

In re Title to Two Parcels
19 FSM R. 482 (Chk. S. Ct. Tr. 2014)

Moreover, even if the Court were inclined to find that the trial judge should have recused himself, the Movant has failed to establish "good cause" for filing the disqualification almost seven months *after* the Judgment was rendered. In support of its disqualification motion, the Movant merely states that "the state did not have knowledge of the facts constituting a disqualification until about seven months, or this month, June 2014." Mot. at 3. This statement, without anything further, is insufficient to meet the good cause standard. It was only after a Judgment was rendered in favor of Jesse, and after the denial of two motions to set aside the Judgment, that the Movant moved to disqualify the trial judge. Given these reason, the Movant's disqualification motion is untimely.

V. CONCLUSION

Based on the foregoing, the Movant's motion to disqualify Associate Justice Repeat Samuel is DENIED.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2013-500
)	
Plaintiff,)	
)	
vs.)	
)	
MAVERICK EZRA, MAXON JOHNNY,)	
MYRON JOHNNY, JOHNNY JOHNNY a/k/a)	
SONY JOHNNY,)	
)	
Defendants.)	
)	

ORDER AND MEMORANDUM ON JURISDICTION

Beauleen Carl-Worswick
Associate Justice

Decided: August 22, 2014

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HEADNOTES

Treaties

A treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. FSM v. Ezra, 19 FSM R. 486, 490 n.2 (Pon. 2014).

International Law – Diplomatic Relations

The FSM President is authorized to enter into diplomatic relations with foreign governments and to consent to the establishment of diplomatic missions in the FSM. FSM v. Ezra, 19 FSM R. 486, 491 (Pon. 2014).

International Law – Diplomatic Relations

Members of diplomatic missions, and their families and private servants, and diplomatic couriers assigned to the mission must be afforded the privileges, immunities, protections, and exemptions specified in the April 18, 1961 Vienna Convention on Diplomatic Relations, and the diplomatic mission's premises is inviolable. FSM v. Ezra, 19 FSM R. 486, 491 (Pon. 2014).

International Law – Diplomatic Relations

An embassy's inviolability and protection is law, made by treaty, and the magnitude of the infraction is irrelevant since inviolability is a foundation of international law that precludes even the slightest violation because there is no more fundamental prerequisite for the maintenance of good relations between the countries in today's interdependent world than the inviolability of diplomatic envoys and embassies. The inviolability rule applies to the embassy building, or parts of buildings and land ancillary thereto, irrespective of ownership and to a diplomatic agent's private residence. FSM v. Ezra, 19 FSM R. 486, 491 & n.4 (Pon. 2014).

International Law – Diplomatic Relations

Under the Vienna Convention, the receiving country is under a special duty to protect diplomatic persons, places, and things against any intrusion or damage, and to prevent any disturbance of peace of the mission or impairment of its dignity. FSM v. Ezra, 19 FSM R. 486, 491 (Pon. 2014).

Jurisdiction – Arising under National Law; International Law – Diplomatic Relations

Since the Constitution explicitly grants the FSM Supreme Court trial division concurrent and original jurisdiction over any cases arising under treaties and since a breach of the inviolability of the embassy premises is a direct violation of an international treaty and international law, the FSM Supreme

Court trial division has original jurisdiction over a prosecution for a misdemeanor trespass and theft committed in a foreign embassy. FSM v. Ezra, 19 FSM R. 486, 491-92 (Pon. 2014).

International Law; Treaties

Pacta sunt servanda ("agreements must be kept"), is the rule of law that applies to all agreements made within the framework of the international legal system, and is the basis of the law of treaties, and once in force treaties are binding on the parties to them and must be performed in good faith. FSM v. Ezra, 19 FSM R. 486, 492 & n.5 (Pon. 2014).

International Law

Although the FSM has not acceded to, ratified, or otherwise adopted Vienna Convention on the Law of Treaties of May 1969, pacta sunt servanda is international customary law that binds the FSM independently. FSM v. Ezra, 19 FSM R. 486, 492 n.5 (Pon. 2014).

International Law

Customary international law can be derived from a variety of sources, but most often from a general and consistent practice of states, and the "practice of the states" includes: 1) all manner of actual behaviors as well as public-statements and instructions from diplomatic and official governmental bodies; 2) international agreements codifying or contributing to the emergence of international law; 3) and can also be derived from general principles common to all legal systems. There is no precise formula to indicate how widespread a practice must be before it is accepted as a general practice. FSM v. Ezra, 19 FSM R. 486, 492 & n.8 (Pon. 2014).

