to protect explicitly the rights of members of the Portuguese minority and of all other ethnic, religious or linguistic minorities in Macao in conformity with the provisions of the ICCPR.

The most troubling provision of the Draft Basic Law with regard to protection against the detention of prisoners of conscience is Article 23. The article reads:

"The Macao Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

The offences listed (treason, secession, sedition and theft of state secrets) may be legitimate criminal offences if legislation ensures that they are clearly defined and limited to acts that would be considered recognizable criminal offences under international standards. However, the sweeping and undefined use

Amnesty International November 1991AI Index: ASA 27/01/91

of terms such as treason, secession and sedition, as currently practised in the PRC, raises the concern that people in Macao could be prosecuted for exercising rights safeguarded under international human rights standards.

In particular, the enactment of laws to prohibit "subversion against the Central People's Government" could, on the basis of current practice in the PRC, be used to imprison political or religious advocates and members of ethnic minorities, as well as others who peacefully exercise their right to freedom of expression or association as guaranteed by the ICCPR. This concern is heightened by the fact that "subversion against the Central People's Government" is not defined (Article 90) in the Draft Basic Law. The Criminal Law of the PRC includes a section on "counter-revolutionary crimes", which are defined as "all acts endangering the PRC committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system."

Amnesty International knows of dozens of Chinese prisoners of conscience who have been sentenced to imprisonment in China under "counter-revolutionary" charges. Some of the offences in Articles 91-102 of the Criminal Law of the PRC may lead to death sentences and execution.

Furthermore, it is unclear whether the courts of the Macao SAR would have jurisdiction to try such cases or whether they would be referred to the Supreme People's Court of the PRC. Article 17 of the Criminal Procedure Law of the PRC provides that the Supreme People's Court shall have jurisdiction at first instance over cases which are of national significance.

The second part of Article 23 of the Draft Basic Law which calls for a complete prohibition of both political activities by foreign groups in Macao and ties between Macao organizations and foreign political organizations expressly violates the guarantees for freedom of expression, assembly, and association found in Articles 19, 21 and 22 of the ICCPR and contradicts the guarantee of freedom of expression found in Article 32 of the Draft Basic Law. The vague terms of this provision, "political organizations", "political activities", and "establishing ties", would allow the legislature of the Macao SAR to restrict and criminalize the most basic of political activities.

The most effective way of guaranteeing the continued protection of the rights of Macao residents who might risk detention as prisoners of conscience, particularly under Article 23 of the Draft Basic Law, would be for the ICCPR to be incorporated into the law of the Macao Special Administrative Region.

Amnesty International recommends that the provisions of the Draft Basic Law which cover the exercise of human rights be amended in conformity with the relevant provisions of the ICCPR. In particular Articles 26, 27, 34, and 42 of the Draft Basic Law should be made consistent with Articles 18, 19, 25 and 27 of the ICCPR. The sweeping limitations and ill-defined terms contained in Article 23 of Draft Basic Law should be amended to ensure that this article does not violate Articles 19, 21 and 22 of the ICCPR.

4.5 Limitations clause

Article 43 of the Draft Basic Law states,

"The rights and freedoms enjoyed by Macao residents shall not be restricted unless as prescribed by law. Such restrictions as prescribed by law shall be limited to those necessary for safeguarding the state security, social order, public sanitation and morality as well as others' rights and freedoms".

Such a broad limitations clause raises the risk that a future legislative measure could undermine some or

all of the rights prescribed in the other provisions of the Draft Basic Law, including those which, according to the ICCPR, may *never* be curtailed even in situations of declared public emergency.

Although limitations clauses must be construed in a narrow fashion so as to avoid undermining the rights which are granted in the same treaty or legislative instrument, the extremely broad formulation of Article 43 presents an unusually large risk of abuse.

The ICCPR provides that some fundamental rights cannot be the subject of any limitation or derogation, even "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4). All other rights under the Covenant are subject only to carefully drafted and internationally accepted limitations which are tailored to each specific right.

The human rights guarantees of the Draft Basic Law may be substantially undermined unless Article 43 is brought into conformity with the minimum international standards found in Article 4 and other provisions of the ICCPR which specify the conditions, if any, under which each right may be limited and, in addition, those rights from which there can be no derogation.

