


7/21/17 TIME 12pm  
By:   
CLERK, FSM SUPREME COURT

**IN THE SUPREME COURT OF THE  
FEDERATED STATES OF MICRONESIA  
TRIAL DIVISION – STATE OF POHNPEI**

HARI TIMSINA, INDRA GHIMIRE,  
BISHNU TAMANG, and KHADGA  
BAHADUR THAPA,  
  
Petitioners,  
  
v.  
  
JOHNNY SANTOS, Chief of FSM National  
Police.  
  
Respondent.

CIVIL ACTION NO.: 2017-033

ORDER

On June 7, 2017, the court held a show cause hearing on writ of habeas corpus in this matter.<sup>1</sup> Chief of Police Johnny Santos (Santos) was represented by the Attorney General Joses Gallen (Gallen). All four petitioners (Refugees) were present, and represented by attorney Marstella Jack (Jack). At this hearing, the court took testimony from all four Refugees and heard arguments from both sides. Out of necessity, Hari Timsina (Timsina) provided translation on behalf of the court during the testimony of Khadga Bahdadur Thapa (Thapa) and Bishnu Tamang (Tamang).<sup>2</sup> As a threshold issue,

<sup>1</sup> On June 7, 2017, just before the hearing, respondent filed a Return on Writ of Habeas Corpus and an Affidavit of Johnny Santos pursuant to 6 F.S.M.C. 1506(2). On June 8, 2017, Jack filed a Supplement, including three attachments. On June 9, 2017, Government filed a Post-Hearing Brief in Support of Motion to Deny Petition for Writ of Habeas Corpus and Dismiss Case which included one attachment.

<sup>2</sup> All four Refugees speak Napali as a native language. Indra Ghimire (Ghimire) speaks English sufficiently to testify on his own, and Timsina speaks English quite well. No one on island could be located to provide translation for this hearing into Napali. Noting that “[w]here no alternative is available, the court may permit even a biased interpreter to serve.” FEDERAL PRACTICE & PROCEDURE: EVIDENCE 2D § 6054 at 367-68 (2007). It is “better practice to appoint a disinterested person as interpreter... [h]owever, a substantial number of cases have recognized that it is at least not... reversible error to appoint a...

1 respondent raised an oral motion to dismiss based on lack of jurisdiction, which was  
2 address by the court prior to arguing the merits of granting or denying the writ.

3 Upon CONSIDERATION of the representations of the parties, and of the file and  
4 record contained herein, the court DENIES the motion to dismiss and GRANTS the Writ  
5 of Habeas Corpus based on the following conclusions of both fact and law.

### 6 I. FACTS

7 On November 17, 2014, thirty-six (36) migrants from India and Nepal arrived in  
8 Yap Harbor by sea, seeking fuel, food and water. Upon arrival, none of the migrants had  
9 travel documents or passports. On October, 2015, four (4) of those migrants were  
10 determined to be refugees by the United Nations High Commissioner for Refugees  
11 (UNHCR). The remainder were returned to their place of origin. The Napalese refugees  
12 were transferred to Pohnpei Harbor and detained in a low-security holding facility awaiting  
13 a more durable solution.<sup>3</sup> This detention was overseen by the FSM Department of Justice  
14 Division of Immigration (Government). The Refugees have received medical care at  
15 Pohnpei State Hospital and food is provided by the UNHCR. However, this detention has  
16 been without a court hearing and without legal or consular representation for the Refugees.  
17 For over two (2) years now, the Refugees have been living on a wooden fishing vessel  
18 whose hull is leaking.<sup>4</sup> They are under twenty-four (24) hour security and cannot freely  
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22 [bias person] to interpret, especially where no other competent interpreter is available.” *Id.*  
at 368 n. 33. Timsina was sworn in under oath.

23 <sup>3</sup> The holding facility in Pohnpei harbor is frequently used to detain criminal defendants  
24 accused of human trafficking, illegal fishing and other immigration violations.

25 <sup>4</sup> By bilging the vessel several times daily, the Government represents that the leak is  
manageable.

1 leave the holding facility. Visitation is restricted.<sup>5</sup> The Government maintains that these  
2 conditions are in compliance with a written agreement made with the UNHCR, which is  
3 not before the court at this time, but affirms that this agreement requires them to uphold  
4 the UNHCR standards.<sup>6</sup> Recently, communication devices were confiscated including a  
5 cell phone and a tablet PC.<sup>7</sup> Furthermore, the Government represented that they intend to  
6 transfer the Refugees immediately after the hearing on June 7, 2017, to a three (3) bedroom  
7 apartment in Palikir, but intend to continue twenty-four (24) hour surveillance and other  
8 restrictions on the Refugees.

## 9 II. JURISDICTION

10 In a two-part motion, the Government questioned whether Jack had standing to  
11 raise the Writ of Habeas Corpus and whether this court had subject matter jurisdiction over  
12 decisions made by the Government regarding the treatment of the Refugees.

