

The Sino-US consular convention needs reviewing, to better protect individuals, writes **Jerome A. Cohen**. So what's preventing it?

# Safe and sound

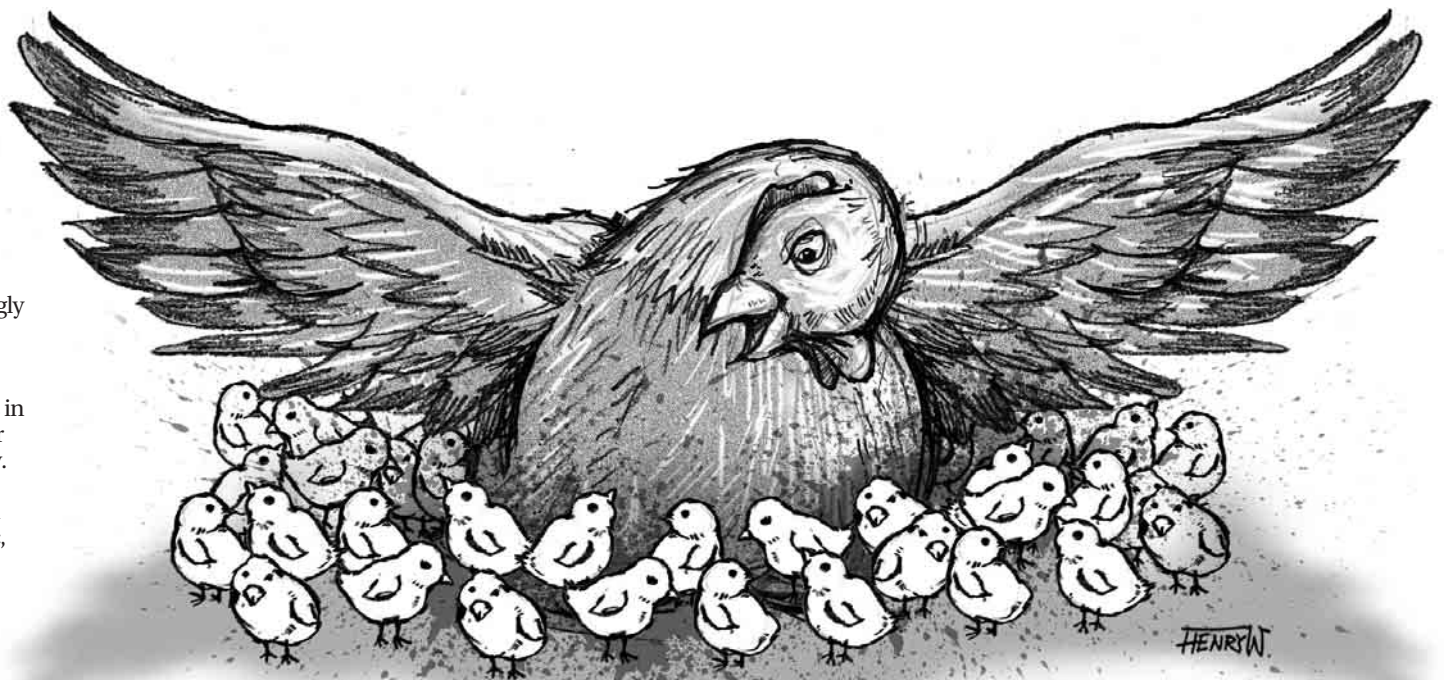
**N**ext month will mark the 30th anniversary of the signing of the US-China Consular Convention. Three decades of increasingly close Sino-American relations have demonstrated the value of this agreement to both countries in protecting the rights and interests of their nationals when visiting the other country. Although seldom thought of until a problem arises, these protections make a major contribution to bilateral economic, commercial, educational, cultural and sports co-operation by enhancing the personal security of participants.

