Two Passports, One Right? Reimagining Consular Protection in the Age of Dual Nationality

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Abstract—This article examines the legal uncertainties surrounding the right to consular assistance under Article 36 of the Vienna Convention on Consular Relations ('VCCR') in cases involving dual nationals. It begins by analysing how dual nationality complicates the identification of the sending state and leads some authorities to deny consular rights where the detainee also holds the nationality of the detaining state. The article traces the evolution of consular assistance from a state-based privilege to an individual procedural guarantee, drawing on international jurisprudence including *LaGrand*, *Avena*, *Jadhav* and *Advisory Opinion OC-16/99*. It then evaluates three interpretive frameworks: a strict formalist reading of nationality, the doctrine of effective nationality and the pro persona principle. It argues

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that denying consular assistance based solely on local nationality is incompatible with the object and purpose of the VCCR and with contemporary human rights standards. Finally, the article proposes a set of interpretive and institutional measures that distinguish between the normative framework governing consular rights and the practical mechanisms required for their implementation, ensuring that dual nationality does not operate as a legal void for procedural protection.

I. Introduction

What happens when a dual national of State A and State B is detained in State A? Under Article 36 of the Vienna Convention on Consular Relations ('VCCR') foreign nationals have the right to communicate with their consular authorities upon arrest or detention.[1] Yet the VCCR does not clarify whether this guarantee applies when the detainee also holds the nationality of the detaining state.[2]

This ambiguity has generated divergent practices with significant consequences in criminal proceedings, particularly where the absence of consular notification may compromise procedural guarantees.[3] While some states treat local nationality as a basis for excluding consular access, international jurisprudence has increasingly recognised consular assistance as an individual procedural safeguard rather than a purely inter-state privilege.[4] Decisions of the International Court of Justice (*LaGrand*, *Avena*, *Jadhav*) and the Inter-American Court of Human Rights (OC-16/99) illustrate this shift.[5]

This article examines the legal status of consular notification in cases involving dual nationals. It argues that

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[1] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, art 36(1)(a).
[2] International Law Commission, 'Draft Articles on Consular Relations with Commentaries' [1961] II YBILC 92, 112–113.
[3] Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99, 1 October 1999) Series A No 16 [84].
[4] *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466 [77]–[78].
[5] *LaGrand* (n 4); *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12; *Jadhav (India v Pakistan)* (Judgment) [2019] ICJ Rep 418; Advisory Opinion OC-16/99 [124]–[125].

denying consular access solely on the basis of local nationality undermines the protective purpose of Article 36. To address this problem the article evaluates three interpretive frameworks: a strict formalist reading of nationality, the doctrine of effective nationality and the *pro persona* principle.

It proceeds in two steps. First, it analyses these competing frameworks and their doctrinal limits. Second, it examines the institutional and practical mechanisms through which consular protection may be implemented in cases of dual nationality. It argues that in situations of vulnerability the individual's right to effective consular assistance should prevail over formal nationality classifications.

II. The Right to Consular Assistance and Dual Nationality

Consular assistance refers to the support a state provides to its nationals when detained abroad, aimed at mitigating vulnerability within an unfamiliar legal system. This includes notification, communication, consular visits and access to legal representation. This section sets out the formalist baseline from which the article proceeds, examining how Article 36 VCCR has been interpreted through a strict reading of nationality that limits consular rights to individuals considered 'foreign', a position contested in dual nationality cases.

A. Article 36 of the Vienna Convention

Article 36 of the VCCR constitutes the central provision regulating consular involvement in cases of arrest or detention of

foreign nationals. Although its character as a rights-conferring norm has been subject to doctrinal debate, the provision establishes a set of entitlements that operate directly upon the individual. It requires that, upon arrest or detention, the person be informed 'without delay' of the possibility of consular notification. It recognises the competence of consular officers to visit, communicate with and assist their nationals, including through facilitation of legal representation.[6]

Notably, Article 36 does not distinguish between individuals holding a single nationality and those possessing multiple nationalities. It refers simply to 'nationals of the sending State', without clarifying how the provision applies where the individual is also a national of the receiving state. This silence reflects the drafting focus of the VCCR, which prioritised the modalities of consular communication rather than complex questions of nationality.[7] As a result, the provision leaves unresolved whether dual nationality affects the availability of consular protection.

