

# MACAU

## Human Rights Challenges For Transition

On 20 December 1999, Macau will return to the sovereignty of the People's Republic of China (PRC) after four centuries of Portuguese rule. With a territory of just 23.6km and an estimated population in 1998 of 430,500, a majority of Chinese origin, Macau will end the 20<sup>th</sup> century with a new challenge ahead of it: to ensure that human rights prevail and are protected after the handover.

### History

Part of China, Macau has been under Portuguese rule for over four centuries. After it joined the United Nations in 1971, the Government of the PRC requested that the UN remove Macau (and Hong Kong) from the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples (aimed at monitoring colonial territories' evolution towards self-rule). In a March 1972 communication to the Special Committee overseeing the implementation of that Declaration, the Chinese Government stated that Macau was a part of Chinese territory occupied by the Portuguese authorities and that the settlement of the question was entirely within China's sovereign right. In November 1972, the UN General Assembly approved the Special Committee's recommendation to exclude Macau from the above list.

Portugal's peaceful Revolution of the Carnations in 1974 brought with it a significant change in its policy towards its colonies and other territories under its jurisdiction. Since 1975 both Portugal and China have agreed to consider Macau as a "Chinese territory under Portuguese administration" thereby removing the formal description of Macau as a colony. Portugal's Constitution, adopted in 1976, reiterated that Macau was not a part of the Portuguese territory but that it was under its administration<sup>1</sup>.

Once diplomatic relations were re-established between Portugal and the PRC in 1979, a process of discussions on Macau's return to the PRC was initiated. The negotiations only formally started on 30 June 1986 and resulted in an agreement between the two countries on 13 April 1987: The Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the question of Macau, known as the Sino-Portuguese Joint Declaration.

Since then, a long and complex process of negotiations between the two countries has taken place, in order to lay the foundations for the handover. The negotiations have been carried out by the Sino-Portuguese Joint Liaison Group and the first stage ended when China's National People's Congress (NPC) adopted the Basic Law of the Macau Special Administrative Region (MSAR) in 1993. The last 12 years of the negotiations have been marked by numerous

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<sup>1</sup> Constitution of Portugal, articles 5 and 292.

difficulties as well as delays, obstacles and last minute improvisations. Many issues, particularly in the area of human rights, never became the object of satisfactory agreements or were simply never addressed. While the Sino-Portuguese Joint Declaration and the Basic Law for the MSAR constitute the two principal points of reference, it is clear that the transition process remains incomplete or below the requirements of international standards where many human rights issues are concerned.

The emerging MSAR and its authorities are faced with the challenge of how to address these gaps and deficiencies in order to guarantee that the rule of law is consolidated and that human rights continue to be protected and enhanced.

### **The Sino-Portuguese Joint Declaration**

The Sino-Portuguese Joint Declaration is an agreement between the PRC and Portugal on the legal status and future of Macau. Together with its annexes, it constitutes an international agreement, ratified by both countries and deposited before the United Nations on 15 January 1988.

The agreement reiterated the principle that, although at present administered by Portugal, Macau is an integral part of the PRC. It set the date of 20 December 1999 for full sovereignty of Macau to be passed back to the PRC and for Portuguese administration of the territory to cease. The Declaration also established the principles governing transition and Macau's new legal status.

The Sino-Portuguese Joint Declaration is based on the principles of "one country, two systems", advocated by the PRC, and of the "continuity" of the legal and economic system which existed under Portuguese administration. According to these principles it was agreed that after handover Macau would assume the status of Special Administrative Region and that the Macau authorities would have a certain degree of autonomy at executive, legislative and judicial level. The Declaration expressly states that "the current economic and social system, as well as the way of life, will remain unchanged" and that "the laws at present in force in Macau will remain basically unchanged"<sup>2</sup>. Nevertheless, the Declaration anticipated that the National People's Congress of the PRC would subsequently adopt a Basic Law for the MSAR which would define the content and scope of its system. The Declaration consequently stated that although "the laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained" they may be totally or partially repealed if any of them "contravene the

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<sup>2</sup> Sino-Portuguese Joint Declaration, article 2, paragraph 4.

Basic Law or are amended in any way by the legislature of the MSAR”<sup>3</sup>, once the Region has been established.

According to the Declaration, the principle of continuity of the existing legal system after handover also applies to international conventions to which China is not a party: “international agreements to which the People’s Republic of China is not a Party but which are applicable in Macau will remain binding”<sup>4</sup>.

The PRC and Portugal included a human rights clause in the Sino-Portuguese Joint Declaration, stating that, in the new Macau Special Administrative Region which is to be created, “all rights and freedoms of the inhabitants and other persons in Macau, including the rights of the individual, freedom of expression, freedom of the press, freedom of assembly and association, freedom to travel, freedom of movement, the right to strike, freedom to choose one’s employment, freedom of academic research, freedom of religion and belief, freedom of communication and the right to own property will be guaranteed by law”<sup>5</sup>. In one of the annexes to the Declaration<sup>6</sup>, additions were made to this list of protected rights, including: the right to “set up and join unofficial associations” and “to set up and join trade unions”, freedom “of education and academic research” as well as guarantees regarding “the inviolability of the home and communications” and the right to have access to the law and justice. These articles are presented as an integral part of China’s “basic policies” on Macau, which may never be contravened by any amendment to the Basic Law<sup>7</sup>.