### 13 **Standing**

14 Pursuant to 6 F.S.M.C. 1504, an “[a]pplication for the writ habeas corpus shall be  
15 made to a court or judge authorized to issue the same, or to a judge of a District court or a  
16 clerk of courts, by a written statement under oath signed by the party for whose relief it is  
17 intended, or by some person in his behalf.” The writ may be filed “by someone other than  
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21 <sup>5</sup> Authorization must be received from Gallen twenty-four (24) hours in advance of any  
visitation.

22 <sup>6</sup> See UNHCR Detention Guidelines, generally. Gallen represented that he would make that  
23 agreement available to the court upon request.

24 <sup>7</sup> The Government represents that they were illegally smuggled into the holding facility.  
25 Jack represents that the Government confiscated those devices as a retaliatory response to  
a human rights article condemning the treatment of the Refugees on the internet.

1 the person for whose relief it is intended.” 39 AM. JUR. *Habeas Corpus* §109, at 316 (2d.  
2 1999). “It may be filed by an agent, friend, wife, husband, a parent for his child, a guardian  
3 for his ward, and a special bail for his principal, as long as the petitioner is a friendly person  
4 petitioning in the interest of the person illegally detained.” *Id.* at §155, 347.

5 The Government argues that Jack is interjecting herself as an unsolicited third party  
6 representative of a non-governmental organization (NGO) and has no standing to file the  
7 writ of habeas corpus on behalf of the Refugees. Jack responds that she met with the  
8 Refugees on May 20, 2017, and that they agreed that she would help them, pro bono, at  
9 that time. The court heard testimony from all four Refugees individually and each one  
10 indicated on the record that they agreed to her representation. The court notes that even in  
11 the absence of a written retainer agreement an oral agreement is sufficient to establish the  
12 attorney client relationship. When considered with the overall circumstances of this case,  
13 the evidence supports the conclusion that Jack was retained and therefore had standing to  
14 file the writ on behalf of her clients, as their lawyer. Accordingly, the court need not  
15 determine whether she would have had standing to file on their behalf as an NGO.  
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### 17 **Subject Matter Jurisdiction**

18 The Government’s second argument is that the FSM has no laws governing asylum  
19 or the treatment of Refugees. In further support of this position, the Government highlights  
20 the fact that the FSM is not a signatory to the 1951 United Nation Convention Relating to  
21 the Status of Refugees (Refugee Convention), nor the companion 1967 Protocol Relating  
22 to the Status of Refugees (Refugee Protocol). Jack concedes that the FSM is not a signatory  
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1 to that treaty, or its protocol, but argue that the Government is nevertheless bound by  
2 customary international law.<sup>8</sup>

3 “International law is a part of our law.” FSM v. Ezra, 19 FSM R. 486, 497 n. 16  
4 (Pon. 2014). The sources of international law include: “conventions,” “international  
5 custom,” “general principles of law recognized by civilized nations,” “judicial decisions,”  
6 and as evidence of these “the teachings of the most highly qualified publicists.” Filartiga  
7 v. Pena-Irala, 630 F.2d 876, 890 at n.8 (2d. Cir. 1980); Statute of the International Court  
8 of Justice June 26, 1945, art. 38, 59 Stat. 1055, 1060, 33 U.S.T.S. 993.<sup>9</sup> “Customary law  
9 can be derived from a variety of sources, but most often from ‘a general and consistent  
10 practice of states’” followed by them from a sense of legal obligation, or opinio juris. Ezra,  
11 19 FSM R. at 497.<sup>10</sup> Simply put, customary law is state practice and opinio juris. “The  
12 ‘practice of the states’ includes: 1) all manner of actual behaviors as well as public  
13 statements and instructions from diplomatic and official governmental bodies; 2)  
14 international agreements codifying or contributing to the emergence of international law;  
15 3) and can also be derived from general principles common to all legal systems.” Ezra, 19  
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18 <sup>8</sup> The FSM became a member state of the United Nations (UN) on September 17, 1991,  
19 and as a result, has reciprocal obligations to the international community... under the  
provisions of the U.N. Charter.” Ezra, 19 FSM R. at 496 n. 15.

20 <sup>9</sup> The International Court of Justice Statute is an Annex to the 1945 Charter of the UN and  
21 all member states are automatically parties to the statute by virtue of their membership.  
22 “All Members of the United Nations are ipso facto parties to the Statute of the International  
Court of Justice.” UN Charter Chapter XIV art. 93(1).

23 <sup>10</sup> The “‘best evidence’ of customary law is proof of the state practice... but courts give  
24 ‘substantial weight’ to international court opinions, national law opinions interpreting  
25 international law, the writings of scholars, and the pronouncements of states themselves.”  
*Id.*; See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §  
102-03 (1987).

1 FSM R. at 492 n. 8. “There is ‘no precise formula’ to indicate how widespread a practice  
2 must be before it is accepted as a general practice.” *Id.*<sup>11</sup> *Opinio juris* is “[t]he principle that  
3 for conduct or a practice to become a rule of customary international law, it must be shown  
4 that nations believe that international law... mandates the conduct or practice.” BLACK’S  
5 LAW DICTIONARY 1125 (8th ed. 1999).

