IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

HE, GUO QUIONG **Plaintiff,** **vs.** **THE GOVERNMENT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, THOMAS O. SABLAN, DAVID AYUYU, RALPH S. DEMAPAN, MARK ZACHARES, MASAAKI NAKAMURA JOHN TAITANO, JULIE OMAR, AND JOHN DOES 1,2,3 AND 4 IN THEIR INDIVIDUAL CAPACITIES,** **Defendants.**	**Civil Action No. 99-268B** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

This matter came before the court on Defendants' motion to dismiss for failure to state a claim pursuant to Com. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment. Plaintiff appeared by and through her attorney, Joe Hill, Esq., and Defendants appeared by and through their attorney, Assistant Attorney General Robert Goldberg. At the conclusion of oral argument, the court took the matter under advisement. The court, having heard the arguments and reviewed all the evidence presented, now renders its written decision denying the motion. **[p. 2]**

I. FACTS

1. Plaintiff, a Chinese national, filed this Complaint against the Commonwealth and a number of individuals after being arrested and taken into custody by immigration officers and detained at the Department of Labor and Immigration ("DOLI") Detention Center. Plaintiff

contends that during the course of a raid of the Jin Apparel Garment Factory on May 12, 1997 ("Jin Apparel"), she was arrested without a warrant, without probable cause, and without being shown the warrant at the time of her arrest. Plaintiff further contends that following the arrest, she was held *in communicado* for thirty three days, was not taken before a judge or magistrate for fifty-nine days, and was never advised of her statutory and constitutional rights to bail, to remain silent, and to counsel. Plaintiff further maintains that she was never informed of her right to communicate with her country's consular officer as provided by the Vienna Convention on Consular Relations and Optional Protocols of April 24, 1964 (the "VIENNA CONVENTION"). In addition, Plaintiff alleges that on two separate occasions she was struck in the face by Defendant Omar, the second of which resulted in her being hospitalized.

2. To vindicate her claims, Plaintiff initially filed an action in the United States District Court for the Northern Mariana Islands for violations of her civil rights and local law against the Commonwealth and then-Secretary of the Department of Labor and Immigration, Thomas O. Sablan; then-Director of Immigration, David Ayuyu; Acting Attorney General, Robert Dunlap; Assistant Attorney General Mark Zachares; Major of Enforcement Unit of the Division of Immigration, Ralph S. Demapan, Immigration Officer Julie Omar; the Government of the Northern Mariana Islands, and the Office of the Attorney General of the Commonwealth.[1] The District Court granted Defendants' motion to dismiss Plaintiff's claims under 42 U.S.C. § 1983 ("§1983") for money damages against the Commonwealth and the individual defendants in their official capacities, but granted Plaintiff leave **[p. 3]** to amend her Complaint to seek prospective relief against these Defendants under § 1983. *See He v. Sablan*, Civil Action No. 97-0044 (Dec. 2, 1997) (Order Re: Defendants' Motion to Dismiss for Failure to State a Claim). The court further dismissed Plaintiff's claims for

[1] *See He v. Sablan*, Civil Action No. 97-0044 (D.N.M.I. 1997). To challenge her confinement, Plaintiff also filed a separate *habeas corpus* action in the Commonwealth Superior Court. *See In re Petition of He Guo Quiong for Writ of Habeas Corpus v. Sablan*, Civil Action No. 97-0680 (N.M.I. Super. Ct. June 23, 1997) (Emergency Verified Application for Writ of Habeas Corpus and Stay of Deportation), *appeal dismissed*, Appeal No. 97-025 (N.M.I. Sup. Ct. Sept. 4, 1997) (Order of Dismissal).

assault, battery, false imprisonment, and false arrest against the CNMI, DOLI, AGO, and the individual Defendants in their official capacities, but, pursuant to 28 U.S.C. § 1367(c)(1),[2] declined to exercise jurisdiction of Plaintiff's claim under the Commonwealth Constitution for violation of Article I, § 3(c). Although the court retained jurisdiction over Plaintiff's remaining state law claims for negligence, due process violations, and denial of equal protection, the parties agreed to dismiss these claims without prejudice. *See He v. Sablan*, Civil Action No. 97-0044 (March 2, 1998) (Order of Dismissal without Prejudice).[3]