It was agreed by Portugal and the PRC that, once Macau had passed back to full Chinese sovereignty, its new status and the terms under which it was agreed would remain unchanged for 50 years from 20 December 1999.

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<sup>3</sup> Ibid, Annexe 1 Section III, paragraph 2.

<sup>4</sup> Ibid, Annexe 1, Section VIII, paragraph 3.

<sup>5</sup> Ibid, Article 2, paragraph 4.

<sup>6</sup> Ibid, Annexe 1, Section V, paragraph 1. This paragraph further extended such protection to “rights related to the ownership of private property and companies, as well as their transfer and inheritance, and to receiving payment of appropriate compensation for lawful expropriations without undue delay; freedom to contract marriage and the right to freely found and raise a family”.

<sup>7</sup> Basic Law, Article 144, paragraph 4.

### **Macau's Legal System after the "Handover": the Basic Law**

The Basic Law of the Macau Special Administrative Region (MSAR) was promulgated by the PRC on 31 March 1993. This law, which will come into force on 20 December 1999, elaborates the basic policies and principles set out by the PRC and Portugal in the Sino-Portuguese Joint Declaration of 1987. In fact, the Basic Law is a kind of mini-constitution regulating Macau's legal status, its relations with the PRC, and the functioning of its legislative, executive and judicial authorities.

According to the terms of the Basic Law, Macau will constitute a Special Administrative Region of the PRC<sup>8</sup>, enjoying a certain degree of autonomy from the central government in Beijing. As mentioned above it will maintain its own executive, legislative and judicial powers as well as its own legal system. Nevertheless, this autonomy is limited. Various questions are within the exclusive competence of the Central People's Government of the PRC. The Central Government is responsible for all issues relating to foreign relations and defence in the MSAR "and other matters outside the limits of autonomy of the region as specified by" the Basic Law<sup>9</sup>. The legislative capacity of the MSAR is also limited. Powers to interpret and amend the Basic Law belong to the National People's Congress (NPC) (see below)<sup>10</sup>: final interpretation of the Basic Law falls to the Standing Committee of the National People's Congress (NPCSC) and amendment to the Congress itself in full session.

According to the principle of continuity, affirmed by the Sino-Portuguese Joint Declaration and the Basic Law (article 8), any laws, decree laws, administrative regulations and other norms which were previously in force in Macau will, in principle, remain in force as long as they do not contravene the Basic Law. In March 1993 the NPC established a Committee for the Basic Law of the MSAR which was mandated to review existing and future laws and other norms and advise the NPC on their compatibility with the Basic Law. The Committee is composed of five people from Macau and five from the rest of China, appointed by the Standing Committee of the NPC (NPC SC), before which the Committee is directly accountable. On the establishment of the MSAR, those laws or norms which the NPC SC declares incompatible with the Basic Law will immediately cease to have effect in Macau. It is a matter of concern that the Macau public is not yet clear which if any legislation will not survive the handover because the NPC SC considers it contravenes the Basic Law. This generates continuing and unnecessary uncertainty.

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<sup>8</sup> The existence of special administrative regions is provided for in article 31 of the Constitution of the PRC.

<sup>9</sup> Basic Law of the MSAR of the PRC, articles 14 and 18.

<sup>10</sup> Basic Law, articles 143 and 144.

This uncertainty extends to numerous laws and norms have been adopted or modified in Macau in recent years and particularly in 1998 and 1999. The introduction of this wealth of new norms so late in the day seems to have been Portugal's last minute push after several years of passivity and inaction. The legal status of these norms is not clear and there is no certainty over which will remain in effect in Macau after the handover. This concern was recently expressed by the UN Human Rights Committee<sup>11</sup>.

While in accordance with the principle of "one country, two systems" the Basic Law establishes that a limited list of Chinese national laws can be applied to Macau, the same law also gives the Standing Committee of the National People's Congress the discretionary power to add to or delete from this list (after consultation with the Committee for the Basic Law of the MSAR and the MSAR government). Article 18 of the Basic Law establishes that these national laws should be confined to those relating to national defence, foreign relations or "other matters outside the limits of autonomy of the region as specified by this [Basic] Law". However, these categories are so broad and ambiguous that there is the potential for a whole range of Chinese national laws to be introduced in Macau, including provisions which are currently being used in China to imprison people for peacefully exercising basic human rights.

### **The Basic Law and Human Rights**

The Basic Law sets out a range of human rights. Article 40 stipulates that the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Conventions of the International Labour Organization (ILO) as they apply to Macau will continue to be protected. The Basic Law also includes, in a general way, many but not all of the rights articulated in these treaties. Under it the following rights are protected: the right not to be arbitrarily deprived of one's liberty, the right to judicial challenge against arbitrary detention (habeas corpus), the right to a fair trial with full judicial guarantees and the right to seek judicial remedy and to receive compensation for human rights violations. The Basic Law expressly forbids torture and ill-treatment. The following freedoms are also recognised: freedom of conscience, expression, assembly, the press, association, travel and movement, as well as trade union rights and the right to strike, among others.

