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## News of a Kidnapping: The Gui Minhai Case and China's Approach to International Law

Thomas E. Kellogg\*

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NEWS OF A KIDNAPPING:  
THE GUI MINHAI CASE AND CHINA’S APPROACH  
TO INTERNATIONAL LAW

*Thomas E. Kellogg\**

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*I. INTRODUCTION*

On January 20, 2018, former Hong Kong-based publisher Gui Minhái was forcibly removed from a train to Beijing.<sup>1</sup> Gui, a Swedish citizen, had been traveling with two Swedish diplomatic officials,

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\* Executive Director, Georgetown Center for Asian Law. The author would like to thank Jerry Cohen, John Kamm, and John Quigley for their excellent comments on an earlier draft of this Article. Any errors remain my own.

1. Chris Buckley, *Chinese Police Seize Publisher From Train in Front of Diplomats*, N. Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/world/asia/china-police-bookseller-train-gui-minhai.html>.

including the Swedish Shanghai consul general, and was scheduled to visit with a doctor at the Swedish embassy after his arrival in Beijing.<sup>2</sup>

Instead, Gui, who was kidnapped from his apartment in Pattaya, Thailand in October 2015, was “disappeared” for a second time.<sup>3</sup> When the train pulled into the station in Jinan, Shandong, plainclothes agents boarded the train, found Gui, and removed him.<sup>4</sup> The agents refused to identify themselves and said nothing about the grounds for Gui’s arrest.<sup>5</sup> For days following his renewed detention, Chinese authorities refused to confirm his whereabouts, and urgent pleas from family members and from the Swedish government to guarantee his safety went unanswered.<sup>6</sup>

Beijing’s interest in Gui stemmed from his work as a publisher and sometime author of salacious and often thinly-sourced books on China’s political elite.<sup>7</sup> Any public discussion of the rivalries and private lives of top Communist Party leaders is strictly prohibited inside China, which gave Gui and other publishers an opening. His now-defunct Hong Kong-based publishing house, Mighty Current, targeted mainland Chinese citizens passing through Hong Kong who were hungry to learn more about the goings-on inside the black box of Zhongnanhai, the home of China’s top leaders.<sup>8</sup>

Two years into his ordeal, Gui probably thought that his case had turned a corner: he was released from custody in October 2017 and was reportedly living in an apartment in Ningbo in China’s coastal Zhejiang province.<sup>9</sup> Although his freedom was deeply circumscribed, he was allowed to visit with Swedish consular officials in Shanghai and spoke

2. Tom Phillips, ‘*A Very Scary Movie*’: *How China Snatched Gui Minhai on the 11.10 Train to Beijing*, THE GUARDIAN (Feb. 21, 2018, 10:48 PM), <https://www.theguardian.com/world/2018/feb/22/how-china-snatched-gui-minhai-train-beijing-bookseller-hong-kong> [<https://perma.cc/S545-VZ5Q>].

3. Euan McKirdy & Steven Jiang, *China confirms swedish publisher Gui Minhai has been detained*, CNN (Feb. 6, 2018, 3:13 PM), <https://edition.cnn.com/2018/02/06/asia/gui-minhai-china-detention-confirmed-intl/index.html> [<https://perma.cc/2AHX-3VRX>].

4. *Id.*

5. Phillips, *supra* note 2.

6. *Id.*

7. Alex W. Palmer, *The Case of Hong Kong’s Missing Booksellers*, N. Y. TIMES MAG. (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/magazine/the-case-of-hong-kongs-missing-booksellers.html>.

8. *Id.*

9. Interview (June 2018). Virtually all interviewees were granted anonymity for this Article, allowing them to speak more freely about matters that are considered politically sensitive in China. Where identifying information is supplied, no such anonymity was requested or given.

regularly over Skype with his UK-based daughter, Angela.<sup>10</sup> After his release, Gui began to present symptoms of the debilitating neurological disorder amyotrophic lateral sclerosis, also known as A.L.S., which in turn led to his now-aborted medical appointment at the Swedish Embassy in Beijing.<sup>11</sup>

Gui's case is an important one. Over the more than two years since Gui's initial abduction from Thailand, his case has strained China-Sweden relations, although some have criticized Stockholm's unwillingness take stronger measures against Beijing.<sup>12</sup> The case has also impacted China's relationship with the European Union.<sup>13</sup> On February 22, 2018, thirty-seven Members of the European Parliament wrote to Chinese President Xi Jinping to demand Gui's immediate and unconditional release, the latest of several interventions by the European Union on Gui's behalf.<sup>14</sup>

International efforts on Gui's case are worthy of note. They come at a time when some Western states have been more reluctant to raise human rights concerns with Beijing, for fear of damaging economic ties with the world's second-largest economy.<sup>15</sup> That said, perhaps the most important international ramifications of Gui's case are not diplomatic, but legal. Under international law, the Chinese government is required to inform a detained foreign national of his rights to consular notification and visitation. If the detainee so requests, then the Chinese government is obligated to notify the detainee's home government of the detention. In addition, China is also obligated to provide diplomatic officials regular and unfettered access to detained foreign nationals,

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10. *Id.*

11. Buckley, *supra* note 1.

12. See Jojje Olsson, *Ignore China's economic muscle and condemn it for kidnapping Gui Minhai*, THE GUARDIAN (Jan. 24, 2018, 10:07 PM), <https://www.theguardian.com/commentisfree/2018/jan/25/sweden-ignore-chinas-economic-muscle-condemn-kidnapping-gui-minhai> [<https://perma.cc/84VX-7ZVE>].

13. See Catherine Lai, *EU efforts to free detained bookseller Gui Minhai to be doubled – not abandoned – after 'interview,' MPs say*, H.K. FREE PRESS (Feb. 23, 2018, 12:39 PM), <https://www.hongkongfp.com/2018/02/23/eu-efforts-free-detained-bookseller-gui-minhai-doubled-not-abandoned-interview-mps-say/> [<https://perma.cc/F7DY-3Z7Q>].

14. See Phila Siu & Kimmy Chung, *37 EU politicians demand Beijing 'unconditionally' release Hong Kong bookseller Gui Minhai*, SOUTH CHINA MORNING POST (Feb. 23, 2018), <http://www.scmp.com/news/hong-kong/politics/article/2134511/37-eu-politicians-demand-beijing-unconditionally-release> [<https://perma.cc/6DW3-V73R>].

15. See Nektaria Stamouli & William Wilkes, *Chinese Cash Blunts Europe's Criticism of Beijing's Human-Rights Record*, WALL STREET J. (June 19, 2017, 1:06 PM), <https://www.wsj.com/articles/chinese-cash-blunts-europes-criticism-of-beijings-human-rights-record-1497892018> [<https://perma.cc/A6JM-GZXZ>] (illustrating this troubling dynamic).

and to allow those diplomatic officials to offer basic forms of support to their nationals as they prepare for possible criminal prosecution.<sup>16</sup>

Gui's rights under international law – as well as Sweden's legal rights – were repeatedly violated over the course of Gui's lengthy ordeal.<sup>17</sup> As of this writing, Gui remains in detention, and may be prosecuted for allegedly trafficking in state secrets.<sup>18</sup> If that prosecution moves forward, Gui would almost certainly face a lengthy criminal sentence. In other words, if Gui is convicted, he may not be able to return to Sweden for several years, if ever.

In this Article, I argue that the violation of both Gui's and Sweden's rights under international law is consequential: the handling of his case, and its denouement, were shaped in important ways by his lack of contact with Swedish diplomatic officials. If Gui had been given timely access to consular officials, it is possible that the case would have turned out differently. Indeed, it seems likely that Chinese officials in charge of Gui's case blocked his access to Swedish consular officials precisely so that he would become more cooperative, and so that they could achieve their desired outcome. In other words, the denial of consular access to Gui was no accident. Instead, it was part of China's larger strategy for dealing with him.

I further argue that Gui's case is part of a small but growing pattern of violations of consular access by China in cases that could be deemed political. Gui Minhai's Mighty Current colleague, Lee Bo, a British citizen, was "disappeared" from Hong Kong and taken over the border into mainland China in December 2015.<sup>19</sup> And yet the UK government was neither informed of his whereabouts in a timely manner, nor given access to Lee during his time in detention.<sup>20</sup> Gui's

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16. See LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 139-185 (2008) (containing a broad overview of China's notification and access obligations under international law).

17. Gui's rights under domestic Chinese law were also violated, including his rights to legal counsel and to a fair trial under Chinese criminal procedure law. See Thomas E. Kellogg, *The Strange and Sad Case of Gui Minhai*, *THE DIPLOMAT* (Jan. 31, 2018), <https://thediplomat.com/2018/02/the-strange-and-sad-case-of-gui-minhai/> [<https://perma.cc/5FKA-HR7U>]. These concerns are very much worthy of note, but sadly a full discussion on this point is beyond the scope of this article.