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[6] VCCR (n 1), art 36 (1)(b) and (c): 'if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner … The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.'

[7] International Law Commission (n 2) 112, 113; United Nations Conference on Consular Relations, 'Official Records, Vol I: Summary Records of the Plenary Meetings and of the Meetings of the First and Second Committees' (1963) UN Doc A/CONF.25/16 [85]–[88].

In practice, this ambiguity has generated divergent interpretations. Some receiving states have argued that individuals who possess the nationality of the detaining state are not 'foreign' for the purposes of Article 36 and therefore fall outside its scope.[8] Other approaches, however, emphasise the protective function of consular assistance, particularly in situations where individuals face linguistic, legal or procedural disadvantages within an unfamiliar system.[9]

This tension between formal nationality and functional protection lies at the core of the dual nationality problem under Article 36. As the following sections will argue, resolving this ambiguity requires moving beyond strict formalist interpretations towards approaches that better reflect the protective purpose of the VCCR.

In sum, Article 36 establishes a normative framework that remains neutral as to competing claims of nationality while privileging the function of consular protection. What is not neutral, however, are restrictive interpretations that elevate local nationality into an automatic exclusion from the scope of the provision.

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[8] ME Wojcik, 'Consular Notification for Dual Nationals' (2013) 38(1) South Ill ULJ 73, 85.

[9] WJ Aceves, 'The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies' (1998) 31 Vanderbilt J Transnatl L 257, 263.

B. Individual Rights and the Humanisation of Consular Law

Against this background, it is necessary to consider how international law has understood the function of consular assistance. Traditionally, consular notification and assistance were conceived as instruments of inter-state diplomacy rather than mechanisms of individual protection. Failures to notify a consulate were generally addressed through diplomatic channels, often remedied by protest, apology or political negotiation between states, without direct legal consequences for the individual concerned.

This understanding began to shift through the jurisprudence of international courts interpreting Article 36 of the VCCR. What is often described as the 'humanisation' of consular law does not involve the creation of new treaty obligations, but a reinterpretation of existing ones from a purely state-centred conception of consular functions towards an approach that recognises the detained individual as a direct beneficiary of certain procedural guarantees.

The shift towards recognising the individual dimension of consular protection is reflected in the jurisprudence of the International Court of Justice ('ICJ'), beginning with *LaGrand (Germany v USA)* ('*LaGrand*'), which held that a detained foreign national is not merely an object of diplomatic protection but a direct beneficiary of the VCCR's guarantees.[10] The case concerned the arrest, conviction and execution of two German nationals in the United States without their being informed of

[10] *LaGrand* (n 4) [13]–[22].

their right to consular notification under Article 36 VCCR. The ICJ held that this failure constituted a breach of Article 36 and, crucially, interpreted the provision as conferring rights on the individual.[11] In practical terms, this means that consular notification is not merely a matter of diplomatic interest between states, but a safeguard that directly affects the detainee's ability to understand proceedings, communicate with counsel, and prepare an effective defence.[12]

At the same time, the enforcement of these rights at the international level remains mediated through the sending state. While the individual is recognised as a rights-holder, they cannot independently bring a claim before the ICJ; it is the state of nationality that must invoke responsibility under the Optional Protocol.[13] This dual structure of individual entitlement combined with inter-state enforcement continues to shape the legal framework of consular protection.

The court further clarified this approach in *Avena and Other Mexican Nationals* (*Mexico v USA*) ('*Avena*'), where it addressed the failure of United States authorities to provide consular notification to 51 Mexican nationals sentenced to death.[14] Building on *LaGrand*, the court held that Article 36 obligations cannot be circumvented by domestic procedural doctrines where their application would deprive the individual of the practical effectiveness of consular notification.[15] A breach of Article 36 therefore requires review and reconsideration of the

[11] *LaGrand* (n 4) [77].
[12] *LaGrand* (n 4) [78].
[13] *LaGrand* (n 4) [77].
[14] *Avena* (n 5).
[15] *Avena* (n 5) [112]–[114].

conviction and sentence in light of the violation. This confirms that consular notification functions as a procedural safeguard rather than a matter confined to inter-state diplomatic relations.[16]