Nevertheless, the Basic Law does not guarantee all the rights and liberties recognized in international standards including some which are established in the Constitution of Portugal and currently recognised in Macau. Among other rights the Basic Law does not clearly and expressly guarantee the right not to be arbitrarily deprived of life, the right not to be extradited for political reasons or for crimes for which the death penalty is applicable, the right to asylum

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<sup>11</sup> Concluding Observations of the Human Rights Committee - Portugal (Macau), UN Document, CCPR/C/79/Add.115, 4 November 1999, paragraph 7.

and the right to conscientious objection. These rights are guaranteed by the Portuguese Constitution and, as such, are protected in Macau up until handover, as provided for in article 2 of the Organic Statute of Macau, which clearly states that all principles, rights, freedoms and safeguards set out in the Portuguese Constitution apply in Macau.

Various of the rights recognised in the Basic Law are poorly regulated in the mini-Constitution of MSAR or are defined in very general terms without sufficient safeguards. Laws have not been passed to protect all of these rights and freedoms. Draft laws on the right to strike, the right to democratic participation are, for example, currently stuck in the Legislative Assembly of Macau, where the PRC authorities and the Macau business community have had and continue to have strong influence. At the same time no law has been passed to protect and regulate freedom of the press. This has led important sectors of society in Macau to consider that various of the rights established in the Basic Law are a dead letter.

It is not clear whether all the human rights which are guaranteed by the Portuguese Constitution will remain in effect in Macau following the handover and whether or not they will be applicable is a matter of debate. Some staff of the Legislative Assembly consider that in the light of the principle of continuity enshrined in the Sino-Portuguese Declaration and in the Basic Law, the Constitutional block which guarantees human rights and fundamental freedoms should still be applicable in the MSAR following handover. This would allow for a higher level of protection of human rights than that established by the Basic Law.

### **Freedoms of opinion and expression**

Freedoms of opinion and expression are protected by article 19 of the ICCPR. The Basic Law guarantees freedom of expression in a general way (article 27), but neither of these freedoms which are fundamental to a democratic society are sufficiently protected.

Indeed, freedoms of opinion and expression come under serious threat by the provision of article 23 of the Basic Law. According to this, the MSAR should legislate on its own against any “act of treason, secession or subversion” against the Central People’s Government of the PRC. The vagueness and lack of definition of terms such as “subversion” pave the way for abuses and arbitrary acts to be committed against those exercising their freedoms of conscience and expression. Amnesty International is concerned that any legislation passed in the MSAR to prohibit “any act of treason, secession, sedition” or “subversion against the Central People’s Government” should not restrict the exercise of fundamental rights, such as the freedom of association and peaceful assembly. Similarly, the organization urges the MSAR authorities to ensure that no legislation on political organizations limits the exercise of fundamental rights safeguarded under international standards.

The national laws on protection of the Chinese national flag and symbols, which under the Basic Law are applicable to Macau, also have the potential to be used against peaceful protestors, as has been seen in a recent case in Hong Kong.

### **Right to conscientious objection**

Even though the Basic Law guarantees freedom of conscience (article 34) in a general way, the right to conscientious objection is not protected by Macau's mini-constitution. On 3 August 1998 the Legislative Assembly of Macau promulgated law No 5/98/M, regulating freedoms of religion, worship and belief in general. Article 2 (3) establishes that 'no one will be the object of prejudice, persecution or deprivation of their rights or be exempt from their obligations and civic duties for not professing a religious faith or due to their beliefs or religious practices, with the exception of the right to conscientious objection, in the circumstances foreseen by the law'<sup>12</sup>. There is no law regulating the right to conscientious objection and as such this right remains completely unprotected.

### **Human Rights and States of Emergency**

Although the Basic Law determines that the maintenance of public order is the responsibility of the Macauese authorities, it does not contain any clear regulations concerning states of emergency.

In the first place, although article 18 of the Basic Law refers to situations of emergency, there are no provisions governing states of emergency. It does not establish the grounds on which a state of emergency can be declared, how such a declaration should be made or what forms of control should be used. It does not state what powers the authorities have or whether human rights could be restricted or suspended. The Basic Law does not establish any specific safeguards for the protection of non-derogable rights during states of emergency or war. Such rights include the right to life, the prohibition on torture and ill-treatment, the freedom of thought, conscience and religion. There is no other law in Macau governing the declaration of a state of emergency. This lack of clarity and uncertainty with regard to the possible declaration of a state of emergency is contrary to the provisions of international human rights law and, in particular, article 4 of the ICCPR<sup>13</sup>. While analysing article 18 of Hong Kong's Basic Law, which is similar

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<sup>12</sup> Unofficial translation

<sup>13</sup> The Special Rapporteur on the Question of Human Rights and States of Emergency has pointed out that, under international human rights law, States must respect certain principles relating to states of emergency: the principle of legality, whereby there should be regulations and mechanisms of control governing such situations; the principle of proclamation, whereby a state of emergency must be publicly announced and the authorities must inform the population about the types of

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to article 18 of the Basic Law of Macau, the Human Rights Committee considered that, given the lack of detailed provisions on states of emergency and of regulations governing the article, it was not in keeping with article 4 of the ICCPR.<sup>14</sup>

Secondly, the Basic Law (article 18) gives the Standing Committee of the National People's Congress of the PRC the power to declare a state of war in Macau. The Beijing authorities also have the power to declare a state of emergency when there are "disturbances in the Region that endanger unity or national security" and which cannot be brought under control by the Macau authorities. The lack of precision and vagueness of the terms used in article 18 of the Basic Law regarding the declaration of an emergency by Beijing could lead not only to the arbitrary use of such powers but also to a weakening of the autonomous status of the Macau region.

