

Abuse of legal process

By Violeta Balan

The John Marshall Law School Chapter of the American Association of Russian-Speaking Attorneys will host a symposium on Abuse of Legal Process for Political Means in Russia on April 4th, 2007 at 5:30 at The John Marshall Law School. The event and the afterwards reception are organized by students and co-sponsored by the JMLS Center for International Business and Trade. The discussion will center primarily on the new charges of embezzlement and money laundering brought against Yukos Oil Company CEO Mikhail Khodorkovsky.

Professor Ralph Ruebner will moderate the forum and the invited speakers are the attorneys representing Mr. Khodorkovsky and other Yukos directors and shareholders. The current panelists are Jeremy Margolis and Robert Andalman from the Chicago office of Sonnenschein Nath & Rosenthal; John Pappalardo, Sanford Saunders and Maria Logan from Greenberg & Traurig, and Pavel Ivlev from Moscow-based firm ALM Feldmans. They will discuss the current charges, previous prosecutions, and the pending appeals.

Yukos Oil was the first transparent and the largest oil company in Russia

until Mr. Khodorkovsky was convicted of fraud and tax evasion in 2005. Its main production unit was acquired by a state-owned oil company before the formal involuntary bankruptcy proceedings commenced; the company's directors, managers and attorneys are either imprisoned or fled the country, and various litigations ensued in Russia, United States, Netherlands, and the European Court of Human Rights.

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Judges should notify foreign nationals

By Cindy G. Buys

Attached is a proposed Illinois Supreme Court Rule 404 that would require Illinois state court judges to notify foreign nationals at an early stage in any criminal proceedings that they have a right to have their consulate informed that they have been arrested or detained. The proposed revision is intended to address a problem that has occurred with respect to implementing the United States' treaty obligations under the Vienna Convention on Consular Relations (VCCR or Vienna Convention). The Vienna Convention is designed to facilitate consular operations in foreign countries. Of relevance here, Article 36(b) of Vienna Convention states that, if requested by a foreign national, the authorities of the receiving State shall, without delay, inform the consular post of the sending State that a national of that State has been arrested or detained.

Local, state, and federal authorities in the United States have not always complied with this obligation, leading to frequent diplomatic protests, as well

as domestic and international litigation.² Most prominently, the United States has been sued at the International Court of Justice (ICJ) three times in the past decade for violation of this obligation—by Paraguay in *Breard*,³ by Germany in *LaGrand*⁴ and most recently by Mexico in *Avena*,⁵ involving 54 Mexican nationals who are on death row in the United States. In all of these cases, the defendants did not raise the government's failure to notify them of their right to have their respective consulates contacted until after trial and conviction, at least in part because they were not aware of that right. The United States thus took the position that the defendants' claims were barred under various state procedural default rules and offered only an apology to the foreign nationals and their sending States. The ICJ determined that the United States was in violation of its treaty obligations. In all of these cases, the sending States declared that they would have provided legal and other assistance to their nationals had they

been notified in time. Such assistance can make a difference in the quality of legal representation an indigent foreign defendant may receive.⁶

The United States' failure to notify foreign nationals of their rights under the VCCR and, in the view of the Sending States, to adequately remedy these violations, has harmed U.S. foreign relations and potentially jeopardized the ability of U.S. citizens traveling abroad to insist upon the same right to contact the U.S. consulate if they are arrested or detained in a foreign country. Thus, it is important to all U.S. citizens that the local, state, and federal authorities do a better job of complying with this treaty obligation. Moreover, by preserving a record of compliance, any compliance issues can be resolved more quickly and accurately on appeal or in post-conviction proceedings.

In recognition of this problem, the U.S. State Department has developed training materials for local police departments intended to educate officers and increase compliance with U.S.

treaty obligations.⁷ Despite these State Department efforts, implementation throughout the country remains spotty. This proposed Illinois Supreme Court Rule will ensure that if the police do not notify a foreign national who has been arrested or detained of the foreign national's right to have the appropriate consulate post contacted, such notification will occur at an early enough stage in the judicial proceedings when consular assistance could make a difference.