A related clarification emerged in *Jadhav (India v Pakistan)* ('*Jadhav*').[17] In that case, Pakistan argued that allegations of espionage justified denying consular access under Article 36. The ICJ rejected this position, reaffirming that the VCCR does not recognise categorical exceptions based on the nature of the charges.[18] Although the case arose in the context of national security, the court's reasoning underscored that the obligations contained in Article 36 remain applicable even in politically sensitive circumstances, and even though the enforcement of those obligations at the international level continues to depend on inter-state mechanisms.[19]

The ICJ has stopped short of framing consular notification as a universal human right. While it has linked Article 36 to due process guarantees and recognised that its breach produces legal consequences for the individual, it has not incorporated these protections into the broader framework of international human rights law. This position is evident in *LaGrand*, where the court acknowledged that Article 36 creates individual rights but declined to determine whether those rights qualify as human rights.[20] Within the triadic framework adopted in this article, this jurisprudence marks a partial shift away from

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[16] *Avena* (n 5) [121]–[123].
[17] *Jadhav* (n 5).
[18] *Jadhav* (n 5) [75].
[19] *Jadhav* (n 5) [73], [75], [89].
[20] *LaGrand* (n 4) [77]–[78].

formalism: the individual is recognised as a rights-holder, yet enforcement remains state-mediated.

A clearer contrast emerges when the ICJ's cautious approach is placed alongside the jurisprudence of the Inter-American Court of Human Rights, a regional tribunal established under the American Convention on Human Rights with an explicit mandate to protect individual rights. Whereas the ICJ has framed consular notification primarily as an individual procedural guarantee grounded in the VCCR, the Inter-American Court has interpreted consular access as part of international human rights law. In its Advisory Opinion OC-16/99, the court held that the right to be informed of consular assistance forms part of the minimum guarantees of due process.[21]

Unlike the ICJ's more cautious approach, the Inter-American Court characterised consular notification as an autonomous right accruing directly to the individual, which must be guaranteed independently of diplomatic intervention by the sending state.[22] This interpretation is significant because it detaches consular protection from inter-state discretion and frames it as a safeguard of individual defence.

By grounding consular access in due process rather than diplomatic protection, the court adopted a nationality-neutral rationale in which the decisive factor is the individual's

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[21] Advisory Opinion OC-16/99 (n 5) [113]–[114]. In comparison to the ICJ's contentious jurisdiction under the VCCR, the court was operating in an advisory capacity within the Inter-American human rights system, which partly explains its broader rights-oriented interpretation.

[22] Advisory Opinion OC-16/99 (n 5) [117]–[119].

vulnerability within a foreign legal system.[23] This approach is particularly relevant in cases of dual nationality, where a strict reliance on formal citizenship may exclude individuals from protection altogether. As the next section will examine, this tension between formal status and functional protection underpins the need for a more flexible, *pro persona* interpretive framework.

III. Doctrinal and Practical Limits of Consular Protection in Dual Nationality Cases

A. The Formalist Approach to Nationality

When applied to situations of dual nationality, this rights-oriented logic exposes the limitations of approaches that rely exclusively on formal citizenship categories. Consular notification is best understood as a procedural safeguard aimed at mitigating the structural disadvantages faced by individuals navigating a foreign criminal process. On this view, the presence of an additional nationality does not in itself negate the need for protection. A denial of consular access must therefore be assessed considering its impact on the individual and the effectiveness of procedural safeguards, rather than through abstract assertions of sovereignty or exclusive national allegiance.

Despite growing international jurisprudence recognising consular assistance as an individual procedural entitlement, state

[23] Advisory Opinion OC-16/99 (n 5) [121]–[124].

practice in dual nationality cases remains fragmented. This divergence reflects two competing approaches: a formalist view that treats nationality as a strictly legal status excluding Article 36 VCCR when the detainee holds the receiving state's nationality, and a functionalist view emphasising the individual's effective ties and the protective purpose of consular assistance. This section argues that such fragmentation reflects the persistence of a formalist approach that prioritises legal status over the protective function of consular assistance, undermining the effectiveness of Article 36 in dual nationality cases.

A clear illustration of this divergence appears in the *Avena* case previously discussed. In its application before the ICJ, Mexico deliberately excluded a detainee who held both Mexican and United States nationality from the list of protected nationals.[24] This has been widely criticised in scholarly commentary as a strategic litigation choice aimed at avoiding a potential jurisdictional challenge regarding the applicability of Article 36 VCCR to dual nationals.