6 It is a common misconception that international obligations are based solely on the  
7 accession to a treaty, they are not. A treaty is merely one way of creating an international  
8 obligation.<sup>12</sup> Significantly, widely accepted treaties, or certain provision contained therein,  
9 may become binding on a non-signatory nations when the practice has become so  
10 widespread that it is incorporated into the corpus of customary international law.<sup>13</sup> Often,  
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13 <sup>11</sup> Although it is impossible to put a quantitative value on qualitative criterion, the  
14 International Court of Justice has held that ratification by 39 out of 130 possible countries,  
15 or merely 33%, “though respectable, [was] hardly sufficient” to demonstrate a widespread  
practice. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark;*  
*Federal Republic of Germany v. The Netherlands)* 1969 I.C.J. 3, 43.

16 <sup>12</sup> As stated *supra*, the other sources include customary law, general principles and  
17 international law cases. While treaties are formally created like statutes, customary law is  
18 informally created like the common law. *See Ezra*, 19 FSM R. 486, 492 n. 7; *Filartiga*, 630  
19 F.2d, at 885 (“the law of nations... has always been part of the federal common law”);  
*Kane v. Winn*, 319 F. Supp. 2d 162, 200 (D. Mass. 2004)(“[c]ustomary international law  
is... binding on federal courts, as part of federal common law”).

20 <sup>13</sup>*See Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 796 (D. Kan. 1980), *aff’d sub*  
21 *nom.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10<sup>th</sup> Cir. 1981)(“although the  
22 affirmations in the Declaration are not binding qua international convention... they can bind  
23 the states on the basis of custom... whether because they constituted a codification of  
24 customary law... or because they have acquired the force of custom through a general  
25 practice accepted as law”); *North Sea Continental Shelf Cases (Federal Republic of*  
*Germany v. Denmark; Federal Republic of Germany v. The Netherlands)* 1969 I.C.J. 3, 42  
 (“become binding even for countries which have never, and do not become parties to the  
Convention. There is no doubt that this process is a perfectly possible one and does from  
time to time occur: it constitutes indeed one of the recognized methods by which new rules  
of customary law may be formed”).

1 however, the treaty is a codification of pre-existing customary laws, which crystalizes the  
2 rule, and might have independent force, notwithstanding withdrawal, suspension or  
3 cessation from the treaty.<sup>14</sup> While it is not clear if the international customary law regarding  
4 refugees existed prior to the Refugee Convention, or if the Refugee Convention itself  
5 generated it, what is clear is that at least some of its provisions are now embedded in  
6 customary international law.<sup>15</sup>

7 Thus even though the FSM has not acceded to the specific codification of the  
8 Refugee Convention, the international customary law is independently binding, until and  
9 unless the FSM makes the appropriate objection.<sup>16</sup> Even then, certain mandatory or  
10 peremptory norms cannot be avoided.<sup>17</sup> Through persistent and open objection, a sovereign  
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12 <sup>14</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal  
13 Republic of Germany v. The Netherlands) 1969 I.C.J. 3, 38 (“emerging customary law  
14 became ‘crystalized’”).

15 <sup>15</sup> According to the UN Depository of Treaties found on the UN Treaty Collection website:  
16 <https://treaties.un.org>, (June 21, 217, 15:33 UTC+11:00), there are 148 states who are  
17 parties to the Refugee Convention, Refugee Protocol or both. Furthermore, there are a total  
18 of 193 recognized sovereign states that are current members of the UN General Assembly.  
19 Enforcement of these treaty provisions by over 75% of the recognized nations of the world,  
20 for over 60 years, has made it a widespread international practice.

21 <sup>16</sup> The persistent objector rule is “[i]f whilst a practice is developing into a rule of general  
22 law, a State persistently and openly dissents from the rule, it will not be bound by it.”  
23 INT’LAW ASS’N, LONDON CONFERENCE: COMMITTEE ON FORMATION OF CUSTOMARY LAW  
24 (GENERAL) INTERNATIONAL LAW 27, at ¶15 (2000); See Ted L. Stein, The Approach of a  
25 Different Drummer: The Principle of the Persistent Objector in International Law, 26  
HARV. INT’L L.J. 463 (1985)(“the principle of the persistent objector is firmly established  
in the orthodox doctrine on the sources of international law”).