18. Interview (June 2018).

19. See Michael Forsythe, *Disappearance of 5 Tied to Publisher Prompts Broader Worries in Hong Kong*, *N. Y. TIMES* (Jan. 4, 2018), <https://www.nytimes.com/2016/01/05/world/asia/mighty-current-media-hong-kong-lee-bo.html>.

20. In a television interview in March 2016, Lee denied that he had been detained, instead suggesting that he had voluntarily returned to the mainland to assist with the investigation of

fellow Swedish citizen, rights activist Peter Dahlin, was denied access to consular officials for thirteen days after he was detained in January 2016.<sup>21</sup> Dahlin's captors acknowledged his right to meet with consular officials, but falsely claimed the right to delay this meeting for as long as they deemed necessary.<sup>22</sup> And geologist Xue Feng, a United States citizen, was denied access to US consular officials for a full three weeks after his 2007 detention, for allegedly stealing state secrets.<sup>23</sup>

Finally, I also argue in this piece that China may be developing new methodologies for skirting its consular notification and visitation obligations under international law. In particular, in some key political cases, Chinese state security agents may be pressuring detained foreign nationals to forego their consular visitation rights, thus making it that much more difficult for diplomatic officials to gain access and to offer assistance. (Individuals detained overseas do have the right to decline consular visits, although most individuals will unsurprisingly take full advantage of consular support.)<sup>24</sup> Given what is publicly known about China's handling of the case, it seems likely that Gui Minhai and Lee

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Gui's case. In that same interview, Lee also disclaimed his UK citizenship, in what may have been an effort by the Chinese government to void his consular visitation rights. To many observers, it seemed highly likely that Lee's statements had been coerced. *See Hong Kong bookseller Lee Bo says he will abandon UK residency*, BBC (Mar. 1, 2016), <http://www.bbc.com/news/world-asia-china-35693759> [<https://perma.cc/9M9E-4CD8>].

21. *See* Michael Caster, *Chapter 5: Enhanced Interrogation*, in PEOPLE'S REPUBLIC OF THE DISAPPEARED (2017) (describing Dahlin's firsthand account of his time in detention); *see also* Tom Phillips, *A human rights activist, a secret prison and a tale from Xi Jinping's new China*, THE GUARDIAN (Jan. 2, 2017), <https://www.theguardian.com/world/2017/jan/03/human-rights-activist-peter-dahlin-secret-black-prison-xi-jinpings-new-china> [<https://perma.cc/9GTK-PRQR>].

22. *See* Caster, *supra* note 21, at 73. Dahlin notes that Chinese officials told him, "I had the right to ask for a lawyer, but I did not have the right to receive a lawyer. I had the right to meet with Embassy personnel, but the authorities could make me wait as long as they wanted before allowing me to meet anyone from my Embassy." *Id.* This statement represents a distortion of China's obligations under Article 36 of the Vienna Convention, *see* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963.

23. *Quiet Fight to Free American in China Jail*, ASSOCIATED PRESS, (Nov. 19, 2009, 9:59 AM), <https://www.cbsnews.com/news/quiet-fight-to-free-american-in-china-jail/> [<https://perma.cc/8RTY-CJ67>]. Other sources put the delayed notification and access at a full 32 days. *See* Richard Bernstein, *Beijing's Bluster, America's Quiet: The Disturbing Case of Xue Feng*, N. Y. REV. OF BOOKS (Oct. 2010, 8:45 AM), <http://www.nybooks.com/daily/2010/10/06/disturbing-case-xue-feng> [<https://perma.cc/C3LQ-C2AW>]. After the initial delay, US officials were able to visit regularly with Xue but were not allowed to attend his 2010 trial. Xue was eventually released in April 2015 and returned to the United States after serving more than seven years in jail.

24. *See* Vienna Convention on Consular Relations, *supra* note 22, art. 36(1)(c).

Bo were both successfully pressured to disclaim their consular visitation rights, and to self-identify as Chinese nationals.

If so, the Gui and Lee cases represent a disturbing development: though several states – including, at times, the United States – have failed to properly execute consular notification, or have blocked consular access, no other state has successfully pressed foreign nationals to openly and publicly disclaim their consular visitation rights, or to renounce their foreign citizenship.<sup>25</sup> The Chinese government’s handling of the Gui and Lee cases raises the concern that other states might learn from China’s example, and adopt similar approaches in politically sensitive cases in their own countries.

This Article proceeds in three parts. In Part I, I offer a brief summary of the Gui Minhai case, focusing in particular on violations of his right to consular access under the Vienna Convention on Consular Relations (“VCCR”). In Part II, I offer a brief overview of Article 36 of the VCCR and put forward a legal analysis of China’s general approach to consular visitation. I highlight both the fact that China seems to largely adhere to its obligations in most cases, and that it has failed to do so in a small but growing number of cases that have significant political overtones. In Part III, I conclude, placing China’s flouting of the VCCR in the context of its approach to international law more generally in the Xi Jinping years.

## *II. THE GUI MINHAI CASE: THE BOOKSELLER VANISHES*

It is impossible to do justice to the complexity and the sheer strangeness of the Gui case in this short Article. This short summary of the case attempts to give a general overview, with particular attention to Gui’s access – or lack thereof – to Swedish consular officials during his more than two years in detention. I also ask questions about the political calculus behind Gui’s initial detention, as well as his second detention in January 2018.

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25. An extensive review of the scholarly record turned up no similar cases from other parts of the world. Interviews with experts also failed to turn up any known incidents of this practice from other jurisdictions.

*A. Background to the Gui Case*

The story of Gui's kidnapping, and his long-term detention inside China, begins in October 2015.<sup>26</sup> At that time, Gui was working away at his luxury apartment in Pattaya, Thailand.<sup>27</sup> On October 17, Gui was visited at his home by a Chinese-speaking man.<sup>28</sup> The two of them left Gui's apartment complex together in Gui's car, after which point Gui disappeared.<sup>29</sup> His whereabouts would remain unknown for a full three months.<sup>30</sup>

In addition to Gui, four other individuals working for Mighty Current were also detained. On December 30, Gui's colleague Lee Bo was disappeared from Hong Kong.<sup>31</sup> Lee, a British passport holder, later emerged on the Mainland and claimed that he had returned to China voluntarily to assist in the official investigation into Mighty Current.<sup>32</sup> Lee was denied access to British consular officials while in detention, and he later publicly disclaimed his British citizenship.<sup>33</sup> To its credit, the UK government asked Beijing for more information on Lee's whereabouts within days of his disappearance.<sup>34</sup>

Though it is beyond the scope of this Article, Lee's apparent abduction from Hong Kong by Mainland Chinese authorities is a violation of Article 22 of the Basic Law, Hong Kong's mini-constitution.<sup>35</sup> Article 22 forbids mainland authorities from operating

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26. Oliver Holmes & Tom Phillips, *Gui Minhai: the strange disappearance of a publisher who riled China's elite*, THE GUARDIAN (Dec. 7, 2015, 9:21 PM), <https://www.theguardian.com/world/2015/dec/08/gui-minhai-the-strange-disappearance-of-a-publisher-who-riled-chinas-elite> [<https://perma.cc/TV3F-KA9C>].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Missing Hong Kong publisher Gui Minhai paraded on China TV*, BBC (Jan. 18, 2016), <https://www.bbc.com/news/world-asia-china-35338484> [<https://perma.cc/7KVN-UREQ>].

31. Forsythe, *supra* note 19.

32. Austin Ramzy, *Hong Kong Bookseller Returns from Mainland China, Denying He Was Abducted*, N. Y. TIMES (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/world/asia/hong-kong-bookseller-lee-bo.html>.

33. *'Missing' Hong Kong bookseller Lee Bo says he will give up British citizenship*, THE GUARDIAN (Feb. 29, 2016, 6:19 PM), <https://www.theguardian.com/world/2016/feb/29/missing-british-bookseller-appears-on-television> [<https://perma.cc/37RT-3RP2>].

34. *UK asks China what it knows of missing Hong Kong Briton*, BBC (Jan. 5, 2016), <http://www.bbc.com/news/uk-35233791> [<https://perma.cc/7KMJ-GABM>].

35. See PEN AMERICA, WRITING ON THE WALL: DISAPPEARED BOOKSELLERS AND FREE EXPRESSION IN HONG KONG, 43 (2016).



in Hong Kong without the approval of both the SAR government and the central government in Beijing.<sup>36</sup>

The other three Mighty Current workers, Lui Por, Cheung Chi-ping, and Lam Wing-kee, were detained in Shenzhen and Dongguan in October 2015.<sup>37</sup> Since none of them hold foreign passports, their cases do not raise any VCCR concerns. Still, their cases raise very real questions about the rights of the accused under domestic Chinese criminal law.