Wojcik argues that Mexico's decision undermined the protective scope of Article 36 VCCR by reinforcing a restrictive assumption that dual nationals are categorically excluded from consular protection when one of their nationalities coincides with that of the detaining state.[25] By failing to contest this premise, Mexico tacitly accepted a formalist conception of nationality that equates local citizenship with the forfeiture of foreign consular rights. However, this is not a necessary reading of Article 36, which does not require nationality to operate as an exclusionary

[24] *Avena* (n 5) [38].
[25] Wojcik (n 8).

criterion. Moreover, alternative arguments grounded in the continuing protective function of consular assistance would also have been available.

Since such a reading is not mandated by the VCCR, which remains silent on the treatment of dual nationality, states interpret their obligations inconsistently. In some jurisdictions, local nationality is treated as a legal barrier to consular notification on the basis of sovereignty and the presumption that nationals do not require external protection.[26]

However, this rigid approach has been challenged in rights-oriented domestic jurisprudence. A notable example is *Amparo Directo en Revisión* 1979/2015, decided by the Supreme Court of Mexico.[27] The case involved a detainee who failed to disclose their second nationality at the time of arrest, raising the question of whether authorities had a continuing obligation to provide consular notification once the dual nationality became known. The court held that while authorities cannot be expected to act on undisclosed or unknown information, the obligation to notify the relevant consulate arises immediately upon discovery of the individual's second nationality.[28] This reasoning represents a clear rejection of formalist premises, as it treats consular notification as a continuing obligation grounded in the protective purpose of Article 36 rather than in rigid nationality classifications.

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[26] Aceves (n 9) 311.

[27] **Suprema Corte de Justicia de la Nación**, *Amparo Directo en Revisión 1979/2015* (Primera Sala, 25 January 2017).

[28] Amparo Directo (n 27) [45].

In his concurring opinion, Justice Arturo Zaldívar emphasised that a detainee's silence or unawareness of their rights does not relieve the state of its international obligations. While acknowledging that requiring authorities to act on unknown information would be unreasonable, he stressed that failure to act after acquiring knowledge of the second nationality would constitute a breach of consular obligations. This reasoning reflects an understanding of Article 36 VCCR as imposing positive duties on the receiving state, duties that persist notwithstanding administrative oversight or the complexities of multiple nationality. This approach better aligns with the protective purpose of consular notification, namely mitigating the procedural disadvantages faced by individuals in a foreign legal system.

This divergence has significant consequences for the practical effectiveness of consular protection. When states oscillate between formalist interpretations that prioritise sovereign control over nationals and functionalist interpretations that emphasise procedural fairness, consular assistance becomes unpredictable. While some jurisdictions have embraced a more rights-oriented, functional approach, others continue to treat local nationality as a categorical bar to consular involvement, thereby restricting access to protection.[29]

B. Effective Nationality and Its Doctrinal Limits

The concept of effective nationality refers to a functional criterion in international law used to determine whether a state may validly

[29] Aceves (n 9) 311.

exercise diplomatic protection on behalf of an individual. Unlike formal nationality, which depends solely on the legal attribution of citizenship under domestic law, effective nationality focuses on the individual's genuine social and territorial links with the state concerned. The doctrine is most closely associated with the ICJ's decision in *Nottebohm Case (Liechtenstein v Guatemala) ('Nottebohm')*, where the court held that nationality, for the purposes of diplomatic protection vis-à-vis a third state, must reflect a genuine connection between the individual and the protecting state.[30] Although developed in the context of diplomatic protection, this reasoning raises an important question for cases of dual nationality: whether formal citizenship alone should determine access to consular safeguards. This section argues that, while effective nationality challenges formalist interpretations, it cannot provide a stable basis for consular protection in dual nationality cases.