<sup>17</sup> Jus Cogens is “[a] mandatory or peremptory norm of general international law accepted  
and recognized by the international community as a norm from which no derogation is  
permitted.” BLACK’S LAW DICTIONARY 876 (8th ed. 1999). “Jus cogens norms, which are  
nonderogable and peremptory, enjoy the highest status within customary international law,  
are binding on all nations, and can not be preempted by treaty.” United States v. Matta-

1 nation may chart a course different from that of the rest of the international community as  
2 a whole, but silence to a widespread or emerging international customary practice is  
3 consent.<sup>18</sup> Moreover, affirmative expressions of a commitment to certain international  
4 customary laws are found in the Universal Declaration of Human Rights (UDHR), to which  
5 the FSM has made no reservation, as well as other UN General Assembly resolutions.<sup>19</sup>  
6 Thus, the absence of legislative enactments does not exempt the FSM from the  
7 international customary law regarding the treatment of refugees, nor does it mean that no  
8 law is applicable, as the Government suggests.<sup>20</sup>

9       Accordingly, jurisdiction in this court is proper. Indeed, the Trial Division of the  
10 FSM Supreme Court has both original and exclusive jurisdiction “in cases in which the  
11 national government is a party.” FSM Const. art. XI §6(a). Furthermore, this court has  
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13 Ballesteros, 71 F.3d 754, 764 (9th Cir. 1995)(emphasis omitted); *See Siderman de Blake*  
14 *v. Republic of Argentina*, 965 F.2d 699, 715 (9<sup>th</sup> Cir. 1992)(Jus Cogens is “an elite subset  
15 of the norms recognized as customary international law”); *Comm. of U.S. Citizens Living*  
*in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)(Jus cogens “rises to the level  
16 of a constitutional obligation, which cannot be overridden by statute”)(emphasis omitted).

17 <sup>18</sup> *Cf. Fisheries Case (United Kingdom v Norway)* 1951 I.C.J. 116, 131 (“the ten-mile rule  
18 would appear to be inapplicable as against Norway inasmuch as she has always opposed  
19 any attempt to apply it to the Norwegian coast”); *Asylum Case (Colombia v. Peru)* 1950  
I.C.J. 266, 277-78 (“even if it could be supposed that such a custom existed... it could not  
be invoked against Peru which, far from having by its attitude adhered to it, has, on the  
contrary, repudiated it”).

20 <sup>19</sup> The UDHR is a fundamental constitutive document of the UN and the FSM has adopted  
21 it through its membership therein. The UDHR is “evidence of opinio juris.” Kane, 319 F.  
22 Supp. 2d at 197 (emphasis omitted); *See Rodriguez Fernandez*, 505 F. Supp. at 796 (“[i]t  
is a declaration of basic principles of human rights and freedoms... stamped with the  
approval of the General Assembly by formal vote of its members”).

23 <sup>20</sup> “[W]here there is no treaty and no controlling executive or legislative act or judicial  
24 decision, resort must be had to the customs and usages of civilized nations.” *The Paquete*  
*Habana*, 175 U.S. 677, 700 (1900).



1 “concurrent original jurisdiction in cases arising under this Constitution; national law or  
2 treaties; and in disputes between a state and a citizen of another state, between citizens of  
3 different states, and between a state or a citizen thereof, and a foreign state, citizen, or  
4 subject.” FSM Const. art. XI §6(b). On more than one occasion our court has held that  
5 “[c]onstitutional guarantees of due process and equal protection extend to aliens.” Pohnpei  
6 v. M/V Miyo Maru No. 11, 8 FSM R. 281, 295 n. 8 (Pon. 1998); *See* Berman v. FSM  
7 Supreme Court(I), 5 FSM R. 364, 366 (Pon. 1992)(“an alien is a person within the meaning  
8 of [FSM Const. art. IV §3]”).

### 9 III. HABEAS CORPUS

10 Pursuant to 6 F.S.M.C. 1503,

11 [w]rits of habeas corpus may be granted by the Trial Division of the High  
12 Court or any judge authorized to be assigned by the Chief Justice in the  
13 Appellate Division of the High Court. Every person unlawfully imprisoned  
14 or restrained of his liberty under any pretense whatsoever, or any person on  
15 behalf of an unlawfully imprisoned individual, may apply for a writ of  
16 habeas corpus to inquire into the cause of such imprisonment or restraint.

17 (emphasis omitted). It is “[a] writ employed to bring a person before a court, most  
18 frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S  
19 LAW DICTIONARY 728 (8th ed. 1999). “The writ of habeas corpus is a writ directed to the  
20 person detaining another, commanding him to produce the body of the prisoner at a  
21 designated time and place, with the day and cause of his caption and detention, to do, to  
22 submit to, and receive whatsoever the court or judge awarding the writ shall consider in  
23 that behalf. The writ is the process of testing the authority of one who deprives another of  
24 his liberty, and is designed to give a person whose liberty is restrained an immediate  
25 hearing to inquire into and determine the legality of the detention.” 39 C.J.S. *Habeas*

1 *Corpus* §1 at 459. “The overriding purpose of such a writ is to protect an individual’s right  
2 to be free from wrongful intrusions and restraints upon their liberty.” In re Anzures, 18  
3 FSM R. 316, 322 (Kos. 2012). The FSM Constitution and international law regarding the  
4 treatment of refugees provides the standards by which the legality of the detention is  
5 evaluated, noting that international law is derived from a variety of sources.