3. In May of 1999, Plaintiff filed the instant case against the Commonwealth and individual defendants Sablan, Ayuyu, Demapan, Zachares, Taitano, Omar, and Does 1 through 4, asserting six separate causes of action for damages arising out of the allegedly unlawful seizure, arrest, and warrantless detention. Plaintiff contends although the search was planned well in advance of the date of the raid (Complaint at ¶ 29), although she had a valid work/entry permit in her possession (¶ 31), and although she cooperated with DOLI personnel and made no attempt to flee or escape (¶ 32), Immigration Officers Nakamura, Taitano, and/or Does 1 and 2 nevertheless arrested and detained her without a warrant (¶¶ 27, 30). Notwithstanding her rights under the United States and Commonwealth constitutions, moreover, Plaintiff contends that from her arrest on May 12, 1997 until June 11, 1997 she was never taken before a judge for a determination of whether there was probable cause for her arrest and to continue her detention (¶¶ 34-36); that she was never provided any administrative hearing to review her arrest or seizure (¶ 41); that she was held without bail and never informed of her right to bail (¶¶ 38, 40); and that she was not allowed reasonable **[p. 4]** access to a telephone or other means of communication to contact an attorney or a representative of the Chinese government (¶¶ 47, ¶ 51-54). Plaintiff claims, moreover, that when she eventually appeared before a judge on June 11, 1997, she was not

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[2] In material part, section 1367 permits a federal district court to decline to exercise supplemental jurisdiction over a claim if the claim raises a novel or complex issue of state law.

[3] *See also Commonwealth Div. of Immigration Services, et al. v. He, Guo Qiong,* Appeal No. 97-036 (N.M.I. Sup.Ct. Feb. 18, 1998) (Stipulated Order of Dismissal).

represented by counsel, even though the sole purpose of the hearing was to determine why she should not be deported (¶¶ 43, 46). Plaintiff further accuses Defendant Omar of assaulting her on two separate occasions, the second of which required hospitalization for medical treatment (¶¶ 55-61). In her Complaint, Plaintiff brings a direct action under Article I, § 3 of the Commonwealth Constitution for unlawful arrest without probable cause, unlawful and unreasonable detention, and excessive force (¶¶ 62-94). Pursuant to 42 U.S.C. §§ 1983 and 1988, moreover, she seeks damages and attorney's fees from the individual defendants for the deprivation of rights secured by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the VIENNA CONVENTION (*id.* at ¶¶ 96-102). Lastly, Plaintiff brings a claim against Defendant Omar for common law assault and battery, or, in the alternative, for negligence for the two instances of physical assault. *Id.* at ¶¶ 108-111.

4. Defendants filed this motion to dismiss for failure to state a claim, or, in the alternative, for summary judgment contending, first, that there is no cause of action for damages under Article I, § 3(c) of the Commonwealth Constitution to remedy an illegal search, arrest, seizure, and that Article I, § 3(c) does not provide for a direct action to challenge the use of excessive or unreasonable force. Second, Defendants assert that Plaintiff fails to allege any basis for personal liability under § 1983, and that these claims are barred, in any event, by the doctrine of qualified immunity. Third, Defendants claim that Plaintiff's claim for assault and battery is barred by sovereign immunity and the Government Liability Act, 7 CMC § 2201, *et seq.* Finally, Defendants maintain that all claims against Sablan and Zachares are barred by absolute immunity.

III. ISSUES

1. Whether Article I, section 3(c) of the Commonwealth Constitution provides a direct action for persons aggrieved by an unlawful search and seizure, unreasonable and excessive detention, and unreasonable force in the absence of any enabling statute. **[p. 5]**
2. Whether Plaintiff states a claim against the individual defendants under 28 U.S.C. § 1983 for the deprivation of any rights, privileges, or immunities secured by the Constitution or the

laws of the United States, and, assuming, *arguendo*, that Plaintiff has stated such a claim, whether the doctrine of qualified immunity shields the individually-named Defendants from liability.