The Basic Law stipulates that, in both situations, the laws of the PRC could be applied by decree of the Central Government, in substitution of Macau's own laws.

Currently, the relevant Chinese national legislation is the Martial Law of the PRC which was adopted on 1 March 1996 with little coverage in China or internationally. This Law provides for the suspension of constitutional rights during a state of emergency. Since the late 1980s, various laws and regulations on state secrets and state security have been introduced in China which restrict fundamental freedoms and cause widespread human rights violations. They curtail fundamental freedoms and criminalize a broad range of activities seen as a threat to the established political, economic or social order. These laws are increasingly being used to jail people for the peaceful exercise of basic human rights.<sup>15</sup> The Martial Law does not expressly incorporate the limitations contained in international standards on states of emergency and its

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measures to be taken, together with their scope, duration and in what parts of the territory they apply; the principle of establishing a time limit, whereby the state of emergency must be limited in time and should only remain in force as long as the reasons which led to its declaration continue to exist; the principle of need and proportionality, whereby a state of emergency can only be declared when ordinary means of dealing with the situation are insufficient and any measures adopted during this period must be proportional to the seriousness of the situation; the principle of non-discrimination; and the principle of non-derogation of human rights, whereby certain human rights, such as the right not to be arbitrarily deprived of one's life or of not being subjected to torture, cannot be suspended or restricted, even in time of war or emergency (UN Doc. E/CN.4/Sub.2/1997/19).

<sup>14</sup> Concluding Observations of the Human Rights Committee - United Kingdom (Hong Kong), UN Document CCPR/C/79/Add.57, paragraph 15.

<sup>15</sup> See Amnesty International's reports, *Peoples Republic of China, Law reform and human Rights*, AI Index: ASA 17/014/1997, March 1997, and, *People's Republic of China: State Secrets - A Pretext for Repression*, AI Index: ASA 17/42/96, May 1996.

provisions are so vague that they would permit the arbitrary suspension of rights, such as the right to fair trial.

Given the provision of article 18 (paragraph 4) of the Basic Law, which gives the Standing Committee of the NPC unlimited power to increase the number of national laws which are applicable to the MSAR once it declares a state of emergency or war, it is possible that, other norms which are valid in the PRC could be applied to the MSAR. Administrative detention in re-education through labour camps for two or three years and with no judicial control could, for example, be extended to Macau. At the same time, the Chinese Criminal Law which punishes different acts as “offences endangering national security” could be extended to Macau but without there being a precise definition of what constitutes “endangering national security”. The UN Working Group on Arbitrary Detention has expressed concern at this situation in as far as it enables “the authorities to arrest and harass persons who may be peacefully exercising their fundamental liberties”<sup>16</sup>. According to the Working Group, the Chinese Criminal Law describes many crimes in a vague and imprecise way, “thereby jeopardizing the fundamental rights of those who wish to exercise their right to hold an opinion or exercise their freedoms of expression, the press, assembly and religion”<sup>17</sup>. At the same time, the death penalty which is not provided for as a punishment in the Penal Code of Macau, but which exists for numerous crimes in the Chinese Criminal Law, could be introduced.

### **Macau residents and the right to nationality**

One of the situations which remains unresolved by the Sino-Portuguese Joint Declaration and the Basic Law is that of Portuguese citizens of Chinese origin. The most affected community is the Macaunese, who currently have dual Portuguese and Chinese nationality, as agreed with Portugal. According to estimates provided by the Secretary of Justice in Macau, there are currently 110,000 Portuguese people of Chinese origin<sup>18</sup>. After handover their legal status will change and they will be considered to be nationals of the PRC, given that the PRC does not accept dual nationality and adopts the criterion of *jus sanguinis*, according to which nationality is determined by the nationality of the parents.

A practical consequence of this situation, which denies the right to dual nationality, is that detainees of Portuguese nationality and Chinese origin could avail themselves of the consular protection of the Portuguese authorities. In November 1999, the Human Rights Committee

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<sup>16</sup> U.N. Document E/CN.4/1988/44/Add.22, paragraph 106.

<sup>17</sup> Ibid, para. 107.

<sup>18</sup> Amnesty International Interview with staff of the Secretary of Justice in Macau, carried out in May 1999.

expressed its concern at the PRC's failure to recognise dual nationality and at the lack of firm agreement between the governments of China and Portugal with regard the nationality of residents of Macau after 19 December 1999. The Committee on Economic, Social and Cultural Rights had also expressed their concern in this regard in 1996.<sup>19</sup> The Human Rights Committee recommended that effective measures be taken to protect the rights of those people who today benefit from dual nationality.<sup>20</sup>

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<sup>19</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights - Portugal (Macau), UN Document E/C.12/1/Add.9, 6 December 1996, paragraph 11

<sup>20</sup> UN Document CCPR/C/79/Add.115, 4 November 1999, paragraph 13.