Widespread speculation that Gui had in fact been spirited back to mainland China was confirmed in January 2016. On January 17, Gui appeared on China Central Television (“CCTV”), stating that he had voluntarily returned to China and had turned himself over to Chinese authorities.<sup>38</sup> He had done so, he said, because he wanted to face justice over an alleged drunk driving incident that took place in 2003.<sup>39</sup>

In that same interview, Gui also asked others to respect his decision to return to China. He explicitly declined any potential assistance from outside actors in his case. “I do not want any individual or organization, including Sweden, to involve themselves in, or interfere with, my return to China,” Gui said.<sup>40</sup>

In an interesting parallel with other cases of detained foreign nationals who are ethnically Chinese, Gui also suggested that he viewed himself not as Swedish, but as Chinese.<sup>41</sup> Gui said, “Even though I am a Swedish national, I truly feel that I am still Chinese, and my roots are still in China. So I hope that the Swedish side would respect my personal choice, rights, and privacy, and let me solve my own problems.”<sup>42</sup>

Gui’s statements in the interview are worthy of note for several reasons. First, Gui’s explanation for his return to China, and his suggestion that it was voluntary, seemed to be coerced. According to

36. Hong Kong Basic Law, art. 22(1).

37. *See id.* at 11 (containing a comprehensive timeline of the disappearances of the five Mighty Current employees).

38. Tom Phillips, *Missing Hong Kong bookseller ‘confesses’ on Chinese state TV*, THE GUARDIAN (Jan. 17, 2016), <https://www.theguardian.com/world/2016/jan/17/missing-hong-kong-bookseller-gui-minhai-reappears-on-chinese-tv> [<https://perma.cc/3QB3-DRDQ>].

39. *Id.*

40. Michael Forsythe, *Missing Man Back in China, Confessing to Fatal Crime*, N. Y. TIMES (Jan. 17, 2016), <https://www.nytimes.com/2016/01/18/world/asia/missing-man-back-in-china-confessing-to-fatal-crime.html>.

41. *Id.*

42. *Id.*

Gui's daughter Angela, Gui had never mentioned any such drunk driving incident, and in the weeks leading up to his disappearance, gave no indication that he planned to return to China.<sup>43</sup> Indeed, according to those close to him, Gui knew that his publishing work made it much too dangerous for him to return to China, and would never have done so on his own accord.<sup>44</sup> Given the facts of the case, it seems clear that Gui was pressured by Chinese authorities to lie about the circumstances surrounding his return to China, and his ongoing detention.

Equally troubling, Gui also seems to have been pressed to publicly disclaim any assistance from Sweden, despite his right to consular assistance under international law. As noted above, if Gui was in fact pushed by Chinese authorities to publicly disavow his consular assistance rights under Article 36 of the VCCR, then this is the first such case in which a state has been able to evade its VCCR responsibilities in this manner.

One potential option for Beijing – to openly and formally claim Gui as a Chinese citizen – seems to have been closed off. According to Gui's daughter Angela, Gui had formally renounced his Chinese citizenship years ago, making him solely a Swedish national and not a dual citizen of both China and Sweden.<sup>45</sup> Still, one wonders why Gui was made to put forward a rationale for his return to China that seems, to put it mildly, rather implausible. Some exile activists believe that Gui's drunk driving story was meant to send a message to other ex-Chinese nationals living overseas, that Beijing's long reach now extends well beyond its own borders, and the niceties of international law will not prevent Chinese authorities from taking action to retrieve those it perceives as troublemakers.<sup>46</sup> If true, then the implausibility of Gui's story becomes less of a liability and more of a benefit to Beijing: it shows that the Chinese Communist Party will not let appearances, such as the less-than-ideal public relations optics of Gui putting forward a facially preposterous story on Chinese television, get in the

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43. *Daughter of Swedish Bookseller Says He is Illegally Held in China on Dubious Charges*, RADIO FREE ASIA (May 25, 2016), <https://www.rfa.org/english/news/china/daughter-of-swedish-05252016104726.html> [<https://perma.cc/N2ZR-LK4C>].

44. Interview with one person close to Gui, who said, "He wouldn't have travelled to the Mainland on his own."

45. Angela Gui, *A call that never comes: Why I cannot remain silent after Chinese authorities abducted my father*, H. K. FREE PRESS (Sept. 3, 2016, 9:22 AM), <https://www.hongkongfp.com/2016/09/03/a-call-that-never-comes-why-i-cannot-remain-silent-after-chinese-authorities-abducted-my-father/> [<https://perma.cc/8YSB-LCQN>].

46. Interview.

way of its efforts to find and punish critics of the regime living overseas. After Gui's first televised appearance, Beijing had to endure a round of press coverage of the case from outlets around the world, virtually all of which questioned the veracity of Gui's story, and highlighted the fact that he had likely been kidnapped from Thailand by Chinese government agents.<sup>47</sup>

Gui made a second television appearance just over a month after his first.<sup>48</sup> On February 28, 2016, Gui was interviewed by the Hong Kong-based Phoenix Television, as part of a Phoenix story on the Mighty Current Books case.<sup>49</sup> In that interview, Gui acknowledged that he had violated Chinese laws relating to book importation, shipping roughly 4,000 Mighty Current books into China in special packaging that could not be scanned.<sup>50</sup>

After that second television appearance, Gui more or less disappeared from sight. Though his case was kept in the headlines, in part through the valiant efforts of his UK-based daughter, Angela, nonetheless Gui was not seen again publicly for roughly another twenty months.<sup>51</sup> Where Gui was during that time is not known. Even his legal status during that time is unclear: there is no public record of Gui being tried for any crime between October 2015 and October 2017, nor did the Chinese government announce any final criminal charges against him. Though reference was made to the 2003 drunk driving case, nonetheless it seems that Gui remained in a form of legal limbo, unable

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47. For three of many such examples, see Isabella Steger, *Missing Hong Kong Bookseller Employee Shows Up in China*, WALL STREET J., (Jan. 18, 2016), <https://blogs.wsj.com/chinarealtime/2016/01/18/missing-hong-kong-bookseller-employee-resurfaces/> [<https://perma.cc/X586-E2T4>]; Ben Bland, *Missing Hong Kong publisher confesses on China state TV*, FIN. TIMES, (Jan. 17, 2016) <http://m.ftchinese.com/story/001065802/en?archive> [<https://perma.cc/8GP8-KLY2>]; Emily Rauhala, *Hong Kong bookseller's televised 'confession' was absurd and incoherent – and that's the point*, WASHINGTON POST, (Jan. 18, 2016) [https://www.washingtonpost.com/news/worldviews/wp/2016/01/18/hong-kong-booksellers-televised-confession-was-absurd-and-incoherent-and-thats-the-point/?noredirect=on&utm\\_term=.a6bf91134cb9](https://www.washingtonpost.com/news/worldviews/wp/2016/01/18/hong-kong-booksellers-televised-confession-was-absurd-and-incoherent-and-thats-the-point/?noredirect=on&utm_term=.a6bf91134cb9).

48. Ned Levin, *Hong Kong Booksellers Confess to Illegal Sales in China*, WALL STREET J. (Feb. 29, 2016, 10 PM), <https://www.wsj.com/articles/hong-kong-booksellers-confess-to-illegal-sales-in-china-1456747083> [<https://perma.cc/7XHN-PYVY>].

49. *Id.*

50. *Id.*

51. Jojje Olsson, *The Gui Minhai Case Two Years On: A Daughter's Struggle*, TAIWAN SENTINEL (Oct. 16, 2017), <https://sentinel.tw/gui-minhai-daughters-struggle/> [<https://perma.cc/HLX9-BYAU>].

to contest his detention in any way, or to meet with a lawyer who might help him mount a meaningful defense.<sup>52</sup>

It was not until October 2017, a full two years after his disappearance from his apartment in Pattaya, Thailand, that Swedish authorities received word that Gui had apparently been released.<sup>53</sup> Yet he was by no means fully free: his movements were heavily circumscribed, and his ability to contact friends and family outside of China was limited.<sup>54</sup> Gui was, however, able to make contact with Swedish consular officials in Shanghai, and to begin making plans to travel to Beijing.<sup>55</sup>

Just a few months later, Gui was detained by Chinese authorities a second time, this time on a train from Shanghai to Beijing.<sup>56</sup> According to press reports, Chinese authorities want to investigate Gui again over allegations that he disclosed state secrets, which may mean that he is facing yet another round of incommunicado detention that could last for months or years.<sup>57</sup> In June 2018, the Chinese Embassy in Sweden confirmed that Gui was in fact being investigated for allegedly disclosing state secrets. Interestingly, at the same time, the Embassy confirmed Gui's Swedish citizenship.<sup>58</sup> As of this writing, no additional information has emerged on Gui's whereabouts or his legal status. As of July 2018, Gui has, once again, disappeared into a legal black hole.