In *Nottebohm*, the ICJ examined whether Liechtenstein could exercise diplomatic protection on behalf of an individual who had recently acquired its nationality. The court reasoned that diplomatic protection presupposes a real and effective link, grounded in factors such as habitual residence, the centre of interests, family ties and the individual's attachment to the state.[31] This approach marked a departure from purely formal conceptions of nationality by privileging genuine social connections over legal status alone. At the same time, the court did not reject formal nationality altogether, holding that, in the context of diplomatic protection vis-à-vis a third state, nationality

[30] [1955] ICJ Rep 4 [22]–[24].
[31] *Nottebohm* (n 30) [22]–[23].

must correspond to a genuine connection.[32] The judgment nevertheless left significant uncertainty as to how this requirement should be applied, as it offered no clear guidance regarding the weight or combination of factors necessary to establish such a link. In practice, the court assessed this 'genuine link' through factors such as habitual residence, centre of interests and family ties, although without specifying how these elements should be weighed.

The relevance of effective nationality to consular assistance remains limited. Unlike diplomatic protection, which operates at the inter-state level, consular assistance functions at detention and seeks to mitigate immediate vulnerability. Nonetheless, some states have relied on formal nationality to deny consular access to dual nationals, prompting arguments that effective nationality may offer an alternative basis for determining access to protection.

In consular cases, rather than the application of the full *Nottebohm* test, a contextual approach drawing on the logic of effective nationality may be more appropriate. The focus shifts from identifying which nationality is 'real' to assessing which consular authority is best positioned to reduce the individual's risk of procedural disadvantage. Relevant factors may include habitual residence, primary language, familiarity with the legal system of the detaining state and the location of close family members. This reframing aligns consular assistance with its protective function, grounding its operation in practical effectiveness rather than abstract status. This approach does not replace the doctrine but

[32] *Nottebohm* (n 30) [24].

adapts its underlying logic to the immediacy of consular protection.

This functional orientation has found support in legal doctrine. Arévalo-Ramírez and Maclean argue that effective nationality may guide the identification of the protecting state in dual nationality cases, particularly where one nationality is merely formal or dormant.[33] At the same time, the authors acknowledge boundary cases, such as individuals who have lived their entire lives in the detaining state. Even in such scenarios, however, they suggest that where the individual expressly requests contact with the other consulate, access should be granted, an approach consistent with individual choice and the *pro persona* orientation later discussed in this article.

The doctrine of effective nationality, however, is not without significant limitations. *Nottebohm* itself was treated with caution in subsequent jurisprudence, and its reasoning attracted substantial criticism at the time. In his dissenting opinion, Judge Klaestad questioned whether international law contained any established rule requiring a '*genuine link*' as a condition for the international effectiveness of nationality,[34] emphasising the absence of consistent and uniform state practice supporting such a requirement.[35] He further criticised the court's severance of

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[33] W Arévalo-Ramírez and RJB Maclean, 'Dual Nationality and International Law in Times of Globalization: Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases' (2020) 17(2) *Revista de Direito Internacional* 287, 292.

[34] In this context, the 'international effectiveness' of nationality refers to the extent to which a nationality attributed under domestic law is recognised by other states for the purposes of diplomatic protection and the exercise of international claims.

[35] *Nottebohm (n 30)* (Dissenting Opinion of Judge Klaestad) [28]–[31].

nationality from diplomatic protection, warning that this approach introduced uncertainty and exceeded what the parties had argued before the court.[36] While these criticisms highlight the indeterminacy of the 'genuine link' requirement, they do not fully negate its analytical value. Rather, they underscore the difficulty of translating the concept into a consistent legal standard, particularly in contexts requiring immediacy, such as consular assistance.

Moreover, the ICJ's reliance on effective nationality has remained largely confined to the realm of diplomatic protection. Its application to consular law has never been articulated as obligatory and remains interpretive rather than binding.[37] This doctrinal gap allows states to selectively invoke or disregard the concept, thereby perpetuating inconsistent practice. As a result, while effective nationality offers a valuable analytical tool for challenging formalistic exclusions of consular access, it cannot on its own provide a stable or comprehensive solution to the problem of dual nationality in consular protection.

C. The Rights-Based Approach: The *Pro Persona* Principle

The third approach is a rights-based interpretation grounded in the *pro persona* principle, which requires that legal norms be interpreted in the manner most favourable to the individual. While prominent in the Inter-American system, it is not unique to it. The Inter-American Court has applied this approach,

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[36] *Nottebohm* (n 30) [31]–[33].