Consideration was given to amending an existing rule of the Illinois Supreme Court Rules on Criminal Proceedings in the Trial Court, but the proposed rule did not seem to fit in any of the existing rules. Therefore, the proposal is to make this provision a new Rule 404. (Rule 404 is currently reserved). This proposed rule has the support of the Illinois State Bar Association's Section on International and Immigration Law.

PROPOSED ILLINOIS SUPREME COURT RULE 404

Rule 404. Consular Notification for Foreign Nationals

At the first appearance of a criminal defendant, the court must advise the defendant in open court that a foreign national who is arrested or detained has the right to have notice of that fact given to the consular representatives of the country of his or her nationality and

the right to communicate with his or her consular representatives. The court shall make a written record that such notice was given.

Committee Comment

Rule 404 is intended to ensure that the United States complies with its treaty obligations under Article 36 of the Vienna Convention on Consular Relations which requires that, if requested by a foreign national, the authorities of the receiving State shall, without delay, inform the consular post of the sending State that a national of that State has been arrested or detained. The United States is a party to the Vienna Convention on Consular Relations and, thus, the Convention is part of the supreme law of the United States by virtue of the Supremacy Clause (Article VI) of the U.S. Constitution. Because Article 36 of the Vienna Convention requires that consular notification be given without delay, notice should be given by the arresting or detaining officer in the first instance. The notice to be given by the judge is not intended to be a substitute for notice by the officer, but is intended instead to ensure that such notice is given and that a written record of notification is kept. By requiring that a written record be kept, the rule will prevent disputes regarding Article 36 compliance. The Committee takes no position on the appropriate remedy for violation of this rule.

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1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) [hereinafter Vienna Convention].

2. One well known case in Illinois is *People v. Madej*, 193 Ill.2d 395, 739 N.E.2d 423 (2000).

3. Case Concerning the Vienna Convention on Consular Relations (*Para. v. U.S.*) (Application of the Republic of Paraguay, Apr. 3, 1998).

4. *Federal Republic of Germany v. United States of America*, 2001 I.C.J. 104 (June 27, 2001).

5. Case Concerning Avena and Other Mexican Nationals (*Mex. v. U.S.*), 2004 I.C.J. No. 128 (Judgment of Mar. 31). Three of the defendants in the Avena case were tried and convicted in Illinois.

6. In *Valdez v. State*, 46 P.3d 704 (2002), Mexican authorities unearthed evidence that had not been discovered by counsel that the defendant suffered from severe organic brain damage. This evidence led the Oklahoma Court of Criminal Appeals to order that Valdez's capital sentence be reconsidered.

7. These State Department materials may be found at <http://travel.state.gov/law/notify.html>. Included in these materials is a "Suggested Fax Sheet for Notifying Consular Officers of Arrests or Detentions" which courts could use when foreign nationals request that such notification be given.

CLE covers immigration issues for family lawyers

By Tahani Afaneh

The Illinois Institute for Continuing Legal Education hosted the 6th Annual Family Law Conference in March, 2007. Daniel Azulay of Azulay, Horn & Seiden, LLC, presented a segment about Immigration Law for Family Lawyers. The segment presented a host of immigration issues that impact Family Law, including International Adoption, International Child Abduction, the Violence Against Women Act (hereinaf-

ter "VAWA"), Marriage Fraud, Religious-Based Marriages, and Annulments.

The Hague Convention on Intercountry Adoption, together with the Intercountry Adoption Act of 2000, seeks to prevent international trafficking, kidnapping, smuggling, and baby-selling. A number of proposed and finalized rules comprise a regulatory framework established by the United States in order to move the country toward its goal of a 2007 formal ratifi-

cation.

The Hague Convention on International Child Abduction was the inspiration for the International Child Abduction Remedies Act (ICARA), the United States' implementing legislation for the Convention. The treaty is currently in force between the US and fifty other countries and seeks to aid parents in the return of their abducted children. A corresponding rule is reflected in the Immigration and Nationality Act. Any