### *B. The Swedish Response*

To its credit, the Swedish government contacted both the Thai government and the Chinese government soon after learning of Gui's

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52. Interview (June 2018).

53. Tom Phillips, *Bookseller Gui Minhai 'half free' after being detained in China for two years*, THE GUARDIAN (Oct. 27, 2017, 2:43 PM), <https://www.theguardian.com/world/2017/oct/27/bookseller-gui-minhai-half-free-detained-china> [<https://perma.cc/LMC5-G6N9>].

54. *Id.*

55. Interview (June 2018).

56. Buckley, *supra* note 1.

57. Tom Phillips, *Chinese media claims bookseller Gui Minhai offered national secrets to foreign groups*, THE GUARDIAN (Feb. 10, 2018, 9:48 PM), <https://www.theguardian.com/world/2018/feb/11/chinese-media-claims-bookseller-gui-minhai-offered-national-secrets-to-sweden> [<https://perma.cc/H7TJ-N9CT>].

58. Though the statement noted that Gui has had access to "senior medical experts," no reference was made to Gui's right to consult with an attorney, a serious breach of his rights under Chinese law. See *Chinese Embassy Spokesperson's Remarks on the Case of Gui Minhai*, EMBASSY OF CHINA (June 8, 2018), <http://www.chinaembassy.se/eng/sgxw/t1566916.htm> [<https://perma.cc/5YZV-V495>].

disappearance.<sup>59</sup> And yet Stockholm's initial outreach to Beijing yielded little in terms of concrete information on Gui's whereabouts: Chinese authorities initially refused to confirm that Gui was being held in official custody, or that he had been forcibly removed from Thailand by Chinese state agents.<sup>60</sup>

On January 22, 2016, a full three months after Gui's disappearance, the Swedish embassy in Beijing noted the "repeated denial of consular access to Mr. Gui Minhai."<sup>61</sup> That same day, Swedish Foreign Affairs Minister Margot Wallstrom condemned Gui's detention and the detention of Swedish rights activist Peter Dahlin as "unacceptable."<sup>62</sup> It was not until late February, after Gui's second television appearance, that Swedish diplomatic officials were given access to Gui.<sup>63</sup> During their meeting, Gui indicated that he did not want any assistance from the Swedish government.<sup>64</sup>

After that initial February meeting, Swedish officials were denied access to Gui for several months. In June 2016, Sweden's Consul-General to Hong Kong, Helena Storm, noted that Sweden's ongoing requests for consular access had been denied.<sup>65</sup> She further noted that Sweden had continued to "request answers on the legal process and any charges against him," and further that Sweden expected Gui's case "to be dealt with within the framework of the rule of law."<sup>66</sup> These public and private overtures yielded little in the way of additional access: it was not until September 2016 that Swedish consular officials were allowed to visit Gui a second time.<sup>67</sup> That second visit also failed to lead to regular visitation rights for Sweden.

It must be said that Sweden did make regular and repeated overtures – mostly in private – to Beijing to win access to Gui.<sup>68</sup>

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59. Holmes & Phillips, *supra* note 26.

60. Interview.

61. PEN AMERICA, *supra* note 35, at 15.

62. *Sweden lashes out at China's detention of campaigners*, THE LOCAL (Jan. 22, 2016, 5:19 PM), <https://www.thelocal.se/20160122/sweden-lashes-out-at-chinas-detention-of-campaigners> [<https://perma.cc/B2JG-64QD>].

63. PEN AMERICA, *supra* note 35, at 15.

64. *Id.*

65. Stuart Lau, *Detained Causeway Bay bookseller Gui Minhai not seen by Swedish diplomats for more than three months, says consul general*, SOUTH CHINA MORNING POST (June 6, 2018), <http://www.scmp.com/news/hong-kong/politics/article/1966843/detained-causeway-bay-bookseller-gui-minhai-not-seen-swedish> [<https://perma.cc/CBK9-S8GT>].

66. *Id.*

67. PEN AMERICA, *supra* note 35, at 19.

68. Interview.

Swedish diplomatic officials also urged that Gui's rights under Chinese criminal law be protected, and that if no charges could be brought against him, he should be released.<sup>69</sup> Still, many observers questioned whether Stockholm's initial primary reliance on quiet diplomacy was the right choice, given Beijing's lackluster response to Sweden's initial efforts at outreach.<sup>70</sup> Would it not have been better, the argument goes, for Sweden to have taken stronger public steps, once it became clear that diplomatic efforts conducted behind closed doors had largely failed?

After Gui's second disappearance, Swedish authorities offered a much stronger response. Just a day after Gui was removed from the bullet train to Beijing, Foreign Minister Wallstrom issued a strongly-worded statement calling for Gui's immediate release.<sup>71</sup> "We take a very serious view of the detention on Saturday of Swedish citizen Gui Minhai, with no specific reason being given for the detention, which took place during an ongoing consular support mission," Wallstrom said.<sup>72</sup> Wallstrom also noted that China's ambassador to Sweden had been summoned twice in the aftermath of Gui's second detention.<sup>73</sup>

In a second statement released roughly two weeks later, Foreign Minister Wallstrom condemned China's "brutal" detention of Gui, and noted that Sweden was once again barred from engaging in consular visits with Gui.<sup>74</sup> Chinese authorities responded with yet another seemingly coerced video featuring Gui, in which he claimed that he had been tricked by Swedish authorities, who were intent on "sensationalizing" his case.<sup>75</sup> Once again, Gui himself had been

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69. Interview.

70. See Michael Caster, *The last missing bookseller: One year on, the anniversary of Gui Minhai's abduction demands action*, H. K. FREE PRESS (Oct. 17, 2016), <https://www.hongkongfp.com/2016/10/17/the-last-missing-bookseller-one-year-on-the-anniversary-of-gui-minhais-abduction-demands-action/> [<https://perma.cc/LZ7V-JNBL>].

71. Margot Wallstrom, Swedish Minister for Foreign Affairs, *Statement in connection with the detention of Swedish citizen Gui Minhai*, GOV'T OFFICES OF SWEDEN (Jan. 23, 2018), <http://www.government.se/statements/2018/01/statement-in-connection-with-the-detention-of-swedish-citizen-gui-minhai/> [<https://perma.cc/N3ZT-5YEE>].

72. *Id.*

73. *Id.*

74. Tom Phillips, *Sweden condemns China's 'brutal' detention of bookseller Gui Minhai*, THE GUARDIAN (Feb. 5, 2018, 9:25 PM), <https://www.theguardian.com/world/2018/feb/06/sweden-condemns-chinas-brutal-detention-of-bookseller-gui-minhai> [<https://perma.cc/SCS8-F4FY>].

75. Tom Phillips, *Bookseller Gui Minhai surfaces in Chinese custody to deliver staged confession*, THE GUARDIAN (Feb. 9, 2018, 9:26 PM), <https://www.theguardian.com/world/2018/>

weaponized, brought into the public arena to speak out against the Swedish government's efforts on his behalf. It seemed clear, yet again, that Gui's statements had been coerced.

The difference between the Swedish government's reaction to Gui's initial detention, in late 2015 and early 2016, and its reaction upon hearing of Gui's second detention in January 2018, is quite pronounced. Other states that find themselves in a situation similar to Sweden might well take note: soft diplomacy efforts may fail to win results in politically sensitive cases, which means that states need to think about diplomatic responses that will increase the political cost to Beijing for failing to adhere to its VCCR obligations. Failure to develop stronger diplomatic tools may prove costly: given the relative success of Beijing's approach to Gui's case, the Chinese government might ignore future pleas by other states to win even minimal access to their own nationals when they are detained inside China.

Sweden's efforts aside, one core question remains unanswered: why, after allowing Gui at least some small measure of freedom, would Chinese authorities decide to take him back into custody, especially in such dramatic fashion? Given the Chinese government's tight-lipped approach to the case, it is impossible to know for sure. Gui's contact with the Swedish consulate in Shanghai was almost certainly preapproved by the state security officials in charge of his case. They must have known that he was in touch with the Swedish consulate in order to renew his passport, and that his goal was to seek medical treatment abroad. Why, then, seek to block him from doing just that, after letting him take some initial steps toward leaving China?