International Law

All nations have a duty and obligation over its territory and general authority over its nationals. This duty requires: 1) prescription, 2) adjudication, and 3) enforcement of international law. Prescription is the nation's responsibility to make sure that its laws, whether created by legislation, executive order, rule or regulation, or court order enable it to carry out its international obligations. Adjudication is the requirement that persons or things are subject to the process of its courts or administrative tribunals, whether civil or criminal proceedings. Finally, enforcement of the law requires the nation to induce or compel compliance and punish noncompliance with its laws through the courts, police, or by other action. FSM v. Ezra, 19 FSM R. 486, 493 (Pon. 2014).

International Law – Diplomatic Relations

Internationally protected persons are entitled to special protection. Those persons are entitled to a higher degree of protection than afforded to ordinary citizens. FSM v. Ezra, 19 FSM R. 486, 493 n.9 (Pon. 2014).

International Law – Diplomatic Relations

Under international law, the state is expected to provide an effective civil remedy, and/or criminal sanction when damage or injury to a diplomatic mission occurs. If it does not do so, the claim might proceed before an international tribunal. FSM v. Ezra, 19 FSM R. 486, 493 (Pon. 2014).

International Law – Diplomatic Relations

In order to fulfill its treaty obligations to protect diplomats, as governed through the application of international law, the FSM must apply its national criminal code of law to private citizens acting within its territorial control. FSM v. Ezra, 19 FSM R. 486, 493 (Pon. 2014).

Criminal Law and Procedure – National Crimes; International Law – Diplomatic Relations

Exclusive national jurisdiction over a trespass and theft at the Chinese Embassy is proper under 11 F.S.M.C. 104(7)(a)(ii) as an otherwise undefined national crime, but jurisdiction is not proper under

11 F.S.M.C. 104(7)(a)(i) where an exclusive list of national crimes is defined. FSM v. Ezra, 19 FSM R. 486, 494 (Pon. 2014).

Criminal Law and Procedure – National Crimes

Jurisdiction under 11 F.S.M.C. 104(7)(a)(i) cannot be supported for the misdemeanor crime of trespass or theft at the Chinese Embassy because the trespass and theft were not committed in the FSM's exclusive economic zone, or its the airspace, or oceans; because it was not a retaliation, or breach of fiduciary responsibility by a public servant; or because it was not against property belonging to the FSM national government, or against people participating in an election. FSM v. Ezra, 19 FSM R. 486, 495 (Pon. 2014).

Criminal Law and Procedure – National Crimes

Exclusive jurisdiction for undefined national crimes can be found under in 11 F.S.M.C. 104(7)(a)(ii) which states that national jurisdiction is proper for any crime that is "otherwise a crime against the Federated States of Micronesia." FSM v. Ezra, 19 FSM R. 486, 495 (Pon. 2014).

Criminal Law and Procedure – National Crimes

The test for what constitutes a crime under 11 F.S.M.C. 104(7)(a)(ii) is: Does the regulation involve a national activity or function, or is it one of an indisputably national character? Alternatively stated, a national crime is one that is committed in some place where the national government has jurisdiction, or that involves a national government instrumentality, or involves an activity that the national government has the power to regulate. FSM v. Ezra, 19 FSM R. 486, 495 (Pon. 2014).

International Law – Diplomatic Relations

The Chinese Embassy does not enjoy full extraterritoriality under the Vienna Convention on Diplomatic Relations, but is afforded special privileges therein because the status of diplomatic premises arises from the rules of law relating to immunity from the prescriptive and enforcement jurisdiction of the receiving state; the premises are not a part of the territory of the sending state. That embassy premises are inviolable does not mean that they are extraterritorial. FSM v. Ezra, 19 FSM R. 486, 495 n.13 (Pon. 2014).

Criminal Law and Procedure – National Crimes

Under 11 F.S.M.C. 104(7)(a)(ii), the FSM Supreme Court's trial division has exclusive jurisdiction over a trespass and theft at the Chinese Embassy because the power to create, enforce, and interpret treaties is exclusively an activity or function that the national government has power to regulate; because a power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power; because the President has the duty to enforce and conduct foreign affairs under national law; because Congress has the duty to ratify treaties; because the national Supreme Court the duty to interpret and adjudicate international treaties; because the nature of the expressly delegated powers in the Constitution's article IX, § 2, calls for a uniform nationally coordinated approach; and because if a power is of an indisputable national character such that it is beyond state's power to control, that power is to be considered a national power. FSM v. Ezra, 19 FSM R. 486, 495-96 (Pon. 2014).