#### 6 IV. INTERNATIONAL LAW

7 A refugee is “[a] person who flees or is expelled from a country, esp. because of  
8 persecution, and seeks haven in another country.” BLACK’S LAW DICTIONARY 1307 (8<sup>th</sup> ed.  
9 1999). In the broadest sense, therefore, a refugee is a person who flees his habitual place  
10 of residence due to natural disasters or because of man-made situations such as war,  
11 genocide or intense discrimination.<sup>21</sup> Although there is no single definition uniformly  
12 accepted under international law, the basic core is acknowledged.<sup>22</sup>

#### 13 **Right to Non-refoulement**

14 Every person has the right to non-refoulement under international customary law.  
15 Non-refoulement is “[a] refugee’s right not to be expelled from one state to another, esp.  
16 to one where his or her life or liberty would be threatened.” BLACK’S LAW DICTIONARY  
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19 <sup>21</sup> Although the emerging customary definition appears to be broadening, many people  
20 displaced from climate change, or other disasters do not meet the traditional definition of  
21 a refugee, but may nevertheless be extended similar protections. *See* Refugee Protocol art.  
22 1(A)(2).

23 <sup>22</sup> The most widely accepted definition is found in the Refugee Convention which defines  
24 a refugee as a person who “owing to a well-founded fear of being persecuted for reasons  
25 of race, religion, nationality, membership of a particular social group or political opinion,  
is outside the country of his nationality and is unable or, owing to such fear, is unwilling  
to avail himself of the protection of that country; or who, not having a nationality and being  
outside the country of his former habitual residence as a result of such events, is unable or,  
owing to such fear, is unwilling to return to it.” Refugee Convention art. 1(A)(2).

1 1083 (8th ed. 1999). This principle is codified in the Refugee Convention which prescribes,  
2 “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner  
3 whatsoever to the frontiers of territories where his life or freedom would be threatened on  
4 account of his race, religion, nationality, membership of a particular social group or  
5 political opinion.” Refugee Convention art. 33. This right has arguably reached the status  
6 of jus cogens in international customary law and is binding on all nations.<sup>23</sup> Thus  
7 “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”  
8 UDHR art. 14.<sup>24</sup> This is not a crime, and “[s]tates shall not impose penalties, on account of  
9 their illegal entry or presence, on refugees who, coming directly from a territory where  
10 their life or freedom was threatened in the sense of article 1, enter or are present in their  
11 territory without authorization, provided they present themselves without delay to the  
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14 <sup>23</sup> See UNHCR, Executive Committee Programme, Non-Refoulement, Conclusion No.6  
15 (XXVIII)(1977)(“the fundamental humanitarian principle of non-refoulement has found  
16 expression in various international instruments adopted at the universal and regional levels  
17 and is generally accepted by States”); Jean Allain, The Jus Cogens Nature of Non-  
18 refoulement, 13 INT’L J. REFUGEE L. 533, 538-41 (2001)(“it is clear that the norm  
19 prohibiting refoulement is part of customary international law, thus binding on all States  
20 whether or not they are party to the 1951 Convention. What remains uncertain is whether  
21 that norm has achieved the status of jus cogens”)(emphasis omitted).

18 <sup>24</sup> Traditionally, the UDHR has been considered only a non-binding expression of  
19 international commitment to human rights, however, because it has been consistently  
20 invoked for nearly 70 years there is an emerging consensus that “in whole or in part, [it]  
21 has in fact become [binding] customary law.” Joan Church, Christian Schulze, Hennie  
22 Strydom, *Human Rights from a Comparative and International Law Perspective* 166  
23 (2007); See Paramijit Jaswal, *Human Rights and the Law* 40 (“substantial parts of the  
24 Universal Declaration... have become... part of customary international law binding upon  
25 all states”); Case Concerning the United States Diplomatic and Consular Staff in Tehran  
(U.S. v. Tehran) 1980 I.C.J. 42 (May 24)(“[w]rongfully to deprive human beings of their  
freedom and to subject them to physical constraint in conditions of hardship is in itself  
manifestly incompatible with the principles of the Charter of the United Nations, as well  
as with the fundamental principles enunciated in the Universal Declaration of Human  
Rights”).

1 authorities and show good cause for their illegal entry or presence.” Refugee Convention  
2 art. 31(1); *See* UDHR art. 11(2).<sup>25</sup>

### 3 **Right to Due Process**

4 The right to due process is guaranteed by the FSM Constitution, “[a] person may  
5 not be deprived of life, liberty, or property without due process of law, or be denied the  
6 equal protection of the laws.” FSM Const. art. IV §3. These protections apply equally to  
7 all persons, including noncitizens. *See supra* Berman, 5 FSM R. at 366. The FSM  
8 Constitution is a human rights document that contributes to the international body of  
9 customary law regarding due process. *See* FSM Const. Preamble (“[w]e extend to all  
10 nations what we seek from each: peace, friendship, cooperation, and love in our common  
11 humanity”). The UDHR states that “[n]o one shall be subjected to arbitrary arrest, detention  
12 or exile.” UDHR art. 9. Due process is a general principle embedded in the laws of all  
13 civilized nations so universally that scholars argue it rises to the level of a procedural jus  
14 cogens principle. *See* Larry May, *Global Justice and Due Process*, 13 (2017)(“due process  
15 should be recognized as jus cogens”). Due process guarantees against arbitrary arrest and  
16 detention are repeated nearly verbatim in the International Covenant on Civil and Political  
17 Rights (ICCPR),<sup>26</sup> which states “[n]o one shall be subjected to arbitrary arrest and  
18 detention. No one shall be deprived of his liberty except on such grounds and in accordance  
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21 <sup>25</sup> “No one shall be held guilty of any penal offence on account of any act or omission  
22 which did not constitute a penal offence, under national or international law, at the time  
23 when it was committed.” UDHR art. 11(2).