Perhaps those same officials started to have second thoughts. What if Gui somehow reached Europe, and decided to renew his publishing work once there? Or what if wrote a book of his own? No doubt he would have more than a few unsavory details to reveal about his kidnapping and two years in detention, including – if other, similar cases are any guide – denial of urgently needed medical care, threats against himself and his family, and possibly even physical abuse or torture. Given more time to think it all over, the officials handling Gui's case might well have changed their minds: better to grab Gui again before potentially losing full physical control over him, than to risk the fallout from any revelations that might ensue once Gui reached Europe.

### III. CONSULAR VISITATION AND INTERNATIONAL LAW

The Vienna Convention on Consular Relations (“VCCR” or “the Convention”), which was adopted in 1963 by the UN Conference on Consular Relations, has justifiably been called “one of the more enduring and important treaties” of the post-War era.<sup>76</sup> Over the more than fifty years since its adoption, the VCCR has achieved a high degree of recognition: 179 states have joined it, including China, the United States, Great Britain, and Sweden.<sup>77</sup> The Convention is generally considered to be customary international law, which means that its provisions are binding on all states, even those few that have not yet ratified it.<sup>78</sup>

#### A. Article 36: A Core International Law Norm

Consular notification and visitation obligations are outlined under Article 36 of the Vienna Convention on Consular Relations.<sup>79</sup> Under Article 36, whenever a foreign national is detained within a state’s jurisdiction, state officials must inform the detained national of his right to consular notification and access.<sup>80</sup> If the detained individual then requests consular assistance, the state is obligated to inform that national’s home government of the detention, and to facilitate consular access “without delay.”<sup>81</sup>

The core goals of Article 36 are quite clear: it is meant to facilitate consular support to citizens detained overseas, while at the same time respecting a receiving state’s sovereignty over purely domestic criminal law matters.<sup>82</sup> In part, Article 36 is prophylactic in nature: sending states hope that their official attention will ensure that their

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76. John B. Quigley, *Vienna Convention on Consular Relations: In Retrospect and into the Future*, 38 SOUTHERN ILL. U. L. J. 1 (2014) 1, 1.

77. *Depositary*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-6&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en) [<https://perma.cc/9WML-UG9Z>] (last visited July 1, 2018).

78. See LEE & QUIGLEY, *supra* note 16, at 25.

79. Vienna Convention on Consular Relations, *supra* note 22, art. 36.

80. See LEE & QUIGLEY, *supra* note 16, at 139-185 (containing an excellent history of Article 36, and an authoritative analysis of states’ rights and obligations under that article).

81. Vienna Convention on Consular Relations, *supra* note 22, art. 36(1)(b).

82. See ANNE JAMES, BRIDGING THE GAP: EFFECTIVE REPRESENTATION OF FOREIGN NATIONALS IN US CRIMINAL CASES 15 (2007).



citizen's case will be handled fairly and in accordance with the law, and that their citizens will not be mistreated if they are sentenced to prison.<sup>83</sup> Article 36 also serves a humanitarian function, in that it allows for the provision of basic humanitarian assistance, including communication with the detained individual's family and even the provision of basic life necessities such as food and medicine in circumstances where they are otherwise not provided.<sup>84</sup>

Many states place a premium on consular support to their own nationals detained overseas and make very real efforts to offer whatever assistance they can to citizens who find themselves jailed in a foreign land.<sup>85</sup> In its instructions to its consuls, for example, the US Department of State states that: "Our most important function as consular officers is to protect and assist U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail."<sup>86</sup> Other states have similarly stressed the importance of high-quality professional consular support to detained citizens.<sup>87</sup>

For the most part, consular access is given to individuals accused of common crimes while abroad, including drug trafficking, disorderly conduct, and so on.<sup>88</sup> In Europe, for example, crimes associated with football hooliganism have generated a huge number of detentions, which in turn led to the creation of a European Convention on Spectator Violence and Misbehavior at Sports Events, which complements the rights and obligations put forward in the Vienna Convention.<sup>89</sup> In such cases, the political concerns that dominated the Gui Minhai case are more or less completely absent, making consular access much easier for the receiving state to execute.

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83. *See id.*

84. *See* ANNE JAMES, A UNIVERSAL SAFEGUARD: PROVIDING CONSULAR ASSISTANCE TO NATIONALS IN CUSTODY: AN INTRODUCTORY GUIDE FOR CONSULATES 3 (2007).

85. *See* LEE & QUIGLEY, *supra* note 16, at 147.

86. *See id.* (quoting U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL AND HANDBOOK ON CONSULAR AFFAIRS: ARREST OF U.S. CITIZENS ABROAD 412 (2016))

87. *See id.* at 147-48.

88. *See id.* at 139-40.

89. *See id.* at 139.

Some states have concluded bilateral consular treaties that augment the provisions of the VCCR.<sup>90</sup> Such treaties may include additional obligations as between the two contracting states that “extend or amplify” the existing provisions of the VCCR.<sup>91</sup> States may, for example, opt to offer each other’s consular representatives additional privileges and immunities not listed in the VCCR.<sup>92</sup> In their bilateral treaty, the United States and China set specific timelines for consular notification and visitation, adding specificity to the VCCR Article 36(1)(b) requirement that states be notified “without delay,” and a specific timeline to the general “right to visit” laid out by Article 36(1)(c).<sup>93</sup>

The VCCR is largely silent on the question of dual nationals. In many cases, individuals who are dual nationals may request and receive consular assistance from both states.<sup>94</sup> If an individual is a national of both the sending and receiving state, the receiving state could choose to recognize the individual’s “predominant” nationality, and offer access if the individual’s predominant nationality is that of the sending state.<sup>95</sup> In practice, however, many states, including both China and the United States, refuse consular protections to dual nationals who hold receiving state citizenship.<sup>96</sup>

Though it may seem nothing more than a diplomatic formality, consular support can have a significant impact on the handling and outcome of a detained foreign national’s case.<sup>97</sup> When they are

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90. *See id.* at 567-68. Many states concluded bilateral consular agreements before the VCCR went into force; under Article 73(1) of the Convention, those agreements generally remain valid.

91. Vienna Convention on Consular Relations, *supra* note 22, art. 73. Scholars generally agree that bilateral agreements that violate or restrict the VCCR would violate a state’s obligations under the Convention.

92. *See* LEE & QUIGLEY, *supra* note 16, at 572-73.

93. United States Consular Convention with the People’s Republic of China, China-U.S., Sept. 17, 1980. Under Article 35 of the Consular Convention, a state must be notified within four days of a national’s detention, and visitation must be granted within two days of notification. *Id.* Both states are guaranteed a minimum of one visit with detained nationals per month. *Id.*

94. *See* LEE & QUIGLEY, *supra* note 16, at 126.

95. *See id.* at 126-27.

96. *See generally* Mark E. Wojcik, *Consular Notification for Dual Nationals*, 38 SOUTHERN ILL. U. L. J. 73 (2013) (analyzing the US approach to its own dual nationals who are detained in the United States).

97. *See* The Right to Information on Consular Assistance in the frameworks of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (serA) No. 16, 10 (Oct. 1, 1999) (noting that “[p]rompt consular assistance may be decisive in the

informed in a timely manner, consular officials can assist their nationals with the negotiation of linguistic and cultural barriers, help with the provision of a robust legal defense,<sup>98</sup> raise concerns about allegations of torture or ill-treatment, and offer vital supports, such as messages from friends and family, that can help detainees make it through the mental and emotional rigors of a criminal trial.<sup>99</sup>

Many of the key international controversies surrounding the VCCR have involved questions of remedies for failure to adhere to Article 36's notification and access requirements. In three of the key Article 36 cases, *Breard*, *Avena*, and *LaGrand*, the United States has been pushed by other countries to provide remedies in cases in which local authorities have failed to notify detained individuals of their consular access rights, and have similarly failed to notify consular officials of the detention.<sup>100</sup> For years, the United States largely ignored judgments from the International Court of Justice ("ICJ") calling on the US to provide more robust remedies for Article 36 violations.<sup>101</sup>

In recent years, more efforts have been made to bring the United States into compliance with international law as expressed in the ICJ verdicts, and to ensure better compliance with Article 36.<sup>102</sup> In 2008, the Supreme Court held that the United States has an "international law obligation" to comply with the ICJ *Avena* verdict.<sup>103</sup> Further, the Court

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outcome of a criminal proceeding, because it guarantees, *inter alia*, that the foreign detainee is advised of his constitutional and legal rights in his own language.").

98. See S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L. J. 719, 722-30 (1995) (discussing that in the United States, for example, consular officials have worked with legal counsel to provide information on a foreign national's life experience that in turn can be used as mitigating evidence in the penalty phase of a criminal trial).