Criminal Law and Procedure – National Crimes; International Law – Diplomatic Relations

Under 11 F.S.M.C. 104(7)(a)(ii), the FSM Supreme Court's trial division has exclusive jurisdiction over a trespass and theft at the Chinese Embassy because ambassadors, and all foreign officials, are explicitly intended to be protected by the national government and breaching of an embassy's sanctity affects the personal residence of the ambassador, and directly affects the ambassador's staff, many of whom are legally protected foreign officials; because, although the embassy's physical premises are not explicitly listed in the Constitution as protected property they are necessarily, and implicitly,

included within relationship with the ambassador and other foreign diplomats; because the duty of protecting the physical diplomatic mission is an express requirement of the agreement between the FSM and China and the Vienna Convention, statutorily incorporated by reference, requires the protection of the embassy itself; and because this is of an indisputably international character, a fortiori of a national character, and therefore beyond the reach of the state power to control. FSM v. Ezra, 19 FSM R. 486, 496 (Pon. 2014).

International Law

Since the FSM became a member state of the United Nations, it has reciprocal obligations to the international community to redress wrongs in good faith under the provisions of the U.N. Charter. FSM v. Ezra, 19 FSM R. 486, 496 n.15 (Pon. 2014).

Treaties

A treaty signed by the President, and ratified by Congress, is our law. FSM v. Ezra, 19 FSM R. 486, 497 (Pon. 2014).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On November 14, 2013, this court raised the question of its jurisdiction sua sponte and ordered all parties to submit briefs on the matter. On November 27, 2013, defendant Maverick Ezra submitted his brief and on November 28, 2013, plaintiff Federated States of Micronesia and defendant Myron Johnny submitted their briefs. On December 4, 2013, defendant Johnny Johnny submitted his brief on jurisdiction and defendant Maxon Johnny submitted his on December 11, 2013. The issue is whether the FSM Supreme Court is the appropriate forum for the prosecution of a misdemeanor trespass and theft committed in a foreign embassy.¹ This is a case of first impression for the court.

The court holds that national jurisdiction is proper for reasons set forth below:

I. ORIGINAL JURISDICTION

On August 29, 1989, the Chinese Embassy was established pursuant to a joint communiqué which conveyed the mutual intentions of the Federated States of Micronesia (FSM) and the People's Republic of China (PRC) to establish diplomatic relations.² On September 11, 1989, the FSM entered into formal diplomatic relations with the PRC pursuant to Title 10 of the FSM Code that governs the diplomatic relationship between the two nations.³ The code states in full:

¹ The information charges all four Defendants with two separate counts: Trespassing contrary to 11 F.S.M.C. 605(1), and Theft contrary to 11 F.S.M.C. 602(1). Both are misdemeanors under national law.

² A treaty is defined as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." 10 F.S.M.C. 502(5) (emphasis added).

³ This treaty was adopted on Sept. 11, 1989, according to the FSM Government's website. Establishment of Diplomatic Relations, <http://www.fsmgov.org/diprel.html> (July 28, 2014, 15:33 UTC + 11:00).

The President of the Federated States of Micronesia is authorized to enter into diplomatic relations with foreign governments and to consent to the establishment of diplomatic missions in the Federated States of Micronesia. Unless otherwise provided by law, treaty, or the President pursuant to section 602 of this title, such missions, members of the mission, and their families and private servants, and diplomatic couriers assigned to the mission shall be afforded the privileges, immunities, protections, and exemptions specified in the Vienna Convention on Diplomatic Relations of April 18, 1961.