### **Independent judicial power**

The existence of a judicial power which is independent of the other branches of the State is a fundamental element of the right to a fair trial and of the protection of human rights in general. Even though the Basic Law stipulates that courts in Macau carry out their judicial functions independently and without interference, the principle of independence of the judiciary has not been satisfactorily protected by the Sino Portuguese Declaration or by the Basic Law and could be undermined.

Basic Law article 87 affords some protection for the independence of the judiciary in regard to selection, tenure and removal and reflects some but not all of the UN Basic Principles on the Independence of the Judiciary. In particular, Basic Principles 11 and 12 also stipulate that terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law and that judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office. Neglect of these principles is more problematic when both the Joint Declaration and the Basic Law stipulate that judges will be nominated by the Chief Executive, and the Basic Law stipulates that judges can be removed from office by a decision of the Chief Executive. This situation has the potential to undermine the principle of independence and impartiality of the judiciary.

Fears for human rights protection engendered by the Macau SAR's weak judicial power are only exacerbated when combined with Macau's young and inexperienced judiciary with only a few years exposure to bilingual laws, grappling with the complexity of the legal system that established the "one country two systems" model.

In their judgement of cases, courts in the Macau SAR can interpret the Basic Law. This power is not, however, absolute. In questions for which the central government is competent or which refer to the relation between the central and regional authorities, the Courts must obtain an interpretation of the Basic Law from the NPC SC before making their final unappealable judgements. Such an interpretation is binding on the Court. This situation undermines the independence and impartiality of the Courts. Some jurists in Macau consider that this provision of the Basic Law is contrary to the Sino Portuguese Declaration, which provides for final appeals to be tried by the Final Appeal Court of Macau, in accordance with the principle of judicial autonomy on which the Declaration is based.

### **Right to effective remedy**

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The Basic Law expressly guarantees the right to the remedy of *habeas corpus*<sup>21</sup>. At the same time, the right to petition is recognised and regulated by law 5/94/M.

Law 112/91 (29 August 1991) establishing the basic organization of the judiciary in Macau, also established the remedy of *Amparo* (article 17). This provides for judicial protection in the face of the violation of fundamental rights guaranteed by the Organic Statute of Macau. However, legislation has never been adopted to regulate procedures governing the right of *Amparo*. In the absence of this, the High Court of Justice of Macau has repeatedly refused to admit and process petitions for *Amparo*. The fate of this remedy following handover is equally unclear.

Under the terms of the International Covenant on Civil and Political Rights, State parties/governments are bound to establish remedies that are effective in practice for all victims of human rights violations in their jurisdictions. This includes ensuring that all people understand their rights and all have access to affordable, effective remedies if their rights are violated. This is an international treaty obligation - a legal imperative of the present, not an aspirational goal for the future.

### **The death penalty**

Macau has a long abolitionist tradition on the death penalty. More than a century ago, in 1869, the official Gazette of Macau published the 28th October 1868 Decree, abolishing the death penalty for ordinary crimes. Successive decrees reiterated the prohibition of the death penalty. In 1911 the death penalty was suppressed for military crimes and although briefly reintroduced during the First World War was definitively abolished in the 1976 Portuguese Constitution.

This abolitionist tradition has not been reflected in the Basic Law, which remains silent on the matter. The new Penal Code of Macau (law 11/95/M), adopted in 1995 after consultations with the Chinese government, expressly prohibits the death penalty, as it does perpetual, indefinite or unlimited deprivation of liberty (article 39). In spite of the prohibition in the Penal Code, however, the absence of express prohibition of the death penalty in the Basic Law means that it could be reintroduced after 20 December 1999.

No formal guarantees to maintain the abolitionist tradition have so far been given by China. The Chinese government news agency, Xinhua has reported only that: "After Macau is returned to China, so long as the legislature of the [post-handover] Macau Special Administrative Region deems it necessary, the provision for abolishing the death penalty . . . can certainly be retained".<sup>22</sup>

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<sup>21</sup> Article 28 of the Basic Law and articles 206 and others of the Code of Criminal Procedure.

<sup>22</sup> South China Morning Post, 15.4.99.

When canvassing for selection as Chief Executive, Edmund Ho Hau-wah reportedly suggested that life sentences might need to be reintroduced to combat increasing crime. He added that executions were not part of his call for harsher sentences, maintaining that “changes to the Penal Code after the handover should be “in tune with Macau’s value system”.<sup>23</sup>

### **Extradition and the transfer, or rendition, of prisoners**

The right not to be extradited for political reasons or for crimes punishable by the death penalty is guaranteed in Macau, under the Portuguese Constitution. The prohibition of extradition for crimes punishable by the death penalty was reiterated by the Constitutional Court of Portugal in a case regarding extradition to China. In 1995, the Constitutional Court refused to extradite Yeung Yuk Leng who was required by China for a crime punishable with capital punishment, on the grounds that the Constitutional prohibition did not provide for announcements of a commutation of the sentence to be a sufficient guarantee<sup>24</sup>.