99. See KATERINA MANTOUVALOU, *CONSULAR ASSISTANCE AND TRIAL ATTENDANCE*, vii (2009).

100. See generally *Breard v. Greene*, 523 U.S. 371 (1998); *Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.)*, Judgment, 2004 I.C.J. Rep. 12 (Mar. 31); *LaGrand Case (Ger. V. U.S.)*, Judgment, 2001 I.C.J. Rep. 466 (June 27).

101. There is a vast literature on these cases, mostly centered on questions of domestic application of international law in the United States, and on the individual nature of the Article 36 right. See generally William J. Aceves, *Avena and Other Mexican Nationals*, 97 AM.J. INT'L L. 923 (2003) (analyzing the *Avena* case); Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR. J. INT'L L. 317 (2007) (containing a rigorous critique of the US response to the ICJ verdicts).

102. Interview with a U.S. Dep't of State Official (Mar. 6, 2018).

103. See *Medellin v. Texas*, 552 U.S. 491, 504 (2008). That said, the Supreme Court held that the ICJ *Avena* verdict was not directly enforceable in the United States. Instead, the Court

held, the United States has a strong interest in implementing *Avena*, specifically “ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.”<sup>104</sup>

In 2011, legislation was introduced to strengthen US compliance with Article 36, but, as of this writing, that bill – the Consular Notification Compliance Act – has yet to become law.<sup>105</sup> That said, the US Department of State has strengthened its efforts to educate local police officials on the importance of adhering to notification and access requirements whenever a foreign national is detained.<sup>106</sup>

In most cases in the US context, the violation of Article 36 was a product of failure at the local level, most likely because state and local authorities did not know that they were obligated to take action to execute their Article 36 responsibilities.<sup>107</sup> Even as hundreds of cases of Article 36 violations have emerged over several years, the United States federal government has continued to reaffirm its Article 36 obligations and has acknowledged violations when they have occurred.<sup>108</sup>

In other words, US shortcomings in adherence to the Vienna Convention – serious though they are – differ from those committed by China in the Gui Minhai case. In Gui’s case, it seems clear that there was an overt (and ultimately largely successful) effort by the Chinese authorities to block Sweden and Gui’s exercise of their Vienna Convention rights.

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held, it should be enforced through implementing legislation passed by the United States Congress. *See id.* at 506.

104. *Id.* at 524.

105. *See* David Carle, *Leahy Renews Effort to Bring U.S. Into Compliance With International Consular Notification Treaty*, PATRICK LEAHY (June 14, 2011), <https://www.leahy.senate.gov/press/leahy-renews-effort-to-bring-us-into-compliance-with-international-consular-notification-treaty> [<https://perma.cc/4WZQ-H7VG>].

106. Interview with a U.S. Dep’t of State Official, *supra* note 102.

107. *Id.* (according to the official, who was involved in outreach to state and local police departments, “No one willfully does not do it. That I have not found.”).

108. *See* Bruce C. Swartz, Deputy Assistant Attorney Gen. and Counselor for Int’l Affairs, Meeting the United States’ International Law Obligations through the Consular Notification Compliance Act of 2011, Statement before the Judiciary Committee, U.S. Senate (July 27, 2011).

*B. Article 36: Chinese State Practice*

When the VCCR was first promulgated in 1963, the People's Republic of China was unable to join the treaty.<sup>109</sup> It was locked out of the international system: the Republic of China represented China at the United Nations until 1971, despite the fact that it had been banished to Taiwan from the Mainland at the end of the Chinese civil war in 1949.<sup>110</sup> After the PRC took over the UN seat in 1971, it began a lengthy process of acceding to key treaties and joining other international organizations.<sup>111</sup> China acceded to the Vienna Convention on Consular Relations on July 2, 1979.<sup>112</sup>

Around the same time, China also concluded bilateral consular conventions with a number of countries, often including provisions that closely mirrored the core provisions of the VCCR.<sup>113</sup> The US-China Consular Convention was concluded in September 1980.<sup>114</sup> China has since concluded some forty bilateral consular conventions, all of which further solidify its commitment to the norms and practices enunciated in the Vienna Convention.<sup>115</sup> As of this writing, despite having concluded various other agreements on trade, cultural exchange, and other matters, China and Sweden have not concluded a bilateral consular agreement.<sup>116</sup>

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109. See SAMUEL S. KIM, CHINA, THE UNITED NATIONS AND WORLD ORDER 102-05 (1979) (recounting the PRC's successful drive to win the China UN seat). See generally Lincoln P. Bloomfield, *China, the United States, and the United Nations*, 20 INT'L ORG. 653 (1966) (containing an analysis of the factors that eventually led the United States to lead the charge against UN representation for the PRC).

110. See KIM, *supra* note 109.

111. See ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY, 33-64 (2007), (describing China's re-integration into the international system).

112. Stephen Kho, *A Study of the Consular Convention Between the United States of America and the People's Republic of China*, 6 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. 1, 2 (1996).

113. *Table of Consular conventions and Agreements Between China and Foreign Countries*, EMBASSY OF CHINA IN EST. (May 18, 2004), <http://ee.china-embassy.org/eng/lsqw/lsex/t111172.htm> [<https://perma.cc/6W2X-DVW6>] (containing a partial list of China's consular agreements).

114. See generally Kho, *supra* note 112 (providing an overview of the U.S.-China Consular Convention).

115. See LEE & QUIGLEY, *supra* note 16, at vii.

116. See *Bilateral Agreement between China and Sweden*, ECON. AND COM. COUNS. OFF. OF THE EMBASSY OF CHINA IN SWEDEN (Feb. 27, 2007), <http://se2.mofcom.gov.cn/article/bilateralcooperation/bilateralagreement/200702/20070204406471.shtml> [<https://perma.cc/78ZT-22Y8>] (containing a partial list of bilateral agreements between China and Sweden).

One early study of Chinese state practice regarding consular notification and access makes clear that the problems of delayed consular notification and insufficient access to detained foreign nationals, especially in politically sensitive cases, are longstanding ones.<sup>117</sup> Throughout the 1980s and 1990s, Chinese authorities repeatedly detained foreign nationals without informing their home governments.<sup>118</sup> Some of these detained nationals were also blocked from meeting with diplomatic representatives after the country in question learned of the detention.<sup>119</sup>

That said, at present, China largely adheres to its Article 36 consular notification and access obligations. Several Beijing-based diplomats have confirmed that their cooperation with the Chinese authorities on Article 36 matters is generally robust and relatively smooth, though by no means fully problem-free.<sup>120</sup> According to one Western diplomat based in Beijing, while consular authorities may not have access to a detained individual until formal notification takes place, nonetheless “they usually hit the 48 hour window.”<sup>121</sup> Diplomats from other countries affirmed the Chinese government’s general promptness in notifying governments when their nationals are detained, and chalked up occasional shortcomings to a lack of understanding of notification requirements in more rural and isolated parts of China.<sup>122</sup>

Diplomatic officials interviewed for this Article noted that Chinese officials often refuse to allow confidential consultations between detained foreign nationals and their consular representatives, and may even bring in a video camera to record conversations.<sup>123</sup> In some cases, officials have restricted the topics that can be discussed during consular visits, disallowing conversation on pending legal matters.<sup>124</sup> Though the Vienna Convention is silent on the question of confidential consultation with detained foreign nationals, nonetheless

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117. *See generally* Kho, *supra* note 112 (Kho’s study focuses on the detention of U.S. citizens, but it seems likely that other foreign nationals were held under circumstances that violated their consular notification and access rights as well).

118. *See generally id.* (In some of the cases covered by Kho, the detained foreign nationals were engaged in more sensitive human rights or religious activities; in others, the individuals were engaged in run-of-the-mill commercial activities).

119. Interviews. *See generally id.*

120. Interview.

121. Interview.

122. Interviews.

123. Interviews.

124. Interviews.

some states to urge their consular officials to request private and confidential visits.<sup>125</sup>

It should be noted that China does not *uniformly* hinder consular notification and access in all politically sensitive cases. Indeed, more often than not, Chinese officials will allow consular access, even despite the political sensitivities surrounding a particular case.<sup>126</sup> For example: Peter Humphrey, a British business consultant who was detained in Shanghai in July 2013 over allegedly illegally acquiring personal information, notes that the British consular officials who visited him regularly were his “angels.”<sup>127</sup> US citizen Sandy Phan Gillis, who was detained in March 2015 on alleged espionage charges, also received regular visits from US consular officials.<sup>128</sup> Canadian citizens Kevin and Julia Garratt, detained in the northeastern city of Dandong in August 2014, also on allegations of espionage, were similarly allowed regular access to Canadian consular officials.<sup>129</sup> These are but a few of many such examples of sensitive cases in which consular access rights – if not, unfortunately, basic criminal due process rights – were largely adhered to.