10 F.S.M.C. 601. Explicitly, this agreement incorporates the Vienna Convention on Diplomatic Relations (Vienna Convention) of April 18, 1961. Article 22 of the Vienna Convention states in full:

- 1) The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.
- 2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- 3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Vienna Convention on Diplomatic Relations, art. 22 (Apr. 18, 1961) (Vienna Convention). Thus, the inviolability and protection of the Chinese Embassy is law, as made by treaty. The magnitude of the infraction is irrelevant and term "inviolable" is one of the foundations of international law that precludes even the slightest violation.⁴ The rule of inviolability applies to the embassy "building, or parts of buildings and land ancillary thereto, irrespective of ownership." Vienna Convention art. 1 (Apr. 18, 1961). Additionally, the "private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." *Id.* art. 30. All mission property, including "the archives and documents of the mission shall be inviolable at any time and wherever they may be." *Id.* art. 24. "The person" of a diplomatic agent shall also be inviolable, including his or her personal "papers, correspondences" and "property." *Id.* arts. 29-30. Even the "means of transport" must be free from "search requisition, attachment or execution." *Id.* art. 22. Under the Vienna Convention, the receiving state is under a special duty to protect these persons, places, and things "against any intrusion or damage, and to prevent any disturbance of peace of the mission or impairment of its dignity." *Id.*; see United States Diplomatic Staff and Consular Staff in Tehran, 1980 I.C.J. 37 (May 24).

The FSM Constitution article XI, § 6(b) states, in full:

The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

⁴ "There is no more fundamental prerequisite for the maintenance of good relations between the states in the interdependent world of today . . . than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." United States Diplomatic and Counselor Staff in Tehran, 1980 I.C.J. 43 (May 24) (citing the previous Order of 15 December 1979).

FSM Const. art. XI, §6(b). The constitution explicitly grants concurrent and original jurisdiction to the FSM Supreme Court Trial Division for any "cases arising" under treaties. A breach of the inviolability of the embassy premises is a direct violation of an international treaty, and international law.

THEREFORE, pursuant to article XI, § 6(b) the FSM Supreme Court Trial Division has original jurisdiction over this matter.

II. INTERNATIONAL LAW

Pacta Sunt Servanda,⁵ is the rule of law that "applies to all agreements made within the framework of the international legal system, and is the basis of the law of treaties." MARYAN GREEN, INTERNATIONAL LAW 163 (3d ed. 1982). "Once in force treaties are binding on the parties to them and must be performed in good faith." *Id.* Unlike other treaties,⁶ the Vienna Convention does not specifically articulate the appropriate steps needed for local enforcement, but does state that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present convention."⁷ Vienna Convention pmb. (Apr. 18, 1961). Customary law can be derived from a variety of sources, but most often from "a general and consistent practice of states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).⁸ It is generally

⁵ *Pacta Sunt Servanda* means "agreements must be kept." BLACK'S LAW DICTIONARY 1140 (8th ed. 2004). "It is the rule that agreements and stipulations, esp. those contained in treaties, must be observed." *Id.* International customary law was codified by the Vienna Convention on the Law of Treaties of May 1969. (Law of Treaties). The FSM has not acceded to, ratified, or otherwise adopted the Law of Treaties. Absence of Record on the FSM Government's Website, <http://www.fsmgov.org/cgi-bin/treaties.cgi> (July 28, 2014, 15:33 UTC + 11:00). The Law of Treaties, however, defines a treaty with language nearly identical to 10 F.S.M.C. 502(5), as "an agreement between subjects of international law in written form and *governed by international law*." Vienna Convention on the Law of Treaties art. 2(1)(a) (May 23, 1969) (emphasis added). Regardless, *Pacta Sunt Servanda* is international customary law that binds the FSM independently.

⁶ *Aut dedere aut judicare*, "prosecution or extradition" is an emerging principle under customary international law and an express requirement under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, as well as other international treaties. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 6, Feb. 20, 1977. This treaty was acceded to by the FSM on Aug. 5, 2004, according to the FSM Government's website. Instrument of Accession Record, <http://www.fsmgov.org/cgi-bin/treaties.cgi> (July 28, 2014, 15:33 UTC + 11:00). Under this convention, prosecution, without exception, is "through proceedings *in accordance with the laws of that state*." *Id.* art. 7 (emphasis added). Furthermore each state "shall take such measures as may be necessary to establish jurisdiction over the crime." *Id.* art 3. This treaty, however, applies only to serious crimes against internationally protected persons, or embassies, rather than mere misdemeanors. *See id.*

⁷ "Customary international law is considered to be like common law in the United States, *but it is federal law*." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d (1987) (emphasis added).