Those concerns are heightened by the provisions in Article 143 of the Draft Basic Law which gives the Standing Committee of the National People's Congress of the PRC power of interpretation of the Basic Law. Although the courts of the Macao SAR may interpret the provisions of the Basic Law in adjudicating cases before them, Article 143 requires the courts of the Macao SAR to seek an interpretation from the Standing Committee of the National People's Congress of provisions "concerning affairs which are the responsibility of the Central People's Government ..." Article 145 states, "laws previously in force in Macao shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law". Article 17 of the Draft Basic Law provides that the Standing Committee of the National People's Congress will have veto power if it "considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities ..."

If "affairs within the responsibility of the Central People's Government" is interpreted expansively, the combination of those provisions would allow for the Standing Committee of the Central People's Government to retain a right of interpretation and veto power over all legislation of the Macao SAR. Those provisions could pose an additional risk of undercutting the guarantees of fundamental rights and freedoms found elsewhere in the Draft Basic Law.

Amnesty International recommends that Article 43 of the Draft Basic Law be amended to incorporate the relevant provisions of Article 4 of the ICCPR in order to guarantee that the right to life, the right to be protected from torture and ill-treatment, the non-retroactivity of laws and the right to freedom of thought, conscience and religion may *never* be curtailed in any circumstances whatsoever.

In revising the Draft Basic Law for Macao, the Drafting Committee may wish to benefit from the experience of the drafters of the Basic Law for Hong Kong, which will also be a Special Administrative Region of the PRC. The first Draft Basic Law for Hong Kong published for solicitation of opinions in April 1988 contained a general limitations clause nearly identical to Article 43 of the Macao Draft Basic Law. During the period for solicitation of opinions concerning the Draft Basic Law for Hong Kong, Amnesty International and many Hong Kong residents raised similar concerns in regard to the limitations clause as are raised in this memorandum. Amnesty International was pleased to note that the Basic Law Drafting Committee for Hong Kong removed the separate limitations clause and provided, instead, that rights and freedoms could only be restricted to the extent permitted by the ICCPR.

Amnesty International November 1991AI Index: ASA 27/01/91

4.6 Provisions concerning a state of emergency

Article 18 of the Draft Basic Law states that if the National People's Congress Standing Committee decides that the Macao SAR is in a state of emergency due to a declared state of war or "by reason of turmoil within the Macao SAR which endangers national unity or security and is beyond the control of the government of the region", the central government in Beijing may issue an order "applying the relevant national laws in the region".

Amnesty International is concerned that the sweeping nature of this article may be used to suspend many of the fundamental rights and freedoms otherwise guaranteed by the Draft Basic Law, to imprison people who peacefully exercise these rights, or to apply the death penalty to a broad range of offences as is currently provided by the laws of the PRC. Unless specific protections are introduced to protect against the death penalty in Macao, Article 18 poses a risk of its introduction, especially in situations in which an emergency is declared by the PRC authorities.

As discussed above, Article 4 of the ICCPR makes clear that none of the obligations it imposes may be derogated from except "in time of a public emergency which threatens the life of the nation and the existence of which is officially proclaimed". It also provides that some fundamental rights cannot be subject to any limitation or derogation even during such an emergency. Those non-derogable rights include the rights to be free from torture and cruel, inhuman or degrading treatment or punishment, the right to be free from arbitrary deprivation of the right to life, and the right to freedom of thought, conscience and religion. The Portuguese Constitution also safeguards against the limitation of fundamental rights during a state of siege or a state of emergency. The residents of Macao currently enjoy protection against the suspension of their rights under Article 4 of the ICCPR and the Portuguese Constitution.

Amnesty International recommends that Article 18 of the Draft Basic Law be revised make clear that any legislation applied in the Macao SAR during a state of emergency must be consistent with the provisions of the ICCPR.

5. Summary of Amnesty International's Recommendations

Concerning the Current Applicability of Human Rights Instruments to Macao:

Amnesty International recommends that the Macao authorities publish in the Macao Government Gazette the ICCPR and the other international human rights instruments to which Portugal is a party, in order to remove any ambiguity as to their current applicability to Macao.

Concerning the Incorporation of the ICCPR in the Domestic Law of Macao after 1999:

Amnesty International recommends that the ICCPR be incorporated into Macao's domestic law by explicit reference to it in the Basic Law. The Draft Basic Law should be revised to reaffirm that the substantive and procedural commitments contained in the ICCPR relating to the human rights of people in Macao are a part of the law of the Macao SAR and will be implemented through all governmental entities of the Macao SAR including the courts.