3. Whether Plaintiff's claim for assault and battery is barred by sovereign immunity and/or the Government Liability Act, 7 CMC § 2201, *et seq.*

4. Whether Secretary Sablan and Assistant Attorney General Zacharas are entitled to absolute prosecutorial immunity.

IV. ANALYSIS

A. Claims under Article I, Section 3

The Fourth Amendment to the United States Constitution and Article I, § 3 of the Commonwealth Constitution guarantee the "right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizure." U.S. CONST. amend. IV, § 3; N.M.I. CONST. Art. I § 3 (1976). In addition to these rights, Article I, § 3(c) of the Commonwealth Constitution expressly provides that "[a] person adversely affected by an illegal search or seizure has a cause of action against the government within the limits provided by law." N.M.I. CONST. Art. I § 3(c). The right of the people of the Commonwealth to be free from unreasonable search and seizure is, accordingly, "firmly grounded in the Commonwealth Constitution." *CNMI v. Aldan*, App. No. 96-034 (N.M.I. Sup.Ct. Dec. 4, 1997).

Notwithstanding the proviso in Article I, § 3(c), Defendants maintain that the Commonwealth's Constitution does not permit direct actions. Opposition at 4-5. Relying upon the commentary to Article I, § 3(c)[4] and what Defendants regard as persuasive case authority, Defendants argue that because it is up to the Legislature to define the limits of this cause of action, and because the Legislature has not yet passed a law restricting or otherwise delineating the boundaries for a cause of action against the government, Plaintiff may not sue the Commonwealth directly for a violation of Article I, § 3(c). **[p. 6]**

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[4] *See* ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) (hereinafter, "CONSTITUTIONAL ANALYSIS") at 10-11.

Pointing to what Plaintiff characterizes as the clear and unambiguous language of Article I, § 3(c) as well as the CONSTITUTIONAL ANALYSIS,[5] Plaintiff takes the position that the Framers clearly intended for the victims of illegal searches or seizures to have a direct cause of action against the government to recover the amount of their damages within limits that the legislature might, at some point, elect to define by law. Notwithstanding its clear authority to limit damages, moreover, Plaintiff points out that the legislature has yet to enact any statutory restriction. Plaintiff therefore concludes that the cause of action provided by Article I, Section 3(c) is essentially unlimited (Opp. at 3-4). Finally, Plaintiff maintains that the protections of Article I, § 3 are largely drawn from and mirror those guaranteed by the Fourth Amendment to the United States Constitution and that they prohibit unlawful and unreasonable arrest without probable cause and in the absence of statutorily-defined exigent circumstances; unlawful, excessive and unreasonable detention; and unlawful and unreasonable excessive force. Based upon these protections, Plaintiff maintains that she has sufficiently pled a cause of action under Article I, § 3(c).

In determining whether the provisions of Article I, § 3(c) are self-executing or instead, as Defendants contend, depend upon further legislation, the court applies general principles of statutory construction. *See Camacho v. Northern Mariana Islands Retirement Fun*d, 1 N.M.I. 362, 368 (1990)(interpreting the retirement system provision in NMI Const. art. III, § 20). Thus the plain meaning of the language governs unless a contrary meaning was intended. *Id.* at 368. When the pertinent language appears ambiguous, then the court may consult legislative history. *Id*. at 369. The court is also duty-bound to give effect to the intent of the framers of the NMI Constitution and the people adopting it. *Aldan-Pierce v. Mafna*s, 2 N.M.I. 122, 163 (1991), *rev'd on other grounds*, 31 F.3d 756 (9th Cir. 1994), *cert.* **[p. 7]** *denied*, 513 U.S. 1116, 115 S. Ct. 913, 130 L. Ed. 2d 794 (1995). With these principles in mind, the court turns to the text of Article I, § 3(c).