This important safeguard, however, was not included in either the Basic Law or the Penal Procedure Code. With the absence of this provision in the Basic Law, the handover will bring with it problems with regard to, on the one hand, extraditions to other countries and, on the other, the transfer of detainees to the Chinese continent. In November 1999, the Human Rights Committee expressed its concern at the lack of a firm agreement on the transfer of residents from the MSAR for trial in other jurisdictions of China, or on the extradition of residents to other countries where they could be exposed to a higher level of punishment, including the death penalty, than those provided for in Macau’s Penal Code. The Human Rights Committee reiterated that the residents of Macau should benefit from the protection of their rights under the ICCPR and that they should not lose such protection by virtue of being transferred to other jurisdictions.<sup>25</sup>

The Basic Law and the Sino-Portuguese Declaration, which confers international obligations on both the PRC and Portugal, provide for the rights and guarantees established by the ICCPR to remain in effect after the handover. Under ICCPR articles 6 and 7, the Macaonese government has the duty towards all people within its jurisdiction to protect their right to life and their right to not be subjected to torture or cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has pointed out that States’ obligation under article 7 of the ICCPR also extends to the duty to put people in risk of being subjected to torture or cruel, inhuman or

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<sup>23</sup> South China Morning Post, 22.4.99.

<sup>24</sup> Sentence 417/95.

<sup>25</sup> Concluding Observations of the Human Rights Committee - Portugal (Macau), UN Doc CCPR/C/79/Add.115, November 1999, paragraph 14.

degrading treatment or punishment on return to another country following extradition, expulsion or devolution<sup>26</sup>. Amnesty International believes that this prohibition on extradition extends to those facing judicial proceedings for crimes which are punishable by the death penalty, given that this constitutes cruel and inhuman treatment.

Regarding the transfer of prisoners to the PRC, it should also be noted that procedures for the application of the death penalty on the mainland fall short of the minimum safeguards set out in article 6 of the ICCPR. Mainland trial procedures do not yet conform to international standards for fair trial set out in article 14 of the ICCPR and in other international standards. As such executions on the mainland constitute summary executions. In relation to this, the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5) state that "[n]o one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country". Although in the case of Macau and the rest of China such a return would be taking place within one country, the principle of two systems must also be respected. Given this and given the principle *pro homine*, according to which the interpretation of norms should be carried out in favour of human rights, Principle 5 of the abovementioned UN Principles should be applied.

The Sino-Portuguese Joint Declaration is an international agreement between sovereign states, by which these states have international obligations. The PRC and China have made a commitment that in the new and emerging MSAR, 'international agreements to which the PRC is not a party but which are currently applicable in Macau will continue to be applicable'<sup>27</sup>. This obligation should be fulfilled in good faith in accordance with the principle *pacta sunt servanda*. In line with this, the PRC has the international obligation to ensure that the people who reside in Macau fully enjoy their rights, freedoms and guarantees under the ICCPR.

### **The Law on Organized Crime and the Right to a Fair Trial**

In July 1997, the Legislative Assembly of Macau passed Law No. 6/97, entitled "the law on organized crime", the aim of which is to combat "secret associations" and illegal gaming and gambling. While it is the case that authorities everywhere have the right and duty to prosecute and suppress crimes, this should be done within the framework of the rule of law and respect for human rights. Law No. 6/97 establishes various provisions which go against international standards for fair trial.

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<sup>26</sup> Human Rights Committee, General Comment No. 20, paragraph 9, in UN Doc. HRI/GEN/1/Rev.3.

<sup>27</sup> Sino-Portuguese Joint Declaration, Appendix 1, Section VIII, paragraph 3.

The law creates a complex criminal offence called “secret association or society”. It defines a “secret association or society” as any organization set up to obtain illegal gain by means of certain kinds of conduct (illegal gambling, kidnapping, etc), offences which already exist in their own right under criminal law. This means that the offence of “secret association or society” incorporates “the offence by means of which it was committed”. The latter becomes subsumed in the main category of offence - “secret association or society” - and constitutes an integral and typical element of the statutory definition of that offence. Nevertheless, the ambiguous description of what constitutes “secret association or society”<sup>28</sup> has led to people convicted for “secret association or society” being given two consecutive sentences: one for the offence of “secret association or society” and one for the “offence by means of which it was committed”. In 1998, the Macau Criminal Court sentenced several people, in two trials, both for belonging to a “secret society” and for “illegal gambling”. As the Human Rights Committee clearly expressed in its observations on Portugal’s report on the implementation of the ICCPR in Macau, this situation is contrary to the principle *ne bis in idem*, which is guaranteed under article 14 of the ICCPR and by which no-one can be punished twice for the same crime<sup>29</sup>.

Article 28 (4) of Law No. 6/97 also establishes a system for anonymous witnesses. The Human Rights Committee pointed out that the practice of using anonymous witnesses is incompatible with the principle of equality of arms and the right to defence, in particular to examine witnesses, enshrined in article 14,3 (b) and (e) of the ICCPR<sup>30</sup>. The UN Special Rapporteur on the independence of judges and lawyers has also considered this practice to be in violation of the right to a fair trial.<sup>31</sup>

This law permits the prolongation for up to three years of imprisonment imposed for the crime of belonging to a secret society or association, when the person has already been imprisoned for the same offence and when there are reasons to believe, such as indications that they still belong to or maintain links with a secret society or association, that once released they would not lead a socially responsible and crime-free life (article 21). This provision undermines the right to security (enshrined in article 3 of the Universal Declaration of Human Rights) and the right not to be arbitrarily deprived of liberty (article 9 of the ICCPR).