⁸ The "practice of the states" includes: 1) all manner of actual behaviors as well as public statements and instructions from diplomatic and official governmental bodies; 2) international agreements codifying or contributing to the emergence of international law; 3) and can also be derived from general principles common to all legal systems. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). There is "no precise formula" to indicate how widespread a practice must be before it is accepted as a general practice. *Id.* Substantial weight however is given to the opinions of the international and national courts, the writing of scholars, and the pronouncements of states. *Id.* § 103. Ultimately, the "best evidence" of customary

accepted that all states have a duty and obligation "over its territory and general authority over its nationals." *Id.* § 206. This duty requires: 1) prescription, 2) adjudication, and 3) enforcement of international law. *See id.* § 401. Prescription is the state responsibility to make sure that its laws, whether created by legislation, executive order, rule or regulation, or court order enable it to carry out its international obligations.⁹ *See id.* § 401(a). Adjudication is the requirement that persons or things are subject to the process of its courts or administrative tribunals, whether civil or criminal proceedings. *See id.* § 401(b). Finally, enforcement of the law requires the state to induce or compel compliance and punish noncompliance with its laws through the courts, police, or by other action. *See id.* § 401(c).¹⁰ In the criminal context, enforcement must be "reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of the violation and must be proportional to the gravity of the offense." *Id.* § 431. This includes "the imposition of criminal sanctions, such as fines and imprisonment, as well as other measures ordered by the court." *Id.* § 431 cmt. b. Significantly, a "state may enforce its criminal law within its own territory through the use of the police, investigative agencies, public prosecutors, courts and custodial facilities." *Id.* § 432(1).¹¹ But any exercise of its criminal law is subject to "reasonableness" and the international law of human rights. *Id.* § 432 cmt. d. Generally, a state is only required to take "such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage." MARYAN GREEN, *INTERNATIONAL LAW* 259 (3d ed. 1982).¹² Thus, under international law, the state is simply "expected to provide an effective civil remedy, and/or criminal sanction when such damage or injury occurs." *Id.* "If it does not do so, the claim might proceed before an international tribunal." *Id.* at 266.

THEREFORE in order to fulfill its obligations created by treaty, as governed through the application of international law, the FSM must apply its national criminal code of law to private citizens acting within its territorial control.

law is proof of state practice. *Id.* § 103 cmt. a. But courts give "substantial weight" to international court opinions, national law opinions interpreting international law, the writings of scholars, and the pronouncements of states themselves. *Id.* § 103(2).

⁹ Internationally protected persons are entitled to special protection. Those persons are entitled to a higher degree of protection than afforded to ordinary citizens. Municipal law may not necessarily reflect this standard and special legislation is sometimes required to fulfill this obligation, especially in light of increased rates of attacks on diplomatic missions and *persons*. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporter's n.6 (1987) ("obligation to provide protection for diplomatic personnel").

¹⁰ Appropriate steps universally include repairing the damage and preventing the repetition of the harm. *See* SOFIE SCHREVELIUS LARSSON, *THE POSITIVE DUTY TO PROTECT DIPLOMATIC MISSIONS AND PERSONNEL* 39 (2005) ("protecting and punishing"). *See* J. CRAIG BARKER, *THE PROTECTION OF DIPLOMATIC PERSONNEL* (2006) ("prevention" and "repression").

¹¹ U.S. jurisdictions have applied criminal code Title 18 U.S.C. § 112 when it is "necessary" and "appropriate" in order to enforce the United States' international obligations under the Vienna Convention on Diplomatic Relations. *Boos v. Barry*, 485 U.S. 312, 329, 108 S. Ct. 1157, 1168, 99 L. Ed. 2d 333, 349-50 (1988).

¹² Sometimes customary law is incorporated, at other times domestic law, namely federal law, is used to carry out the obligation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. a-b (1987). "The courts appear to have considered these rules as a blend of international law and domestic law," ultimately governed by a reasonableness standard. *Id.* § 1 introductory note.

III. EXCLUSIVE JURISDICTION

The court furthermore finds that exclusive national jurisdiction is proper under 11 F.S.M.C. 104(7)(a)(ii) as an otherwise undefined national crime, but jurisdiction is not proper under 11 F.S.M.C. 104(7)(a)(i) where an exclusive list of national crimes is defined.

A. Exclusive Jurisdiction under 11 F.S.M.C. 104(7)(a)(i) is not proper because trespass and theft is not a defined national crime.