24 <sup>26</sup> According to the UN Depository of Treaties found on the UN Treaty Collection website:  
25 <https://treaties.un.org>, (June 21, 2017, 15:33 UTC+11:00) there are 169 states who are  
parties to the ICCPR treaty and 6 more states who are signatories but have not yet ratified  
the treaty; it is therefore a widespread practice among nations.

1 with such procedure as are established by law.” ICCPR art. 9(1). Those rights, along with  
2 others, are codified in the ICCPR as nonderogable. *See* ICCPR art. 4(2) (“no derogation”).  
3 Although the FSM is not a signatory to that treaty, the nonderogable portions of that treaty  
4 are generally recognized as expressions of customary international law, if not jus cogens.<sup>27</sup>  
5 *See Rodriguez Fernandez*, 505 F. Supp. at 797 (“[a]lthough the United States is not bound  
6 by either of these documents, they are indicative of the customs and usages of civilized  
7 nations”). Thus, even though there is a bewildering variety of actual state practices  
8 regarding asylum and refugee claims, certain due process rights under customary  
9 international law must be protected. First, “[a]nyone who is arrested shall be informed, at  
10 the time of arrest, of the reasons for his arrest and shall be promptly informed of any  
11 charges against him.” ICCPR art. 9(2). Second, “[a]nyone arrested... shall be brought  
12 promptly before a judge or other officer authorized by law to exercise judicial power, and  
13 shall be entitled to a trial within a reasonable time or to release.” ICCPR art. 9(3). Third,  
14 an alien has a right to have his case reviewed, “and be represented.” ICCPR Art.13. Thus  
15 refugees and asylum-seekers are guaranteed the right to prompt access to the courts of law,  
16 the right to be informed of those procedures and the right to be represented by an attorney.<sup>28</sup>  
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19 <sup>27</sup> “This conclusion is particularly valid when the right in question appears in both the  
20 UDHR and the ICCPR.” Burns Weston, Anna Grear, *Human Rights in the World*  
21 *Community* 119 (2016). Those rights “not only reflect customary international law but also  
22 partake of the character of jus cogens.” *Id.* Nonderogable international obligations are by  
23 definition jus cogens. *See supra* n. 17.

24 <sup>28</sup> Those customary international rights are nearly identical to the rights of a criminal  
25 defendant as guaranteed by the FSM Constitution, which states “[t]he defendant in a  
criminal case has a right to a speedy public trial, to be informed of the nature of the  
accusation, to have counsel for his defense, to be confronted with the witnesses against  
him, and to compel attendance of witnesses in his behalf.” FSM Const. art. IV §6. Although  
the relations with a refugee are an administrative procedure, generally governed by title 17,

1 Ultimately, “[e]veryone has the right to an effective remedy by the competent national  
2 tribunals for acts violating the fundamental rights granted him by the constitution or by  
3 law.” UDHR art. 8.

#### 4 **Right to Liberty**

5 The right to “liberty” is guaranteed by the FSM Constitution. FSM Const. art. IV  
6 §3. The right to liberty and freedom of movement is also guaranteed under customary  
7 international law and codified in a variety of international conventions. “Everyone has the  
8 right to life, liberty and security of person.” UDHR art. 3; *See* ICCPR art. 9(1) (“Everyone  
9 has the right to liberty and security of person. No one shall be subjected to arbitrary arrest  
10 or detention”). Specifically, liberty means that “[s]tates shall not apply to the movements  
11 of... refugees restrictions other than those which are necessary and such restrictions shall  
12 only be applied until their status in the country is regularized or they obtain admission into  
13 another country.” Refugee Convention art. 31(2). Moreover, states shall allow “refugees  
14 a reasonable period and all the necessary facilities to obtain admission into another  
15 country.” *Id.* During that time, a “[s]tate shall accord to refugees lawfully in its territory the  
16 right to choose their place of residence and to move freely within its territory subject to  
17 any regulations applicable to aliens generally in the same circumstances.” Refugee  
18 Convention art. 26; *See* ICCPR art. 11(1) (“[e]veryone lawfully within the territory of a  
19 State shall, within that territory, have the right to liberty of movement and freedom to  
20 choose his residence”).  
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23  
24 these Constitutional guarantees are an expression of universal human rights and must be  
25 substantially followed whenever significant liberty interests are at stake, and regardless of  
the fact a refugee is not a criminal defendant.