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[5] The section-by-section commentary to the Constitution states:

> This section provides a remedy for persons who are the victims of illegal searches or seizures. Such persons have a cause of action against the government to recover the amount of their damages within limits provided by law. This section leaves to the Legislature the definition of the proper limits for such actions.

CONSTITUTIONAL ANALYSIS, Article I, § 3(c).

Contrary to the authorities relied upon by Defendants,[6] the court finds that the constitutional provision for a cause of action against the government within the limits provided by law is not ambiguous, and that Article I, § 3(c) plainly and clearly creates a constitutional cause of action against the government for victims of an illegal search or seizure. The fact that the Legislature has not yet enacted a statute defining the limits of an Article I, § 3(c) direct action, moreover, does not and cannot prohibit a victim of an illegal search and seizure from pursuing an action against the government for damages directly. To interpret Article I, § 3 in any other fashion would mean that the Framers intended to condition the right, instead of any remedy limiting the right, upon further action by the Legislature. Such an interpretation is not only contrary to the plain meaning of Article I, § 3(c), but it is entirely unsupported by the history to the provision as well.

Briefing Paper No. 7, an analysis developed for and provided to the delegates of the First Constitutional Convention who were considering the protections to be afforded the victims of an illegal search and seizure, addressed potential remedies for unlawful searches and seizures. *See* Vol.2, Wilmer, Cutler & Pickering, Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention, No. 7 at 26-29 (Oct. 1976) ("Briefing Paper No. 7"). The Briefing Paper suggested to the delegates that creating a constitutional direct action against the CNMI Government for money damages, including punitive damages, modeled upon that recognized by the federal courts in *Bivens*,[7] "would guarantee to all citizens a remedy for ... official lawlessness" and thus deter police misconduct. Briefing Paper No. 7 went on to **[p. 8]** note that even if the delegates elected not to include that particular right in the Constitution, the Legislature would still be free to grant it by statute. *Id.*

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[6] Defendants cite *Grenier v. Kennebec County*, 748 F. Supp. 908 (D. Me. 1990) and *Sauers v. Salt Lake County*, 735 F.Supp. 381, 386 (D. Utah 1990) for the proposition that enabling legislation is required to establish a viable cause of action. Both *Grenier* and *Sauer,* however, concern the availability of implied rights of action under applicable state constitutions. The case at bar concerns rights and remedies available under an express provision of the Commonwealth Constitution and, contrary to *Grenier* and *Sauers*, there is no Commonwealth civil rights statute providing an alternative form of relief. Similarly, *Joseph v. CNMI* is distinguishable, because in contrast to the cause of action created by Article I, § 3(c), there is no provision in the CNMI Constitution or any enabling legislation creating a direct cause of action for asserting violations of the rights to be free from cruel and unusual punishment and to due process. *See Joseph v. CNMI,* Civil Action No. 97-1086A (July 2, 1998) (Order Granting Defendant's Motion to Dismiss and Stay).

[7] *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Investigation,* 403 U.S. 388, 91 S.Ct. 1999, 29L.Ed.2d 619 (1971).

Acting on the suggestion incorporated in the Briefing Paper, the Committee on Personal Rights and Natural Resources elected to include a direct action among those fundamental rights guaranteed by Article I, § 3, leaving the limits of that action to be determined by the Legislature. Committee Recommendation No. 4, adopted by the Constitutional Convention on October 29, 1976, contained a provision identical to that which appears as Article I, § 3(c). As reasons for including a private cause of action for damages, the Committee noted:

> Section 3(c) ... provides that the victims of illegal searches or seizures will have a cause of action against the Commonwealth government. Under the Fourth Amendment, the only sanction for an illegal search or seizure is the application of the exclusionary rule that prevents the evidence obtained by these methods from being used in the criminal trial. The Committee believes that a more sensible policy is to compensate those who are adversely affected and to leave the courts free to decide whether the evidence gathered by these methods should be used in the trial based on considerations of the probative nature of the evidence itself.