In that sense, the cases that are the focus of this article – including the Gui Minhai case – are outliers. Unlike most foreigners who are detained in China, Gui, Lee Bo, Xue Feng, and Peter Dahlin were not granted immediate access to consular officials. Even more troublingly, Gui and Lee may have been pressured to renounce their Swedish and British passports, as a means of nullifying their and their countries’ rights under the Vienna Convention.

Even extremely rich and powerful businesspeople – including mainland-born Chinese who have taken up foreign citizenship – are not

125. See LEE & QUIGLEY, *supra* note 16, at 150-51.

126. Interviews. As one US-based NGO expert on detentions of U.S. citizens put it, “generally speaking, if you are an American citizen, they will grant you consular access.” *Id.* The same seems to hold true for citizens of other countries as well.

127. Peter Humphrey, ‘I was locked inside a steel cage’: Peter Humphrey on his life inside a Chinese prison, *FIN. TIMES* (Feb. 15, 2018), <https://www.ft.com/content/db8b9e36-1119-11e8-940e-08320fc2a277> [<https://perma.cc/YK8X-8EF2>].

128. *China charges U.S. woman with espionage*, *REUTERS* (Aug. 30, 2016, 6:41 AM), <https://www.reuters.com/article/us-china-rights-usa/china-charges-u-s-woman-with-espionage-idUSKCN115159> [<https://perma.cc/U2AC-3H8K>].

129. Michelle Zillio, *Kevin Garratt makes first public appearance after release from Chinese prison*, *GLOBE AND MAIL* (Oct. 6, 2016), <https://www.theglobeandmail.com/news/politics/canadian-detained-in-china-makes-first-public-appearance-since-release/article32285150/> [<https://perma.cc/Y6XH-MVB3>].

immune to potential violations of their Vienna Convention rights.<sup>130</sup> In late January 2017, prominent billionaire businessman Xiao Jianhua was abducted from the Four Seasons Hotel in Hong Kong and was taken over the border into China.<sup>131</sup> Various sources have reported that Xiao is not in detention, and in fact is merely “helping” Chinese authorities with various anti-corruption investigations.<sup>132</sup> This claim has been met with skepticism by some, who have pointed to the strange circumstances surrounding Xiao’s departure from Hong Kong as evidence that he was forcibly abducted, and is not willingly cooperating with Chinese authorities.<sup>133</sup> As far as is known, Xiao has not been able to meet with Canadian consular officials, despite the fact that he has held Canadian citizenship for over a decade.<sup>134</sup>

Peter Dahlin’s case aside, there is an unmistakable racial component to Beijing’s approach to an individual’s VCCR rights. The cases of Gui, Lee, Xue, and Xiao have raised concerns among many Chinese-born individuals who have obtained foreign citizenship that the Chinese government will simply ignore the foreign passports – and the rights that come with them – of ethnically Chinese individuals who

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130. See Ben Bland, *Foreign passports offer little protection for China’s elite*, FIN. TIMES (Feb. 13, 2017, 8:42 P.M.), <https://www.ft.com/content/91fd733e-eea6-11e6-930f-061b01e23655> [https://perma.cc/2JP9-5W5U].

131. Michael Forsythe, *Billionaire is Reported Seized From Hong Kong Hotel and Taken Into China*, N. Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/world/asia/xiao-jianhua-china-hong-kong-billionaire.html>.

132. See *Chinese tycoon ‘helping inquiries’ into 2015 stock market turmoil and case of former top spy*, SOUTH CHINA MORNING POST (Feb. 1, 2017), <http://www.scmp.com/news/china/policies-politics/article/2067268/chinese-tycoon-helping-inquiries-2015-stock-market> [https://perma.cc/S8XL-KSF8].

133. See Michael Forsythe, *A Missing Tycoon’s Links to China’s Troubled Dalian Wanda*, N. Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/business/dealbook/china-wanda-xiao-jianhua.html>. Of course, if Xiao had returned to China voluntarily, and affirmatively chose to assist the Chinese authorities in their anti-corruption work, the Vienna Convention would not apply, since Xiao was not in detention.

134. See Craig Offman & Nathan Vanderklippe, *Brian Mulroney, Liberal government seek release of billionaire in China*, GLOBE AND MAIL (Mar. 6, 2017), <https://www.theglobeandmail.com/news/politics/brian-mulroney-liberal-government-seek-release-of-billionaire-in-china/article34210940/> [https://perma.cc/FGN2-77W4] (In the immediate aftermath of Xiao’s disappearance, the Canadian Foreign Ministry said in a statement that “consular officials are in contact with the authorities to gather additional information and provide assistance.”); Jamil Anderlini et al., *Chinese billionaire abducted from Hong Kong*, FIN. TIMES (Jan. 31, 2017), <https://www.ft.com/content/8e54c51c-e7a7-11e6-893c-082c54a7f539> [https://perma.cc/U3YT-VMBE]. It is possible that Xiao is a dual citizen, and continues to hold Chinese citizenship, which would serve as a legal basis for China’s failure to grant Canada any consular visitation rights to meet with him. Regardless, Chinese government officials have not yet publicly stated *any* grounds for denying Xiao his consular visitation rights.



are detained in China.<sup>135</sup> Foreign Minister Wang Yi's 2016 statement that Lee Bo is "first and foremost Chinese" was an apt encapsulation of this point of view.<sup>136</sup>

Still, it seems clear that China is taking steps to block certain key individuals from accessing consular representatives, in violation of international law. In addition, it seems highly likely that, in some cases, the Chinese government has used detained individuals themselves to frustrate the underlying goals of VCCR Article 36.

If so, then China has found a new and innovative way to evade its Article 36 obligations. This Author was unable to identify any other instances of detained foreign nationals being forced to publicly renounce consular assistance or their own foreign nationality.<sup>137</sup> As noted above, both the United States and other countries have fallen short at times in terms of their own adherence to Article 36. But for the most part, those instances of failure were due to low-level bureaucratic shortcomings, and not to an active effort, sustained over a period of years in at least two cases, to strip an individual of his consular assistance rights.

The fact that China has found a new way to evade its VCCR Article 36 commitments is a deeply disturbing example of Beijing's at times instrumentalist approach to its obligations under international law. As one prominent American scholar of China has put it: "China continues to display and practice a distinct 'transactional' style of diplomacy, carefully weighing national costs and benefits, rather than contributing to global collective 'public goods.'"<sup>138</sup>

Sadly, it seems clear that the PRC government has yet to fully internalize the values that underlie the Vienna Convention, and is

135. See Eva Dou, *For China-Born Detainees, a Foreign Passport Provides Few Protections*, WALL STREET J. (Jan. 24, 2018, 3:03 PM), <https://www.wsj.com/articles/hong-kong-booksellers-re-arrest-highlights-china-legal-limbo-1516823525?mod=searchresults&page=1&pos=1> [<https://perma.cc/Y4R9-5A6C>].

136. See Naomi Ng & Phila Siu, *'First and Foremost a Chinese citizen': China's foreign minister on missing Hong Kong bookseller who also holds a British passport*, SOUTH CHINA MORNING POST (Jan. 5, 2016, 11:28 A.M.), <http://www.scmp.com/print/news/hong-kong/law-crime/article/1898106/first-and-foremost-chinese-citizen-chinas-foreign-minister> [<https://perma.cc/S6T4-DBWW>].

137. It may well be the case that other states have in fact pressured detained foreign nationals to forego their Article 36 rights. But at the very least, no such cases have publicly emerged. The fact that they haven't speaks to the durability of the norm and the fact that most states view reciprocity as a key factor that helps to ensure adherence for cases of their own detained foreign nationals.

138. DAVID SHAMBAUGH, *CHINA GOES GLOBAL* 127 (2013).

willing to jettison those core values when China's perceived state interests so require.<sup>139</sup> This approach fits in with China's broader approach to its international law obligations, in which China generally "obeyed most international rules and norms, [and yet] its compliance was selective and shallow."<sup>140</sup>

If so, such an interest-based approach is incredibly short-sighted: after all, hundreds of millions of Chinese nationals travel overseas every year, to study, to do business, or for tourism.<sup>141</sup> Some take up residence in foreign countries for years at a time before eventually deciding to return to China. If and when its own citizens get into trouble while abroad, China will expect prompt notification of their arrest, and seek a reasonable level of access to them while in detention. In other words, China enjoys the reciprocal rights that are protected by the Vienna Convention, and should therefore seek to strengthen the VCCR through its own rigorous compliance with its core provisions. At least in the key cases documented in this Article, the Chinese government has allowed domestic political concerns to override the benefits of compliance.