1 The freedom of a refugee, however, may be curtailed by the legitimate needs of the  
2 state to provide for “public order,” “public health” or “national security.” ICCPR art. 11(3).  
3 States have “the right to apply during that period such internal measures as they may deem  
4 necessary.” Refugee Convention art. 32(3). Thus detention under international customary  
5 law is not “per se arbitrary.” A v. Australia, Comm. No. 560/1993 U.N. Doc.  
6 CCPR/C/59/D/560/1993, at ¶ 9.3 (1997). Detention is only considered “arbitrary if it is not  
7 necessary in all the circumstances of the case.” *Id.* at ¶ 9.2. What is required is that “it is  
8 necessary and reasonable in all of the circumstances, and proportionate.” C. v. Australia,  
9 Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999, ¶ 4.32 (2002). Thus, no  
10 particular procedure is required, only that there is a procedure to ensure that a refugee is  
11 detained only when it is necessary, reasonable and proportionate. *See Vasileva v. Denmark*,  
12 2003-I Eur. Ct. H.R. at ¶ 23 (“[p]referably, its maximum duration should be regulated by  
13 legislation. However, since it is not, only the principle of proportionality applies”). In the  
14 FSM, liberty is usually protected through the criminal procedures found in title 12 and  
15 FSM Crim. R. 46, and these procedures embody the requirements of necessity,  
16 reasonableness and proportionality which must be applied in the absence of legislation.<sup>29</sup>

### 18 **Right to Property**

19 The right to “property” is guaranteed by the FSM Constitution. FSM Const. art. IV  
20 §3. Similarly, it is protected by customary international law, as codified in the Refugee  
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23 <sup>29</sup> FSM Crim. R. 46, requires that a criminal defendant be released prior to trial, unless he  
24 or she is a danger or flight risk, which no set of lesser restrictions can reasonably prevent.  
25 Although refugees are not criminal defendants, these procedures offer a guideline, which  
if substantially followed in refugee and asylum cases, would be in compliance with the  
international law. *See supra* n. 28.

1 Convention. *See* Refugee Convention art. 13 (“[s]tates shall accord to a refugee treatment  
2 as favourable as possible and, in any event, not less favourable than that accorded to aliens  
3 generally in the same circumstances, as regards the acquisition of movable and immovable  
4 property and other rights pertaining thereto, and to leases and other contracts relating to  
5 movable and immovable property”). The right to property is the same as the right to liberty  
6 and it cannot be abridged unless it is necessary, reasonable and proportionate under the  
7 circumstances.

### 8 **Analysis**

9 In this case, the determination of refugee status was made by the UNHCR in  
10 October of 2015. That finding has been agreed to and accepted by the Government.  
11 Background checks were conducted by the United States Federal Bureau of Investigation  
12 (FBI) and the Refugees were determined not to be a national security risk or danger to the  
13 public. Similarly, medical inspections were conducted and the Refugees pose no health risk  
14 to the public. Several local community members have expressed the desire to sponsor the  
15 Refugees and the UNHCR has provided the funding to ensure that they will not be a burden  
16 on the state during their stay. The Refugees have expressed a sincere desire to participate  
17 in the cultural life of the community, to move about, to attend church and to visit freely  
18 with friends. The Government represents that they intend to relocate the Refugees to an  
19 apartment in Palikir, immediately following this hearing. However, the Government  
20 represents that there is crime in Palikir, even murder, and confinement to the apartment is  
21 necessary for the protection of the Refugees themselves. Therein the Government plans to  
22 continue twenty-four (24) hour surveillance and restrictions on visitation. Jack objected,  
23 stating that this is tantamount to in-house detention, which is admittedly a lesser degree of  
24  
25



1 restriction, but it too unnecessarily monitors the Refugees and restricts their liberty of  
2 movement. Jack argued that the Refugees should be without any restrictions whatsoever  
3 and treated the same as any other FSM citizen. The court is not convinced that no  
4 restrictions are necessary, reasonable and proportionate under these circumstances, nor is  
5 it convinced that twenty-four (24) hour security is necessary. Accordingly, the court finds  
6 that a curfew with regular reporting the appropriate level of restriction under the law.<sup>30</sup>

7 Finally, the confiscation of communication devices including, but not limited to, a  
8 tablet PC and a cell phone, are not germane to the protection of the refugees, nor does such  
9 property have any health or security implication to the FSM. The court notes certain  
10 property seizures may be necessary, such as guns, weapons or other contraband, however,  
11 restrictions on communication devices and computers are not. Accordingly, the  
12 Government must return the confiscated property.

13  
14 This is a case of first impression for the FSM. The court recognizes that the failure  
15 of the Government to apply these international standards was the result of uncertainty in  
16 what appears to be a legal void, rather than a discriminatory intent to punish outsiders as  
17 suggested by counsel. In the absence of express legislation regarding refugees, however,  
18 the Government need look no further than our own criminal procedures and substantially  
19 apply them within the administrative law context to guarantee compliance with due process  
20 under the FSM Constitution and international law. Ultimately, the Division of Immigration  
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23 <sup>30</sup> What are necessary, reasonable and proportionate restrictions prior to the determination  
24 of status, medical clearance and background checks are often significantly more restrictive  
25 than those made after such determinations.