See Report to the Convention of the Comm. on Personal Rights and Natural Resources, *appearing in* II Journal of the N.M.I. Constitutional Convention of 1976 at 498 (October 29, 1976). In recommending the direct cause of action, moreover, the Committee expressly recognized "that there may be a need for limitations on the amount of money damages for which the Commonwealth will be liable in such cases and has permitted the legislature to set such limits. " *Id.*

Thus the Commonwealth Constitution insures that persons adversely affected by violations of the rights protected by Article I, Section 3(c) would "have a cause of action against the government to recover the amount of their damages... ." CONSTITUTIONAL ANALYSIS at 10-11. Because this court is "duty-bound" to give effect to the intention of the framers of the Commonwealth Constitution and the people adopting it, the court therefore concludes that there is a direct action under Article I, § 3(c) for persons adversely affected by an illegal search or seizure, and that this cause of action is unlimited. *Aldan-Pierce v. Mafnas,* 2 N.M.I. 122, 163 (1991), *rev'd on other grounds,* 31 F.3d 756 (9th Cir. 1994), *cert.* **[p. 9]** *denied,* 53 U.S. 1116, 115 S.Ct. 913, 130 L.Ed.2d 794 (1995). Having determined that the Commonwealth's Constitution provides a direct action under Article I, § 3(c), the court now determines the scope of that right in relation to the violations alleged by Plaintiff in the Complaint.

In her First and Second Causes of Action, Plaintiff brings an action under Article I, § 3(c) for, among other things, unlawful and unreasonable arrest without probable cause and in the absence of statutorily-defined exigent circumstances; for unlawful, excessive and unreasonable detention; and for unlawful and unreasonable excessive force. Plaintiff also appears to suggest, moreover, that the protections of Article I, § 3(c) should encompass: (1) the Commonwealth's failure to adopt administrative rules or regulations limiting the discretion of Nakamura, Taitano, and the Doe Defendants to arrest her without a warrant (¶ 65); (2) the failure of Defendants Sablan, Ayuyu, Demapan, and Zachares, either individually or collectively, to prevent the unlawful seizure, arrest, and detention, or their wrongful approval and ratification of these acts (¶ 66-67); (3) denial of a *Gerstein* hearing, an adversarial hearing, and/or an adequate review of her arrest pursuant to 3 CMC § 4335 and 4341(d) (¶¶ 68-71, 75); (4) the denial of her clearly established right to be released from custody as soon as possible, along with her right to bail (¶¶ 72-73); (5) the denial of her clearly established right to be taken before a Judge of the Superior Court for a status examination pursuant to 3 CMC § 4382(c); and (6)the denial of her clearly established right to communicate with an attorney, to a consular officer, and potential third party custodians, either by telephone or other means (¶¶ 76-79). Plaintiff's Second Cause of Action contains a claim for excessive force in violation of the 4th and 14th Amendments to the United States Constitution as well as under Articles I, §§ 3, 5, 6, and 10 of the Commonwealth Constitution. Since Article I, § 3 was drawn largely from the Fourth Amendment to the United States Constitution,[8] federal case law is highly instructive in determining which of these claims may be brought by direct action under the Commonwealth Constitution. *See Babauta v. Superior Court*, 4 N.M.I. 309, 314(1995). **[p. 10]**

The Fourth Amendment protects against unreasonable searches and seizures by the government[9] and applies to all seizures that involve only a brief detention short of a traditional arrest.

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[8] *See* CONSTITUTIONAL ANALYSIS at 7. *See also Commonwealth v. Auguon*, Crim. No. 90-008 at 9, n. 8 (N.M.I. Super. Ct. Mar. 9, 1990) (Order and Decision), *modified*, Crim. No. 90-008 (N.M.I. Super. Ct. Apr. 25, 1990) (Supplement to Decision of March 9, 1990); *Commonwealth v. Lizama*, Crim. No. 90-0106 at 12 (N.M.I. Super. Ct. Oct. 18, 1991) (Order), *rev'd*, 3 N.M.I. 400 (1992), *aff'd*, 27 F.3d 944 (9th Cir.).