#### IV. CONCLUSION: STATUS QUO OR REVISIONIST POWER?

In recent years, a debate has raged over China's approach to international law, and its future aspirations for influence within the international system.<sup>142</sup> As China grows more wealthy and powerful, would Beijing more actively support the existing United States-led international order, or would it seek to reshape key institutions and norms to better suit its own interests?

Those arguing in favor of viewing China as a status quo power, one that would support the existing set of rules and norms, had more

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139. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) ("[T]he complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.") (emphasis in original).

140. See SHAMBAUGH, *supra* note 138, at 131.

141. See Jane Li, *Record 133 million Chinese tourists to travel out of mainland this year, with Hong Kong their top destination: report*, SOUTH CHINA MORNING POST (Sept. 8, 2016, 10:29 P.M.), <http://www.scmp.com/news/china/money-wealth/article/2017633/record-number-chinese-tourists-travel-outside-mainland-year> [<https://perma.cc/9EP8-K9HX>].

142. See generally Alastair Iain Johnston, *Is China a Status Quo Power?*, 27 INT'L SECURITY 5 (2003) (the most in-depth assessment of this question); Scott L. Kastner & Phillip C. Saunders, *Is China a Status Quo or Revisionist State? Leadership Travel as an Empirical Indicator of Foreign Policy Priorities*, 56 INT'L STUD. Q. 163 (2012) (more recent assessment).

than a few points to make in favor of their point of view: after all, few countries have benefited as much as China has from the existing order.<sup>143</sup> At the same time, given the significant role that economic growth plays in legitimating one-Party rule in China, few countries would have as much to lose if a breakdown in the international order led to increased regional tensions, which in turn caused an economic downturn. Better for China to stick with the existing system, the argument goes, rather than risk the instability that might ensue were it to take steps to undermine that system.

To be sure, China has taken a number of important steps to support the existing liberal order. After years of dragging its feet, China has become a key supporter of international efforts to combat climate change, for example. In fact, the Chinese government's diplomatic efforts helped to push the Paris Agreement on Climate Change over the finish line. Though China's record on trade is far from perfect, it has largely sought to handle trade disputes through the WTO dispute resolution mechanism, rather than taking unilateral action outside the bounds of the WTO. And China has, at times, played a constructive role in international efforts to curb North Korea's nuclear weapons development program.

At the same time, any discussion of China's approach to international institutions and international law takes place against a backdrop of rapidly declining US government support for the world order that it did so much to create.<sup>144</sup> In his first year in office, President Trump withdrew the United States from the Paris Climate Agreement, pulled out of the Trans-Pacific Partnership regional free trade agreement, and has threatened to take the United States out of the North American Free Trade Agreement. He has repeatedly ridiculed key North Atlantic Treaty Organization allies, deriding them as "free riders." And his administration abandoned the United States' seat on the UN Human Rights Council, a body that President Trump himself termed an "embarrassment."<sup>145</sup>

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143. See G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 *FOREIGN AFF.* 23 (2008). Ikenberry points out that, "China can gain full access to and thrive within [the existing] system. And if it does, China will rise, but the Western order – if managed properly – will live on." *Id.* at 24.

144. See Jack Goldsmith, *The Trump Onslaught on International Law and Institutions*, *LAWFARE* (Mar. 17, 2017, 10:09 A.M.), <https://lawfareblog.com/trump-onslaught-international-law-and-institutions#> [<https://perma.cc/8PE3-KHGV>].

145. Nahal Toosi & Eliana Johnson, *Sources: U.S. considers quitting U.N. Human Rights Council*, *POLITICO* (Feb. 25, 2017, 8:52 P.M.), <https://www.politico.com/story/2017/02/trump->

Most supporters of the liberal international order believe that the system will be resilient enough to survive the leadership vacuum created by the Trump presidency.<sup>146</sup> But the fact remains that US government criticism of Chinese violations of international law is undermined by Washington's own recent actions.

For its part, China has taken several steps that have undermined the effectiveness of international law and international institutions. In July 2016, Beijing publicly rejected an important verdict on the South China Sea, and has continued to take steps, many considered by international law experts to be illegal, to strengthen its hold over international waters there.<sup>147</sup> China and Russia have both blocked various UN Security Council resolutions meant to deal with the crisis in Syria, including a 2014 resolution that would have referred the Syrian conflict to the International Criminal Court.<sup>148</sup> And China has taken several steps over the past two decades to undermine the effectiveness of UN human rights bodies, so as to avoid being censured by the international community for serious and ongoing violations of core civil and political rights.<sup>149</sup>

No doubt, any final analysis of China's approach to international law and politics will more heavily weigh its higher-profile contributions and shortcomings.<sup>150</sup> But for any state, strict adherence

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administration-united-nations-human-rights-council-235399 [https://perma.cc/QW8D-9UWG]; Carol Morello, *U.S. withdraws from U.N. Human Rights Council over perceived bias against Israel*, WASHINGTON POST (June 19, 2018), https://www.washingtonpost.com/world/national-security/us-expected-to-back-away-from-un-human-rights-council/2018/06/19/a49c2d0c-733c-11e8-b4b7-308400242c2e\_story.html?noredirect=on&utm\_term=.687a2b93d2d8 [https://perma.cc/QZU7-FP3K].

146. See Jake Sullivan, *The World After Trump: How the System Can Endure*, 97 FOREIGN AFF. 10 (2018).

147. See Thomas E. Kellogg, *The South China Sea Ruling: China's International Law Dilemma*, DIPLOMAT (July 14, 2016), https://thediplomat.com/2016/07/the-south-china-sea-ruling-chinas-international-law-dilemma/?allpages=yes&print=yes [https://perma.cc/TJ9N-XL6R].

148. See Thomas E. Kellogg, *Xi's Davos Speech: Is China the New Champion for the Liberal International Order?*, DIPLOMAT (Jan. 24, 2017), https://thediplomat.com/2017/01/xi-davos-speech-is-china-the-new-champion-for-the-liberal-international-order/?allpages=yes&print=yes [https://perma.cc/Z5VW-K282].

149. See Thomas E. Kellogg, *China Is Getting Better at Undermining Global Human Rights*, FOREIGN POL'Y (Oct. 18, 2017, 2:47 P.M.), http://foreignpolicy.com/2017/10/18/china-is-getting-better-at-undermining-global-human-rights/# [https://perma.cc/3LX4-6E67].

150. See Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, 97 FOREIGN AFF. 60 (2018) (an influential – and relatively pessimistic – recent assessment of American and international efforts to influence China's reform trajectory and its engagement with the liberal international order). Campbell and Ratner write that, despite

to many of the fundamental rules that underlie the day-to-day conduct of international life is a key measuring stick. The Vienna Convention on Consular Relations, now more than a half-century old, codifies basic and absolutely vital customary international law norms.<sup>151</sup> China's failure to adhere to its obligations under Article 36 – even in just a small handful of high-profile cases – adds to the growing concern among members of the international community that China might try to change the international rules of the game in ways that suit its own interests. The jury is still out on whether China is a revisionist or a status quo power. Still, the Gui Minhai case and others like it are a painful reminder that China has not yet fully adopted and internalized key liberal international norms and values.

What should the international community do about Beijing's failure to fully adhere to its VCCR obligations? A key lesson of the Gui Minhai case is that perhaps only sustained public pressure – of the sort that Sweden initially failed to bring to bear in Gui's case – will change China's interest-based calculus in any given case. Private diplomacy, while no doubt an important part of any country's diplomatic toolkit, will likely not be enough to generate a positive Chinese response. Similarly, arguments that rely too heavily on China's legal obligations, or on the liberal values that underlie the Vienna Convention, may also fail to sway Chinese decision-makers.<sup>152</sup>

At the end of the day, there is no easy solution to the problem of Chinese non-compliance with VCCR Article 36 in cases that are deemed politically sensitive. States seeking access to their detained nationals who are in custody in China should keep in mind that their Chinese counterparts are paying ever more attention to the dictates of domestic politics, and less to the rules and norms of international law. Sadly, in Xi Jinping's China, when the two are in conflict, it may be difficult for international law to prevail.

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the best efforts of the U.S. and other players to integrate China into the existing rules-based international system, "Beijing remain(s) threatened by . . . [some] central elements of the U.S.-led order – and has increasingly sought to displace them." *Id.* at 68.

151. See LEE & QUIGLEY, *supra* note 16, at 585-89 (2008) (summarizing the important ways in which the VCCR has shaped the development of international law and the conduct of international affairs).

152. See KENT, *supra* note 111, at 56 ("[M]ost theories of compliance are based on the assumption of shared liberal norms, both international and domestic, and a common understanding about the principles of conduct necessary to uphold them. These understandings are not shared by China.").