[37] Peter J Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (NYU Press 2016) 65.

notably in Advisory Opinion OC-16/99, to maximise individual protection.[38] Its relevance to consular law becomes evident when Article 36 VCCR is examined through the lens of due process and access to justice. Although the VCCR is not formally a human rights treaty, consular notification enables detainees to understand the charges against them and communicate with counsel in an unfamiliar legal system.

Structurally, the *pro persona* principle does not merely resolve interpretive doubt; it reorders the analytical framework governing Article 36 VCCR. Rather than asking whether dual nationality excludes consular protection, the starting point becomes a presumption of notification. Where an individual holds multiple nationalities, notification should be the default rule unless the detainee expressly refuses assistance.[39] This approach aligns with the Inter-American Court's characterisation of consular information as an autonomous safeguard of due process, designed to protect the individual's capacity to defend themselves effectively.[40]

Second, the burden of justification shifts. If consular notification is treated as a due process guarantee rather than a discretionary inter-state courtesy, the detaining state must justify

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[38] Sabina Veneziano, 'The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights' (2018) 49 Geo J Int'l L 501.
[39] Practical limitations may occasionally affect the implementation of this presumption. For instance, notification may be difficult where the sending state lacks a consular presence in the receiving state, or where contact with the consulate could expose the detainee to specific risks. These situations, however, concern the practical modalities of implementation rather than the underlying interpretive principle that consular notification should ordinarily be available when requested.
[40] Advisory Opinion OC-16/99 (n 5) [84], [124]–[125].

any refusal to notify a second state of nationality (although international law has yet to define clear criteria for such justifications). This reverses the formalist logic under which the individual must prove why assistance should be granted. Rights-based approaches to Article 36 require that procedural obstacles, including domestic default rules, cannot neutralise the substance of the guarantee. Potential justifications may include situations where notification is materially impossible or where it would expose the detainee to a demonstrable risk, though such exceptions must remain narrowly construed.

Third, the structural reading affects remedies. If denial of consular access compromises the fairness of proceedings, the remedy cannot be limited to symbolic acknowledgment. While the ICJ has required 'review and reconsideration' following violations of Article 36,[41] under the approach advanced in this article the *pro persona* principle would require an inquiry into whether the violation materially affected the defence, particularly in capital or pre-trial detention cases. Where prejudice is established, procedural correction must be effective, not merely formal.[42] This remedial focus resonates with approaches that assess whether the absence of consular assistance caused material prejudice to the defence, rather than treating the violation as formally harmless.[43]

The *pro persona* principle therefore provides a coherent framework for addressing the dual nationality dilemma under

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[41] *LaGrand* (n 4); *Avena* (n 5).

[42] Aceves (n 9) 311.

[43] John Quigley, 'Application of Consular Rights to Foreign Nationals: Standard for Reversal of a Criminal Conviction' (2005) 11 ILSA J Int'l & Comp L 403.

Article 36 VCCR. It reverses the presumption that formal nationality operates as a ground for excluding consular notification and supports an interpretation that prioritises the effective enjoyment of procedural safeguards. Although the VCCR remains silent on dual nationality, this silence should not be read in isolation from the broader evolution of international law towards recognising the individual as a subject of rights.[44]

IV. Institutional and Practical Responses to Dual Nationality Reframing

A. Bilateral and Institutional Mechanisms: The *Pro Persona* Principle as an Interpretive Solution

Bilateral and multilateral mechanisms refer to inter-state arrangements through which states seek to clarify or coordinate the application of consular notification obligations, particularly in situations not explicitly addressed by the VCCR. These uncertainties are threefold. First, the VCCR remains silent on whether a detainee who also possesses the nationality of the receiving state is entitled to notification of another state of nationality—a question that formalist interpretations frame as whether such a right exists at all. Second, judicial practice has not resolved the issue, as illustrated by the strategic exclusion of a dual national from the protected group in *Avena*, which left the

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[44] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, CUP 2016); Advisory Opinion OC-16/99 (n 5) [84], [125].

question substantively unaddressed.[45] Third, domestic courts (particularly in the United States) have applied procedural doctrines, most notably procedural default, which allows domestic courts to deny remedies where claims are not raised in a timely manner, even where a violation of Article 36 has occurred.[46]

This domestic–international disconnect has been analysed as a recurring obstacle to the effectiveness of Article 36, particularly where domestic procedural doctrines neutralise the remedial value of consular notification.[47] Bilateral mechanisms are therefore presented not as amendments to the VCCR, but as practical coordination mechanisms through which states clarify the practical operation of notification obligations in cases of multiple nationality.

