

Safeguarding Nationals Abroad: The Evolution of Consular Rights from the 17th Century to Gui Minhai's Case

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Abstract: Since the 17th century, relations between states have continuously evolved. Within this dynamic framework, the rights of nationals abroad have become a significant concern. International law, particularly the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963), safeguards these rights. Consular notification is a crucial right protected for nationals residing in foreign countries, ensuring they receive the necessary support, especially when accused of a crime abroad. Despite ratifying these conventions, many countries today tend to violate these provisions. The case of Gui Minhai underscores the critical importance of adhering to the rules of consular notification.

Keywords: consular relations, consular notification, nationals.

1. Introduction

Human rights today encompass all aspects of human life, including education, employment, living standards, protection from violence, and other areas. The guarantee of these rights extends to foreign nationals residing outside their home country's jurisdiction. These individuals are protected under the Vienna Convention on Consular Relations (1963) and the Vienna Convention on Diplomatic Relations (1961). Foreign nationals must not face discrimination and are entitled to the same treatment as the host country's citizens [1].

This protection is universal and applies equally to all individuals, regardless of whether they are offenders or perpetrators of crimes, including foreign nationals who commit offenses outside their home country. The enforcement of applicable rules must align with the agreed international legal standards and respect their human rights, including the right to consular notification from their home country. According to Article 36 of the Vienna Convention on Consular Relations (1963), if a foreign national commits a crime, the consular notification must be given to the individual's home country government about the detention, enabling the home country to provide protection [2].

Currently, legal issues arise when foreign nationals are denied the right to consular protection due to their home country's lack of notification. This situation hinders the home country's ability to protect and guarantee the rights of its citizens due to obstacles imposed by other states [3].

A notable case is China's refusal to grant consular access to the Swedish government for Gui Minhai, accused of leaking Chinese state secrets. This situation highlights that international law rules are non-mandatory and lack enforcement mechanisms, reflecting the principle of *pacta sunt servanda* (agreements must be kept). These rules are based on mutual consent among nations, which should respect each other's rights and interests. Similarly, Malaysia's refusal to provide consular access to the Indonesian government showcases the challenges in ensuring consular protection. The research Objectives is to explain the rights of notification, access, and consular assistance in protecting the human rights of detained foreign nationals under the Vienna Convention on Consular Relations (1963), with a focus on the Gui Minhai case.

2. Results and Discussion

One of the critical issues discussed by the International Law Commission (ILC) is the responsibility of states. Since the establishment of international relations, state responsibility has emerged, closely linked to human rights accountability. A focal point in this context is the human rights of citizens while they are in foreign countries. As international relations develop, so too does the discourse on human rights, eventually evolving into legal issues concerning diplomatic protection, which has become part of customary international law. Diplomatic protection is one of the oldest forms of human rights, particularly the protection of the individual rights of citizens.

Diplomatic protection encompasses the rights enshrined in the 1963 Vienna Convention on Consular Relations, emphasizing non-discriminatory treatment of foreign nationals seeking protection [4]. Consular officers are granted the right to visit, communicate with, and assist their detained nationals abroad. This direct oversight ensures the protection of the human rights of their citizens. Furthermore, consular officers have the right to consular notification and access [5].

Article 36 of the 1963 Vienna Convention on Consular Relations outlines the obligations of the receiving state regarding the detention of foreign nationals within its territory. It states [6]:

- a. Local authorities must inform detained foreigners

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“without delay” of their right to communicate with their consulate and to have the consulate notified of their detention.

- b. Upon the detainee’s request, authorities must notify the consulate of the arrest without delay and permit consular access to the detained national. Any communication addressed to the consulate by the detainee must also be forwarded without delay.
- c. Consulates have the right to be notified of the detention without delay, to communicate, correspond, and visit with their detained nationals, to arrange for their legal representation, and to provide other appropriate assistance with the detainee’s consent.
- d. While these rights are to be exercised in accordance with the laws of the detaining state, its laws and regulations must allow “full effect” to be given to the rights conferred under Article 36.

Consular notification is defined as [7]:

- a. Informing the consular officers of the sending state about the arrest and detention of their nationals in the receiving state.
- b. Facilitating communication between consular officers of the sending state and their nationals in the receiving state as provided by international law.
- c. Ensuring the arrested and detained nationals receive assistance from their consular office.