It is time for China and the US to review their experience with the convention. Presumably both governments have adequate files. Yet my own occasional exposure to consular disputes, as uncompensated adviser to families of Americans detained in China, suggests that, whether at the US embassy in Beijing or the State Department, relevant American officials, who frequently change jobs, could benefit from greater familiarity with "bureaucratic memory". Certainly, thorough analysis of both this historical record and the experience of other countries with Chinese consular agreements should precede any bilateral renegotiation of provisions that have proved troublesome.

US nationals should want their government to clarify and strengthen those protections enshrined in Article 35 of the convention, which guarantee each government the rights to communicate with and meet its nationals in the other country. Four important issues, related to criminal justice, need to be considered.

The first concerns the circumstances in which the host government must notify the other government that it has taken one of the latter's nationals into custody. The convention plainly provides that this must be done whenever a national has been "arrested or placed under any form of detention".

Nevertheless, in cases allegedly involving "state secrets", China's Ministry of State Security has sometimes failed to give timely notice that it is holding an American in "supervised residence", a compulsory measure that can subject a suspect to six months of incommunicado detention in a special ministry facility rather than an ordinary jail. Occasionally, Chinese officials lamely claim that they did not realise the convention requires a detention notice for "supervised



residence". The convention should be revised to erase any doubts.

Wherever foreign criminal suspects are confined in China, often only a consular visit can interrupt the inevitably coercive interrogation and the torture that sometimes accompanies it. This makes the timing of the detention notice and consular visit a second critical issue. In the convoluted language of the convention, a consul's right to visit, at the latest, "shall not be refused after two days from the date notification has been sent". Absent unusual communication problems, the convention allows the host four days to send the notification.

This means that a suspect can be held as long as six days before a consul can meet him and assist him to obtain a lawyer and interpreter, and even this generous limit is frequently violated. Yet, until a consul arrives, the suspect is alone with his interrogators while they seek to extract a quick confession. In order to shorten this dangerous period, it would be desirable to reduce the time limit for notification to 48 hours and to require consular access immediately thereafter.

A third significant issue is what can be discussed during consular visits, which can occur at monthly intervals. The convention merely mentions a right to "converse". China interprets the term narrowly. With no apparent justification, it usually prohibits any discussion of the case itself and enforces this prohibition through police who monitor each visit. This drastically diminishes the value of such visits and should be changed.

## The US may have other concerns that militate against renegotiation of the convention, even if China should be willing

The final important issue – one that plagued not only the US in the trial of American petroleum geologist Xue Feng (薛峰) but also Australia in the recent Stern Hu case – is whether there is a consular right to attend trials that China closes to the public. Like its Australian counterpart, the US-China convention grants consular access to all trials involving nationals of the sending state. It mentions no exceptions. China's domestic law explicitly confirms consular access in closed trials, including state secrets trials, whenever a consular agreement calls for trial access generally.

In some state secrets trials of Americans, Chinese courts have permitted consular attendance. In recent years, however, without reasoned explanation, China has excluded US consuls from such cases. If the interests of Americans detained in China are uppermost in the minds of US officials, they should protest at such exclusions and try to persuade China to reconfirm the existing obligation to allow consular access to all trials.

Yet the US may have other concerns that militate against renegotiation of the convention, even if China should be

willing. In accordance with the principle of reciprocity, the US would have to grant China the same improved access to Chinese nationals in the US as the US would gain in China. At a time of rising concern about Chinese spying specifically and national security generally, American law enforcement agencies may be reluctant to provide quicker notice of detention, especially since the US, unlike China, has a federal system that complicates compliance. They may also not want to guarantee Chinese consuls free discussion with sensitive detainees or the opportunity to attend any American closed trials. The two governments' law enforcement agencies may have similar views.

Another mutual disincentive to renegotiation is the fact that expansion of Sino-American consular rights would offer other governments, including Taiwan's, an incentive to attempt to improve their existing consular-type arrangements with both China and the US.

In view of its long-standing, scandalous disregard of its obligations to many third countries under the Vienna Convention on Consular Relations, the US may not want to raise the subject of consular protections with any country. That would be unfortunate, however, for the rights of Chinese, Americans and many others.

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