The constitution expressly states that Congress has the power "to define national crimes and prescribe penalties." FSM v. Jano, 6 FSM Intrm. 9, 10 (Pon. 1993); FSM Cont. art. IX, § 2(p). Title 11 F.S.M.C. 103 articulates the contours of the national court's exclusive jurisdiction: "The National Government of the Federated States of Micronesia has exclusive jurisdiction over all national crimes, as defined in section 104(7) of this title." As defined by that section, national crimes are:

- (a) any crime which is
 - (i) inherently national in character and defined anywhere in this title; or
 - (ii) otherwise a crime against the Federated States of Micronesia
- (b) a crime is "inherently national in character" when any of the following is true:
 - (i) the crime is committed in the exclusive economic zone of the Federated States of Micronesia as defined in title 18 of this Code;
 - (ii) the crime is committed in the airspace above the territory comprising the Federated States of Micronesia as defined in article I, section 1 of the FSM Constitution;
 - (iii) the crime is committed on any airborne vehicle of the National Government, regardless of that vehicle's location;
 - (iv) the crime is committed on any watergoing vessel flagged and registered by the Federated States of Micronesia regardless of that watergoing vessel's location;
 - (v) the crime is committed on any watergoing vessel of the National Government regardless of that vessel's location;
 - (vi) the crime is committed against a national public servant in the course of, in connection with, or as a result of that person's employment or service;
 - (vii) the crime is committed against a former national public servant in retaliation for an act undertaken while that person was engaged in public service and within the scope of his or her official duties;
 - (viii) the crime is committed by a national public official or public servant while that person is engaged in his or her official duties or in violation of a fiduciary duty;
 - (ix) the crime involves property belonging to the National Government;
 - (x) the crime is committed against any person participating in or attempting to

participate in a national election.

11 F.S.M.C. 104(7). In this case, jurisdiction under 11 F.S.M.C. 104(7)(a)(i) cannot be supported for the misdemeanor crime of trespass or theft because it is not found by definition in the exclusive list. The trespass and theft were not committed in the exclusive economic zone as defined by title 18, nor was it in the airspace, or oceans. It was not a retaliation, or breach of fiduciary responsibility by a public servant. Nor was it against property belonging to the FSM National Government, or against people participating in an election. By definition, then, this is not a national crime.

B. *Exclusive Jurisdiction under 11 F.S.M.C. 104(7)(a)(iii) is proper because a violation of an international treaty is an undefined national crime.*

Alternately, exclusive jurisdiction for undefined national crimes can be found under in 11 F.S.M.C. 104(7)(a)(iii) which states that national jurisdiction is proper for any crime which is "otherwise a crime against the Federated States of Micronesia." There is no defined list for what constitutes a crime under this section, however, the courts have articulated a test: "In an examination to determine whether it is a national crime, the focus is: Does the regulation . . . involve a national activity or function, or is it one of an indisputably national character." Jano v. FSM, 12 FSM Intrm. 569, 575 (App. 2004). Alternatively stated: "A national crime is one that is committed in some place where the national government has jurisdiction, or that involves an instrumentality of the national government, or involves an activity that the national government has the power to regulate." FSM v. Fal, 8 FSM Intrm. 151, 154 (Yap 1997). Notably, "[t]here appears nothing of an indisputably national character in the power to control all lesser crimes." FSM v. Boaz (II), 1 FSM Intrm. 28, 32 (Pon. 1981).

Under the first part of the national crimes test, the property on which the Chinese Embassy is located on,¹³ is not the property of the FSM national government and therefore the national government does not have exclusive jurisdiction by nature of the place. Nor can it be said, under the second part of the test, that the Chinese Embassy is an instrumentality of the national government.¹⁴ Under the third part, however, the power to create, enforce, and interpret treaties is exclusively an activity or function that the national government has power to regulate. The FSM Constitution art. VIII, § 1 states: "A power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power."

The FSM Constitution article X, § 2, in pertinent part, explicitly delegates to the president the duty to enforce and conduct foreign affairs under national law: "(a) to faithfully execute and implement the provisions of this Constitution and all national laws; (b) to receive all ambassadors and to conduct foreign affairs and the national defense in accordance with national law."

¹³ The Chinese Embassy does not enjoy full extraterritoriality under the Vienna Convention on Diplomatic Relations, but is afforded special privileges therein. "The status of diplomatic premises arises from the rules of law relating to immunity from the prescriptive and enforcement jurisdiction of the receiving state; *the premises are not a part of the territory of the sending state.*" RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 77 cmt. a (1965) (emphasis added)." Souryal v. Torres Advanced Enterprise Solutions, LLC, 847 F. Supp. 2d 835, 840-41 (E.D. Va. 2012). "That premises are inviolable does not mean that they are extraterritorial." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 466 cmt. a (1987).