Law No 6/97 also stipulates that in cases of crimes of belonging to a secret society, suspects will not benefit from pre-trial release, preventative detention being the only option in this case. This

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<sup>28</sup> articles 1 and 2 of Law No. 6/97)

<sup>29</sup> UN Document, CCPR/C/79/Add.115, November 1999, paragraph 12.

<sup>30</sup> UN Document, CCPR/C/79/Add.75, paragraph 21.

<sup>31</sup> UN Document, E/CN.4/1998/39/Add.2, paragraph 93.

provision undermines that established by article 9 (3) of the ICCPR, according to which pre-trial preventative detention should not be used as a general rule.

### **International human rights treaties**

The Sino Portuguese Declaration<sup>32</sup> and the Basic Law<sup>33</sup> expressly established the principle of continuity of treaties to which the PRC is not party. The Basic Law (article 40) also establishes that the rights guaranteed by the ICCPR, the ICESCR and the ILO Covenants, as applied to Macau will continue to be protected in the MSAR. The reality however is more complex and there are many uncertainties around whether the international human rights treaties ratified by Portugal and applicable up to now in Macau will remain in force. One of the major obstacles in this regard is the lack of internal legislation to implement the provisions of these international treaties and safeguard the rights and guarantees enshrined in them. It is also clear that this issue has not been satisfactorily resolved by the Portuguese and Chinese authorities.

The question of whether human rights treaties will remain in effect in Macau after the handover applies to three different categories: the treaties which are applicable to Macau<sup>34</sup> but to which the PRC is not a party (the ICCPR, the ICESCR), the treaties ratified by Portugal and which the authorities of that country do not consider apply to Macao (Optional Protocol to the ICCPR), and the treaties which are applicable to Macau and to which the PRC is a party.<sup>35</sup>

The ICCPR and the ICESCR, ratified by Portugal but not China, should remain in force in Macau after handover. Portugal has made reservations on the application of certain articles of the ICESCR to Macau.

What is not certain is whether individuals will have access to the Human Rights Committee in order to present complaints of violations of their rights under the ICCPR. This procedure is an extremely important mechanism of international human rights protection. Portugal is a State Party to the Optional Protocol of the ICCPR, which recognises the competence of the Human Rights Committee to consider and examine “communications from individuals within the jurisdiction” of the State Party. The Protocol contains no express provision whereby, in situations such as that of Macau, State Parties have to make a special declaration for application of the Protocol to be extended. The Basic Law does not provide for any limitations on this point.

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<sup>32</sup> Sino-Portuguese Joint Declaration, Appendix 1, Section VIII, paragraph 3.

<sup>33</sup> Basic Law, article 138.

<sup>34</sup> Resolution 41/92, 31 December 1992, of the Portuguese Congress provided for the application of the ICCPR in Macau.

<sup>35</sup> The Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child and the International Convention on the Elimination of all forms of Racial Discrimination

During its mission to Macau last May, Amnesty International was told by the Portuguese authorities that, in their view, the Optional Protocol to the ICCPR was not in force in Macau. This position goes against the principle of international law that the authorities of a country cannot invoke obstacles of internal law to avoid their international commitments. This principle is widely recognised in Jurisprudence<sup>36</sup> and is enshrined in article 27 of the UN Convention on the Law of Treaties.

Also, the Human Rights Committee, reiterated in November 1999 in relation to Macau “its long-standing position that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered into by the predecessor State.”<sup>37</sup>

The provisions of the Optional Protocol to the ICCPR are of immense importance in Macau because they give individuals access to international remedy for human rights violations. The lack of clarity and uncertainty about the legal status of the Optional Protocol to the ICCPR, both now and after the handover, gives Amnesty International cause for concern.

In addition, in October 1999, during the consideration of Portugal’s final report on the implementation of the ICCPR in Macau, the Portuguese delegation informed the Human Rights Committee that there were no arrangements in place concerning the submission of reports to them after handover. Such reports are an absolute and integral requirement of the ICCPR, the ICESCR, the Convention against Torture and the Convention on the Rights of the Child which all apply in Macau. The reporting requirements issue was satisfactorily resolved in the case of the Hong Kong SAR. Amnesty International hopes that similar arrangements may be made for the MSAR, and recommends that the Macau SAR government be entrusted by the PRC government with the consultations and drafting necessary to prepare reports or sections of reports which concern the implementation of these standards in Macau and with their presentation before relevant UN bodies.

In November 1999 the Human Rights Committee expressed concern at the paucity of local non-governmental human-rights organizations in Macau and the fact that their establishment was

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<sup>36</sup> Permanent Court of International Justice, Advisory Opinion of 4 February 1932, *Traitement des nationaux polonais et autres personnes d’origine ou de langue polonaise dans le territoire de Dantzig*, Series A/B, n° 44; Advisory Opinion of 31 July 1930, *Question des communautés greco-bulgares*, Series n° 17. International Court of Justice, Advisory Opinion 26 of April 1988, *Obligation d’arbitrage*; Sentence of 28 November 1958, *Application de la Convention de 1909 pour régler la tutelle des mineurs (Pays Bas/Suède)*; Sentence of 6 April 1955, *Notteböhme (2e. Phase) (Lichtenstein/Guatemala)*. Laudo arbitral S.A Bunch, *Montijo (Colombia/Estados Unidos de América)*, 26 July 1875, Permanent Court of International Justice, sentence of 13 September 1928, *Usine de Chorzow (Allemagne/Pologne)*, Series A, NE 17.