B. Soft Law and State Practice

International bodies have attempted to mitigate uncertainty through non-binding instruments. The International Law Commission, in its Draft Articles on Diplomatic Protection, addressed the problem of dual nationality by proposing the criterion of 'predominant nationality' as a balancing test.[48] Unlike effective nationality, which focuses on an individual's genuine connection to a state, predominant nationality requires a

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[45] *Avena (n 5)* [38].

[46] *LaGrand* (n 4).

[47] Lorena Rincón Eizaga, 'International v. United States Courts: In Search of a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations' (2006) 7 Rev Colomb Derecho Int 221.

[48] International Law Commission, 'Draft Articles on Diplomatic Protection with Commentaries' [2006] II YBILC 24, art 7.

comparative assessment between nationalities, which may introduce uncertainty and limit its usefulness in time-sensitive consular contexts.

Scholarly commentary has similarly suggested that clearer interpretive standards could reduce inconsistent recognition of consular rights between states, particularly in United States–Mexico practice.[49] Such standards might include presumptions in favour of notification in cases of dual nationality or procedural guidelines requiring authorities to verify possible foreign nationality at the time of detention. Yet these efforts remain soft-law guidance. They provide orientation but do not create enforceable obligations unless incorporated into treaty practice or domestic law.

Beyond soft law, state practice also illustrates how consular protection may be operationalised through diplomatic initiative. In the case of Manuel Guerrero Aviña, a dual British–Mexican national detained in Qatar, Mexican authorities were able to provide consular support despite the absence of a specific bilateral treaty addressing dual nationality with Qatar.[50] While the extent of Qatar's formal consent is not fully documented, the assistance appears to have taken the form of diplomatic access

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[49] Sergio Méndez Lara, 'Los estándares en torno al derecho a la información consular en México y Estados Unidos y la cuestión de la asistencia consular' (2012) 1(3) *Revista Métodhos* 6, 15.

[50] Secretaría de Relaciones Exteriores (México), 'Juez en Qatar presenta decisión en el caso de Manuel Guerrero Aviña' <https://www.gob.mx/sre/prensa/juez-en-qatar-presenta-decision-en-el-caso-de-manuel-guerrero-avina> accessed 1 August 2024.

rather than intervention, highlighting the flexibility of such arrangements.

The significance of this case lies not only in a judicial ruling clarifying Article 36, but in the demonstration that states may adopt expansive interpretations of their consular obligations through diplomatic initiative. The Mexican authorities characterised their response as part of a broader human rights-based consular policy. This example illustrates not just the operational potential of institutional cooperation but also its contingent nature: assistance depended on proactive diplomatic engagement rather than on a clearly defined legal rule governing dual nationality.

C. Practical Cooperation and Its Limits

Despite its practical flexibility, cooperation grounded primarily in diplomatic initiative raises structural concerns. Where consular protection depends on goodwill rather than on an enforceable entitlement, the individual lacks a legally secure position. This distinction is particularly significant in high-stakes cases. The ICJ in *Jadhav* rejected the argument that allegations of espionage justify exclusion from Article 36 obligations, reaffirming that the VCCR does not create categorical exceptions based on the nature of the charges.[51] The case illustrates that disputes over consular notification often arise in contexts where states invoke national security or similar grounds to restrict access. In such situations, reliance on discretionary diplomatic cooperation may leave

[51] *Jadhav (n 5)* [73]–[75].

detainees without effective protection when the guarantees of Article 36 are most needed.

Accordingly, while bilateral and institutional arrangements can facilitate coordination and reduce friction, they do not eliminate the underlying normative question. Without a rights-based interpretive foundation, cooperative mechanisms risk functioning as exceptional diplomatic interventions rather than as stable guarantees.

D. The Equality Objection: The Detaining State's Perspective

An objection frequently raised in state practice and academic commentary is that affording differentiated treatment to dual nationals may violate the principle of equality before the law.[52] Under this view, once an individual possesses the nationality of the receiving state, they must be treated in the same manner as any other national. To permit external consular intervention may be criticised as conferring a procedural advantage unavailable to single-national citizens, thereby creating unequal treatment.