Amnesty International also recommends that Article 40 of the Draft Basic Law be amended to include, specifically, the provisions of the ICCPR and all other international conventions concerning human rights currently applicable to Macao.

Concerning the Continuing Applicability of the Human Rights Instruments after 1999:

Amnesty International recommends that the PRC (including the Macao Special Administrative Region) ratify the Covenants and comply with the reporting procedures provided by each Covenant. In this case, after 1999, each of the periodic reports which the PRC would submit to the Human Rights Committee would include a separate section about the Macao SAR presented by the Macao authorities.

Amnesty International also recommends that international human rights treaties be formally excepted from the scope of Article 138 of the Draft Basic Law: human rights treaties necessarily protect fundamental rights of all citizens without discrimination.

Amnesty International recommends that the Draft Basic Law be amended to state clearly how Macao will be bound by the Covenants, including the obligation to report to monitoring bodies.

Concerning Protection Under the Convention Against Torture:

To maintain the level of human rights protection currently available in Macao under the Convention against Torture, Amnesty International recommends that the PRC cancel the reservation it entered under Article 28 of the Convention and declare under Article 22 that it recognizes the competence of the Committee against Torture to consider individual complaints of violations of the Convention.

Until such time as the PRC cancels its reservation and makes the declaration as recommended above, Amnesty International further recommends that the Draft Basic Law be amended to state specifically that people in Macao have the right to make individual complaints to the Committee against Torture.

Amnesty International also recommends that Article 28 of the Draft Basic Law be amended to conform to the language of international instruments such as the ICCPR and the Convention against Torture, which prohibit not only inhuman treatment but also cruel, inhuman or degrading treatment as well as punishment.

Amnesty International also recommends that Article 138 of the Draft Basic Law be amended to ensure that the Convention against Torture continues to apply to Macao without the precondition of a decision to that effect by the Central People's Government.

Concerning the Protection of the Right to Life and the Prohibition of the Death Penalty:

Amnesty International recommends that the Draft Basic Law be revised specifically to protect the right to life by reaffirming the present prohibition on the use of the death penalty with regard to offences committed in Macao. The Draft Basic Law would also be considerably strengthened by the inclusion of language from the Second Optional Protocol to the ICCPR which states, "No one within the jurisdiction of a State Party to the present Protocol shall be executed."

Amnesty International recommends further that the procedural safeguards detailed in Articles 6 and 14 of the ICCPR be incorporated into the Draft Basic Law.

Concerning the Independence of the Judiciary:

Amnesty International recommends that provisions reinforcing the independence of the judiciary be incorporated in the Draft Basic Law, in particular, a provision making the terms of office and conditions of service of judges subject to legislation and a provision granting guaranteed tenure to judges until a mandatory retirement age or the expiry of their term of office.

Concerning Guarantees for Fair Trial:

Amnesty International recommends that the safeguards of the right to a fair trial in the Draft Basic Law be strengthened by incorporating all the guarantees recognized in Articles 9, 10, 14 and 15 of the ICCPR, and that the Draft Basic Law clearly state that the fair trial provisions of the ICCPR shall form a part of the law of the Macao SAR.

Concerning Guarantees for the Exercise of Fundamental Rights:

Amnesty International recommends that the provisions of the Draft Basic Law which cover the exercise of human rights be amended in conformity with the relevant provisions of the ICCPR. In particular Articles 26, 27, 34 and 42 of the Draft Basic Law should be made consistent respectively with Articles 18, 19, 25 and 27 of the ICCPR. The sweeping limitations and ill-defined terms contained in Article 23 of the Draft Basic Law should be amended to ensure that this article does not violate Articles 19, 21 and 22 of the ICCPR.

Concerning the Basic Law's Limitations Clause:

Amnesty International recommends that Article 43 of the Draft Basic Law be amended to incorporate the relevant provisions of Article 4 of the ICCPR in order to guarantee that the right to life, the right to be protected from torture and ill-treatment, the non-retroactivity of laws and the right to freedom of thought, conscience and religion may *never* be curtailed in any circumstances whatsoever.

Concerning States of Emergency:

Amnesty International recommends that Article 18 of the Draft Basic Law be revised to make clear that any legislation applied in the Macao SAR during a state of emergency must be consistent with the provisions of the ICCPR.