<sup>37</sup> Un Document CCPR/C/79/Add.115, para. 3.

not being encouraged. This echoed concerns the Committee expressed in 1997 when examining Macau's previous report on implementation of the ICCPR. Amnesty International urges the Central and Macau SAR authorities to make every effort to encourage the widest possible community participation in the reporting process.

The Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention against Torture)<sup>38</sup> and the International Convention on the Elimination of all forms of Racial Discrimination have all been ratified by both Portugal and the PRC. In 1998 these human rights treaties were published in the official Bulletin of Macau. According to official Macau sources, the PRC maintains that all these treaties will automatically remain in effect in Macau, but subject to the reservations made by the PRC and not according to the texts ratified by Portugal. The PRC has made reservations to all of these treaties, whereas Portugal has made none. In the case of the Convention on the Rights of the Child, for example, the PRC has made a reservation to article 6, which guarantees the intrinsic right to life of every child. The effect of China's reservation is that this right is only recognised in as far as it is not incompatible with its family planning policies. With regard to Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Elimination of all forms of Racial Discrimination, the PRC has made reservations to the respective articles which establish the mechanisms for resolving controversies over the interpretation or application of these treaties.

In the case of the Convention against Torture, Portugal made a declaration under article 22, allowing the Committee against Torture to examine communications from individuals in the case of violations of the Convention. But the PRC has made significant reservations to the Convention: it does not recognise the competence of the Committee Against Torture to carry out investigations when it receives information regarding the systematic practise of torture. Neither does the PRC recognise the competence of the Committee Against Torture to examine individual communications regarding violations of the Convention. It is not clear whether these two fundamental mechanisms for international protection which are provided for by the Convention against Torture will apply to Macau after the handover

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<sup>38</sup> For many years Portugal denied that the Convention against Torture applied in Macau. The Committee against Torture, in its observations and recommendations on Portugal's report in 1993, recommended that Portugal extend the application of the Convention to Macau. The Rapporteur for Portugal of the Committee Against Torture reminded the Portuguese authorities during the debate that the Convention was equally applicable in Macau. In a mission to Macau in May 1999 an Amnesty International representative raised the issue again. On 15 June 1999, the Government of Portugal informed the Secretary-general that the Convention would apply to Macau.

As mentioned above, one of the major obstacles facing the application of human rights treaties in Macau is the lack of internal legislation to implement their provisions and safeguard the rights and guarantees they enshrine. Several of the treaty monitoring bodies have clearly expressed this concern.

### **A future of uncertainties and challenges**

Twelve years on from the adoption of the Sino-Portuguese Joint Declaration, and with the handover now to take effect, many human rights related aspects of the transition process remain a matter for concern. The lack of protection of fundamental rights, such as the right to not be arbitrarily deprived of life or the right to conscientious objection, the weak or insufficient protection of other rights and the uncertainties around legislation which will continue to be in force, are among the issues which are overshadowing the handover. This crucial period of life for the people in Macau is full of uncertainty and insecurity as far as their human rights are concerned.

Faced with this legacy, the emerging MSAR has an enormous challenge: to address the gaps and deficiencies in order to ensure that human rights remain in force and are protected and enhanced in Macau. Handover represents a new stage in the history of Macau. The international community, in particular Portugal and the European Union, cannot remain indifferent to Macau's fate and must make every effort to monitor the development of the human rights situation.

The authorities of the MSAR have a duty to guarantee and protect the rights of all people in Macau. At the same time they must promptly take up the challenge to perfect the system for protecting and safeguarding human rights following the transition period. In order to fulfill these commitments, Amnesty International recommends the authorities of MSAR to take all necessary legislative and other measures to:

- guarantee and protect all human rights and freedoms in force up to 19 December 1999;
- guarantee the entry into force of internal legislation implementing the ICCPR, the ICESCR, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention against Torture and the ILO Conventions;
- guarantee effective judicial remedy for human rights violations;
- guarantee access to international remedies of protection, provided for by the Optional Protocol to the ICCPR and article 22 of the Convention against Torture;
- guarantee the right to conscientious objection and freedoms of opinion and expression, as well as the rights of those who benefit from dual nationality;
- clearly prohibit the death penalty and effectively guarantee the right not to be arbitrarily deprived of life, as well as prohibit extradition and/or the transfer of detainees for political crimes punishable with the death penalty;
- guarantee the existence of an independent and impartial judicial power to ensure the right to a fair trial;
- adopt a legal framework which governs states of emergency in accordance with international standards and in particular article 4 of the ICCPR;

- reform the provisions of the law on organized crime which are incompatible with international human rights standards;
- strengthen mechanisms for independent investigation and redress of human rights violations, through the ombudsman's office or the establishment of a human rights commission in accordance with the UN Principles Relating to the Status of National Institutions (the Paris Principles).

Amnesty International also recommends that:

- the international community, in particular Portugal and the European Union, should closely monitor the development of the human rights situation in Macau and encourage the MSAR authorities to further strengthen protection for human rights.