¹⁴ The PRC is a sovereign nation and its diplomatic mission is not a part of the FSM national government.

The FSM Constitution article IX, § 2, in pertinent part, explicitly delegates to the national legislature the duty to ratify treaties: "(b) to ratify treaties;"

The FSM Constitution article XI, § 6, in pertinent part, explicitly delegates to the national Supreme Court the duty to interpret and adjudicate international treaties: "(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments . . . (b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties."

It is the explicit function of the national executive branch to conduct foreign affairs with national law under article X, § 2(b), and to enforce international treaties under article X, § 2(a); it is the explicit function of the national legislature to ratify treaties under article IX, § 2(b); and for the national supreme court to oversee all cases involving interpretations of treaties under article XI, § 6(b).

The nature of the expressly delegated powers in article IX, § 2, of the Constitution— including the power to impose taxes, to provide for the national defense, ratify treaties, regulate immigration and citizenship, regulate currency, foreign commerce and navigation, and to provide for a postal system — strongly suggests that they are intended to be the exclusive province of the national government, since they "call for a uniform nationally coordinated approach." *Innocenti v. Wainit*, 2 FSM Intrm. 173, 181-82 (App. 1986). Finally, "If a power is of an indisputable national character such that it is beyond state's power to control, that power is to be considered a national power, even though it is not an express power granted by the Constitution." *FSM v. Kotobuki Maru No. 23 (I)*, 6 FSM Intrm. 65, 70-71 (Pon. 1993).

First, ambassadors, and all foreign officials, are explicitly intended to be protected by the national government. Breaching the sanctity of an embassy affects the personal residence of the ambassador, and directly affects the ambassador's staff, many of whom are legally protected foreign officials. More than that, it affects the larger diplomatic relations with PRC, and implicates a host of foreign affairs issues with countries other than the aggrieved state. In truth, how the FSM interprets and responds to its obligations formed by international agreements including the Vienna Convention has an effect on the diplomatic relationships with the entire international community as a whole.¹⁵ Thus, the FSM president is constitutionally obligated to conduct and carry out these relations in accordance with national law. Second, although the embassy's physical premises are not explicitly listed in the Constitution as protected property they are necessarily, and implicitly, included within relationship with the Ambassador, and other foreign diplomats. Third, the duty of protecting the physical diplomatic mission is an express requirement of the agreement between the FSM and PRC. The Vienna Convention, statutorily incorporated by reference, requires the protection of the embassy itself. This is of an indisputably international character, a fortiori of a national character, and therefore beyond the reach of the state power to control.

THEREFORE, pursuant to 11 F.S.M.C. 104(7)(a)(ii), the FSM Supreme Court's trial division has exclusive jurisdiction over this matter.

¹⁵ The FSM became a member state of the United Nations on September 17, 1991, and as a result, has reciprocal obligations to the international community to redress wrongs in good faith under the provisions of the U.N. Charter. See U.N. Charter arts. 33-38. Declaration of Acceptance <http://fsmgov.org/cgi-bin/treaties.cgi> (July 28, 2014, 15:33 UTC +11:00).

IV. CONCLUSION

Under FSM Constitution article XI, § 6(b), original jurisdiction is proper for alleged violations to any treaty, or international agreement. Furthermore, enforcement of international law requires the national government to exercise its criminal code which creates exclusive jurisdiction under 11 F.S.M.C. 104(7)(a)(ii). A treaty signed by the president, and ratified by congress, is our law.¹⁶ Thus, although an ordinary misdemeanor trespass and theft have no place in the national courts, this misdemeanor trespass and theft was a violation of an international treaty.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2013-500
)	
Plaintiff,)	
)	
vs.)	
)	
MAVERICK EZRA, MAXON JOHNNY,)	
MYRON JOHNNY, JOHNNY JOHNNY a/k/a)	
SONY JOHNNY,)	
)	
Defendants.)	
_____)	

ORDER

Beauleen Carl-Worswick
Associate Justice

Hearing: February 6, 2014
Decided: August 22, 2014

APPEARANCES:

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¹⁶ "International law is a part of our law." The Paquete Habana, 175 US 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 320, 328 (1900).