[9] The Fourth Amendment provides, in material part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

See United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975). The Fourth Amendment thus governs challenges to the period of confinement between a warrantless arrest and the preliminary hearing at which a determination of probable cause is made,[10] while the Due Process Clause of the Fifth and Fourteenth Amendments regulates the period of confinement following an initial determination of probable cause.[11] Similarly, while the Due Process Clause of the Fourteenth Amendment, and not the Fourth Amendment, protects a post-arraignment pretrial detainee from the use of excessive force amounting to punishment, [12] a constitutional claim for use of excessive force may arise under the **[p. 11]** Fourth Amendment when a person is subjected to unreasonable conduct by law enforcement officials following arrest but prior to booking. *Compare Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1869-171, L.Ed.2d 443 (1989) (use of excessive force during detention or arrest should be analyzed under the Fourth Amendment) and *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir.1984) (excessive use of force claim is actionable under

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> searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. 4.

[10] *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111-14, 95 S.Ct. 854, 861-63, 43 L.Ed.2d 54 (1975); *Armstrong v. Squadrito*, 152 F.3d 564, 569 (7th Cir. 1998) (Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1479 (9th Cir.1993), *cert. denied sub nom. Killeen v. Hallstrom*, 510 U.S. 991, 114 S.Ct. 549, 126 L.Ed.2d 450 (1993).

[11] Where the constitutional concern is not with the initial decision to detain an accused and the restriction of liberty that such a decision necessarily entails, but rather with the conditions of ongoing custody following an arrest, substantive due process principles govern the judicial analysis. *Bell v. Wolfish*, 441 U.S. 520, 533-34, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). *See Brothers v. Klevenhagen*, 28 F.3d 452, 455-56 (5th Cir. 1994) (once an arrest is complete, a criminal defendant's protection no longer emanates from the Fourth Amendment, but from other rights recognized by the Due Process Clause). In reviewing a claim of excessive/unlawful detention, the Ninth Circuit appears to use either a due process, *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or a Fourth Amendment analysis. *See Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985).

[12] *See Graham v. Connor*, 490 U.S. 386, 395 n. 10. (1989) (*citing Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). *See also Crump* v. *Plummer*, 2000 WL 1072164 (N.D.Cal. Jul 24, 2000), *citing United States v. Walsh*, 194 F.3d 37, 47 (2nd Cir.1999). The standards for a constitutional claim of excessive force were articulated by the Supreme Court in *Hudson v. McMillian*, 503 U.S. 1, 5, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). In *Hudson*, however, the plaintiff was a prisoner suing under the Eighth Amendment. Courts addressing excessive force claims brought by pretrial detainees have concluded that "the Hudson analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well." *See Walsh*, 194 F.3d at 47.

section 1983 as a Fourth Amendment violation of the right to be free from an unreasonable seizure) *with, e.g., Graham v. Connor,* 490 U.S. 386, 393, 395 n. 10, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (rejecting the notion that all claims of excessive force are governed by one generic standard and instructing that the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force"). As in cases challenging unlawful detention, certainly the timing of when the allegedly excessive force occurred (*i.e.*, during arrest, during pretrial detention, or after pretrial detention) appears crucial to the determination of which constitutional protections apply, and when. As in cases involving an arrest, investigatory stop, or other "seizure" of a free citizen, the "objective reasonableness" standard of the Fourth Amendment applies in determining whether the challenged application of force was excessive. *See Graham v. Connor*, 490 U.S. at 395-397, 109 S.Ct. at 1871-72. The "reasonableness inquiry" is an objective one: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.*, 490 U.S. at 397, 109 S.Ct. at 1872-23.

