The Rio Tinto case shows how China steamrollers its international legal commitments, write **Jerome A. Cohen** and **Yu-Jie Chen**

# Law unto itself

Although this week's Rio Tinto case focused world attention on China's domestic legal system, it also raised doubts about a rising China's adherence to its international legal commitments. After the People's Republic began to represent China in the United Nations in October 1971, it steadily increased its participation in the development of international law. Despite continuing grave violations in practice of existing international standards for protecting civil and political rights, China's overall direction in international law, at least until recently, seemed progressive.

Now, however, an old, nationalistic tone has begun to mark its criminal prosecutions of foreigners as well as Chinese dissidents, often explained with merely vague references to "judicial sovereignty" without further elucidation. This may reflect the setbacks that China's domestic criminal justice system has suffered since the 17th Communist Party Congress introduced tougher policies and personnel in late 2007. This may also reflect a change of the Chinese government's attitude towards international law in light of its growing influence on the world stage. It is a development worthy of attention.

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This recent return to shrillness in Chinese rhetoric and practice of international law became apparent last December when the British government and human rights organisations lodged many pleas and then protests against the impending execution of an alleged heroin smuggler, British national Akmal Shaikh. He was denied an adequate psychiatric assessment to determine whether he should be held responsible for the offence.

Apparently playing more to a domestic audience than a foreign one, Ministry of Foreign Affairs spokeswoman Jiang Yu (姜瑜) declared, without supporting reasoning, that "nobody has the right to speak ill of China's judicial sovereignty". She airily rejected as "groundless" the troubling accusations that China had violated international standards as well as its own criminal law.

When foreign governments and NGOs protested against the trial of famous dissident Liu Xiaobo (劉曉波), who was sentenced to 11 years for exercising his international and domestic rights to free expression, the same spokeswoman – again without substantive argument – categorised such statements as "gross interference in China's judicial internal affairs" that fails to "respect China's judicial sovereignty".

It was the Rio Tinto case, however, that fully revealed a seeming arrogance towards China's international obligations. When the Australian government sought reconsideration of Beijing's refusal to permit Australian consuls to attend the closed session of Australian national Stern Hu's trial, as required by the Sino-Australian consular agreement, spokesman Qin Gang (秦剛), instead of attempting to defend Beijing's decision through treaty interpretation, dismissed the claim by stating that "the case would be handled according to Chinese laws". China's "sovereignty, especially judicial sovereignty", he said, takes precedence over its binding international agreements.

This was a puzzling and dangerous comment, since China's international agreements are voluntary exercises of China's sovereignty and commit it to conform its domestic laws to international standards, instead of using domestic laws as excuses not to follow them.

Last July, China also excluded American consuls from observing the closed trial for the alleged theft of state secrets of American national Xue Feng, contrary to the provisions of the Sino-American consular convention and despite the fact that American consuls had been allowed to observe earlier closed prosecutions of American nationals. The lack of publicity then surrounding the Xue case – and the failure of the US, which has had its own lapses in consular obligations, to protest against that decision – enabled Beijing to avoid a public explanation.

But the spotlight on Rio Tinto left it no choice. This is not a fuss over some minor technical point. To be a defendant in a closed prosecution in China, where one's nearest family is often excluded from the courtroom and where the bravest defence lawyers operate under severe restrictions and pressures, is a nightmare.

The presence of diplomats from one's country provides not only an opportunity to hold prosecutors, judges and defence lawyers to account for their trial conduct but also at least a minimal, much-needed boost to an accused who has already been detained for months or even years before trial, and who may understandably feel intimidated against speaking freely.

The most disturbing aspect of China's defence of its Rio Tinto exclusion of consular observers is that it rests on a false premise. The claim that Chinese law precludes foreign consuls from attending closed trials, contrary to the explicit provisions of many Chinese consular agreements, actually flies in the face of Chinese law.

Since June 20, 1995, when the ministries of foreign affairs, public security, state security and justice, together with the Supreme People's Court and the Supreme People's Procuracy, jointly issued an instruction on the handling of foreign-related cases, it has been clear that, if a Chinese consular agreement provides for consular attendance at trials, that commitment must be honoured even in a closed trial and no domestic law can interfere with the international obligation.

Indeed, the principle that, in Chinese law relating to cases involving foreigners, China's international commitments trump its domestic law dates back at least to the 1987 predecessor to the still valid 1995 instruction. This is a stark contrast with recent Chinese responses, which have disregarded its own laws as well as international norms.

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