From this perspective, once an individual holds the nationality of the receiving state, international consular protection becomes unnecessary as the individual is presumed to benefit from the same legal protections as any other citizen. However, equality in contemporary constitutional and human rights reasoning is not confined to formal symmetry. Substantive equality permits differential treatment where such differentiation

[52] James Crawford, Brownlie's Principles of Public International Law (9th edn, OUP 2019) 511–514.

pursues a legitimate aim and responds to relevant distinctions in situation. Although the Inter-American Court did not address the equality objection directly, its characterisation of consular notification as a safeguard of due process underscores the importance of ensuring effective access to justice.[53]

In the dual nationality context, the relevant distinction lies not in citizenship status but in the detainee's effective ability to exercise procedural rights. A dual national may formally be a citizen of the receiving state while lacking meaningful familiarity with its legal system, language or institutional practices. In such circumstances, consular assistance does not confer an advantage but mitigates a structural disadvantage. In response to the objection that dual nationals should rely solely on their state of nationality, this approach recognises that procedural guarantees must operate at the point of vulnerability, irrespective of formal status.

Treating dual nationality as an automatic bar to consular notification creates an arbitrary exclusion, as it applies irrespective of the detainee's actual vulnerability or need for assistance. Article 36 does not expressly prohibit notification in cases of multiple nationality.[54] Reading such an exclusion into the text would elevate formal citizenship over the protective function of the VCCR. As the ICJ has clarified, Article 36 establishes concrete obligations whose application does not depend on discretionary political assessments of the individual's status.[55]

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[53] Advisory Opinion OC-16/99 (n 5) [84], [125].
[54] VCCR (n 1), art 36.
[55] *LaGrand (n 4)*; *Jadhav (n 5)* [73]–[75].

Accordingly, recognising the availability of consular notification to dual nationals does not undermine equality. Where differentiation responds to demonstrable procedural disadvantage and remains proportionate to the aim of ensuring access to justice, equality before the law is preserved rather than compromised.

V. Conclusion

Under current international law, this article argues that the most coherent interpretation of Article 36 of the Vienna Convention on Consular Relations is that it applies to all nationals of the sending state, irrespective of whether they also possess the nationality of the detaining state. This interpretation reflects the functional purpose of the VCCR and aligns with jurisprudence recognising the procedural significance of consular notification, including its characterisation as a safeguard of due process. While not universally accepted, this reading reflects the broader evolution of international law toward recognising the individual as the primary beneficiary of procedural guarantees.

Within this framework, the doctrines of effective nationality and the *pro persona* principle support a rights-based interpretation of Article 36. This approach is principled because it prioritises the effective protection of the individual and aligns the VCCR with due process guarantees. Rather than treating consular assistance as a matter of diplomatic discretion, it understands consular notification as a procedural safeguard ensuring that individuals can exercise their defence effectively in an unfamiliar legal system.

Translating this interpretive framework into practice requires a tiered operational approach. First, at the judicial level, consular notification should be presumed available to the detainee unless expressly waived. Where notification is withheld, the detaining state must justify the restriction. Violations should trigger review and reconsideration capable of assessing whether the absence of consular notification affected the fairness of proceedings and, where appropriate, the provision of effective remedies.

Second, at the administrative level, authorities should adopt protocols requiring notification to all states of nationality once dual citizenship becomes known. Simultaneous notification avoids disputes over nationality hierarchy and ensures that procedural safeguards do not depend on rigid classifications that may obscure the detainee's actual vulnerability.

Third, at the institutional level, states should pursue bilateral or multilateral arrangements clarifying notification practices in cases of dual nationality, such as agreements establishing default notification rules or coordination mechanisms between consular authorities. While these instruments cannot replace a rights-based interpretation, they can support more consistent and predictable application in practice.

These measures reflect a complementary approach in which rights-based interpretation provides the normative foundation, while institutional mechanisms support its practical implementation.

In the context of dual nationality, excluding individuals from consular safeguards on the basis of formal citizenship alone produces arbitrary and unequal outcomes. A rights-based interpretation therefore does not expand Article 36 beyond its text; it ensures that its protective function operates effectively. Consular notification is not a discretionary privilege, but a necessary safeguard of procedural fairness in situations of vulnerability.