From this definition, consular notification is the official announcement of facts or actions regarding consular matters, not limited to arrests or detentions but also including deaths, guardianship, shipwrecks and air accidents, births, and insurance.

The principles of consular notification are [8]:

- a. Informing detained nationals of their right to consular assistance and access.
- b. Prompt notification once the nationality of the detained person is determined, prior to any investigation, ensuring their right to consular access.
- c. Reciprocity, ensuring nationals receive similar treatment when detained abroad.

Gui Minhai, a former Hong Kong-based publisher and writer, was forcibly removed from a train to Beijing. A Swedish national, Gui was traveling with Swedish diplomatic officials and was scheduled to visit a doctor at the Swedish embassy upon arrival in Beijing. However, Gui, who was abducted from his apartment in Pattaya, Thailand, in October 2015, went missing for the second time. Chinese authorities refused to confirm his whereabouts, ignoring urgent appeals from his family and the Swedish government to guarantee his safety [9].

Beijing's interest in Gui stemmed from his work as a publisher and occasional author of scandalous books about China’s political elite. Discussions about the private lives and rivalries of Communist Party leaders are strictly prohibited in China, creating a market for Gui's publications in Hong Kong, targeting mainland Chinese eager to learn more about the secretive leadership.

Gui's case involves multiple human rights violations. After disappearing from Thailand in October 2015, Gui was

essentially held incommunicado for nearly three months. Although sporadically allowed contact with his wife and daughter, he generally had no access to a lawyer, violating Chinese law. He was detained for two years without charges or trial, a further violation of domestic criminal procedures. Gui was forcibly disappeared without the ability to challenge his detention in court. Under international law, China must notify foreign governments when their nationals are detained on Chinese soil and offer prompt and regular consular access. In Gui’s case, China failed to do both. Beijing remained silent for weeks in response to Sweden's official inquiries about Gui's whereabouts. When it became known that Gui had been taken back to China, Beijing denied Swedish diplomats access to him, relenting only in February 2016, four months after his detention began.

China typically adheres to its obligations to notify other countries when foreign nationals are arrested and to allow consular visits. However, Beijing’s failure to honor Gui's right to consular notification and access is not isolated; in several politically “sensitive” cases over recent years, China has hidden foreign nationals, often denying knowledge of their whereabouts. Human rights activist Peter Dahlin, also a Swedish national, was detained for 13 days before being allowed to meet Swedish officials. Gui's Mighty Current colleague, Lee Bo, a British passport holder, was denied access to British diplomats for weeks while detained on the mainland in connection with Gui's case.

According to press reports, Chinese authorities want to investigate Gui again for allegedly revealing state secrets. Meanwhile, Sweden has repeatedly summoned the Chinese ambassador for further discussions about Gui’s case. A Swedish Foreign Ministry spokesperson confirmed they are taking “firm action at a high political level”. For Gui to have any chance of being released from China, Sweden needs to follow through with full diplomatic pressure, requiring support from major European allies and the United States. Without sustained pressure, Gui is likely to disappear again into China's extralegal detention system.

Under Article 36, any foreign national detained within a state's jurisdiction must be informed of their right to consular notification and access. If the individual requests consular assistance, the state is obligated to notify the home government and facilitate consular access “without delay”. The core purpose of Article 36 is to facilitate consular support for detained nationals abroad while respecting the host state’s sovereignty over purely domestic criminal matters. Partly prophylactic, Article 36 aims to ensure fair treatment and adherence to the law for detained nationals, preventing abuse if they are imprisoned.

In bilateral agreements, the United States and China have established specific timelines for consular notification and visits, adding specificity to Article 36(1)(b) requirements for “without delay” notification and setting timelines for “the right to visit” under Article 36(1)(c).

Gui Minhai's case illustrates the challenges of ensuring consular access and notification in politically sensitive situations, highlighting the importance of international pressure

and diplomatic efforts in protecting the rights of detained foreign nationals.

3. Conclusion

The case of Gui Minhai underscores the complexities and challenges of diplomatic protection under international law. It highlights the critical role of consular notification and access in safeguarding the rights of detained foreign nationals. International law provides a framework for protecting these rights, but its effectiveness depends on states' adherence to their obligations and the international community's willingness to hold them accountable.

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