1 under the Department of Justice, is an agency,<sup>31</sup> and agency actions<sup>32</sup> must comply with  
2 the due process and lawfulness requirements expressly protected under title 17, the  
3 Administrative Procedures Act. *See* 17 F.S.M.C. 111.<sup>33</sup> Furthermore, any “person  
4 adversely affected or aggrieved by agency action is entitled to judicial review thereof in  
5 the Supreme Court of the Federated States of Micronesia.” 17 F.S.M.C. 111(2). Thus, our  
6 court has the authority to review and set aside any Government actions that do not comply  
7 with those requirements.

8 This Judicial Order is not to conflict in any way with the Executive Order issued  
9 on June 1, 2017, nor with the Government’s commitments with the UNHCR. The  
10 Executive Order signed by the President of the FSM himself, has declared that the Refugees  
11 may “remain in the FSM pending their resettlement” and required that the Government  
12 provide “an adequate standard of living until their departure.” Accordingly, the Refugees  
13 shall be treated as temporary visitors until permanent resettlement has been effected. Until  
14 that time, the Government is expected to facilitate the transition of the Refugees into the  
15 Palikir apartment, to secure transportation to the store for necessities every two weeks, to  
16

17  
18  
19 <sup>31</sup> *See* Smith v. Nimea, 17 FSM R. 333, 335 (Pon. 2011)(“FSM Division of Immigration &  
Labor (“Immigration”), a national agency”).

20 <sup>32</sup> “‘An agency action’ includes the whole or part of an agency regulation, order, decision,  
21 license, sanction, relief, or the equivalent or denial thereof, or a failure to act.” 17 F.S.M.C.  
101(2).

22 <sup>33</sup> Pursuant to 17 FSMC 111(3)(b), our court shall “hold unlawful and set aside agency  
23 actions and decisions found to be: (i) arbitrary, capricious, an abuse of discretion, or  
24 otherwise not in accordance with law; (ii) contrary to constitutional right, power, privilege,  
25 or immunity; (iii) in excess of statutory jurisdiction, authority, or limitations, or a denial of  
legal rights; (iv) without substantial compliance with the procedures required by law; or  
(v) unwarranted by the facts.”

1 regularly patrol of the area by vehicle and to continue to provide as otherwise required by  
2 their agreement with UNHCR.

### 3 V. CONCLUSION

4 Like all nations, the FSM is bound by international law. This obligation exists,  
5 regardless of accession to any particular treaty. International law protects the “inherent  
6 dignity” and “inalienable rights of all members of the human family.” UDHR Preamble.  
7 All people, regardless of whether they are a citizen of a state, or of no state at all, have the  
8 right to seek asylum in other countries and live free from persecution. In articulating these  
9 rights we look to the Constitution of the FSM and to the body of international law which  
10 can be found in international custom, general principles, judicial decisions and treaties.

11 ACCORDINGLY, the court finds that confinement for over two (2) years, without  
12 due process, is an extraordinary circumstance and the writ of habeas corpus is GRANTED.

13 IT IS HEREBY ORDERED that the Refugees are released from detention and free  
14 to move about subject to the following restrictions which are necessary, reasonable and  
15 proportionate for their own safety while here in the FSM:  
16

- 17 1. **Curfew.** Refugees shall be confined to their apartment in Palikir, every  
18 night from 7:00PM to 7:00AM. Refugees are otherwise free to move  
about during the daytime hours on their own recognizance.
- 19 2. **Reporting.** Refugees shall report to the Government once every two  
20 weeks, in the manner directed by the Government, to coordinate their  
21 personal necessities and transmit any formal communications with the  
UNHCR or to conduct any other Government business as may be  
22 necessary.
- 23 3. **Change of Residence.** Government shall promptly file a notice with the  
24 court if it becomes necessary to change the residence of Refugees for  
25 any reason.

1 4. **Visitation.** Refugees shall have no restriction on visitation during the  
2 daytime hours. Visitors, however, shall not remain in the apartment  
overnight or during curfew hours.

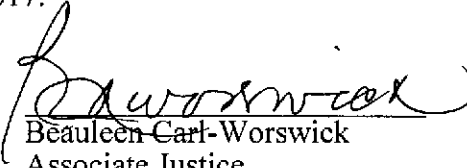
3 5. **Obey All Laws.** Refugees shall obey all municipal, state and national  
4 laws to which they are subject.

5 IT IS FURTHER ORDERED that the Government shall return any property  
6 belonging to the Refugees;

7 ORDERED that the Government shall file the agreement with UNHCR with the  
8 court no later than Friday, August 4, 2017;

9 ORDERED that if either party is in need of modification of the release conditions  
10 of this Order, they may do so by filing the appropriate motion with the court.

11 SO ORDERED the 21<sup>st</sup> day of July, 2017.

12   
13 Beauléon Carl-Worswick  
14 Associate Justice

15 ENTERED this 21<sup>st</sup> day of July, 2017.

16   
17 Clerk of Court  
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