The Fourth Amendment's prohibitions against arrest without probable cause; unlawful, excessive and unreasonable detention; and unlawful and unreasonable excessive force used during an arrest or prior to a probable cause determination apply within the Northen Mariana Islands as they do within each of the states.[13] Nor are these protections restricted to the criminal context: they also extend to the area of immigration enforcement. *See, e.g., United States v. Montoya de Hernandez,*473 U.S. 531, 542-22, **[p. 12]** 105 S.Ct. 3304. 3311-12, 87 L.Ed.2d 381 (1985) (analyzing constitutionality of traveler's border detention under Fourth Amendment reasonableness standard); *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)(random, roving immigration-patrol stops violate the Fourth Amendment); *Benitez-Mendez v. INS*, 760 F.2d 907, 909-10 (9th Cir.1983) (INS seizure of alien violated Fourth Amendment); *United States v. Medina-Ortega,* 2000 WL 1469314 (D. Kan. Sep 25, 2000) (even illegal aliens

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[13] *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES (hereinafter, "COVENANT") § 501(a), 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq.

residing in the United States are entitled to Fourth Amendment protection). *See also Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 643 F.Supp. 884 (N.D.Cal. 1986)(INS' routine use of open-ended "warrants of inspection" to gain entry into workplaces for dragnet style questioning and seizures of large numbers of workers at particular site violates the Fourth Amendment and is invalid as a matter of law).[14] Thus, Federal courts have held that in order to arrest an alien without a warrant, an immigration officer must have reason to believe that the alien is illegally in the United States and is likely to escape before a warrant can be obtained. *E.g.*, *Tajeda-Mata v. Immigration and Naturalization Service*, 626 F.2d 721, 725 (9th Cir. 1980), *cert. denied*, 456 U.S. 994, 102 S.Ct. 2280, 73L.Ed.2d 1291; *Lee v. Immigration and Naturalization Service*, 590 F.2d 497, 499-500 (3d Cir. 1979) and cases cited therein. In addressing the constitutionality of warrantless searches conducted for immigration enforcement, moreover, this court has also ruled that notwithstanding the powers bestowed upon immigration officers by 3 CMC § 4382(b)[15] and 3 CMC § 4442,[16] warrantless searches and **[p. 13]** seizures must still comply with the Fourth Amendment. *See Office of the Attorney General v. Construction Equipment and Other Personal Property Seized at Tower Construction Site in San Vicente*, Civil Action No. 98-731 (N.M.I. Super.Ct. Jan. 25, 1999) (Order Denying Tower Construction Corporation's Motion to Dismiss and Motion to Strike).

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[14] *See also INS v. Delgado*, 466 U.S. 210, 213 n. 1, 215-21, 104 S.Ct. 1758, 1761 n. 1, 1762-65, 80 L.Ed.2d 247 (1984) (considering whether questioning of resident aliens by INS agents amounted to seizure for purposes of Fourth Amendment); *Martinez v. Nygaard*, 831 F.2d 822, 824, 826-28 (9th Cir.1987) (analyzing whether seizures of three resident aliens complied with Fourth Amendment).

[15] In material part, 3 CMC § 4382(b) provides that an immigration officer may arrest a person without a warrant, provided that:

> (1) The officer has probable cause to believe that the person is an alien, and is in the Commonwealth in violation of any law or regulation made pursuant to law regulating the admission, exclusion, or expulsion of aliens; and
> (2) The officer reasonably believes that the person is likely to escape before a warrant can be obtained for his arrest.

[16] 3 CMC § 4442 permits the chief or his designee to enter and search any worksite where nonresident workers are employed, or any nonresident worker employer-provided facility. The statute further provides that entry and search undertaken pursuant to statute may occur at any time work is in progress, or any other reasonable time, and may be for general inspection purposes or in furtherance of a specific investigation.

To pass muster under the Fourth Amendment, the detention must have been "reasonable." *See Rhoden v. United States*, 55 F.3d 428, 432 (9th Cir. 1995) (evaluating challenge to detention). What is "reasonable," however, necessarily "depends upon all of the circumstances surrounding the search and seizure, as well as the nature of the search and seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. at 537, 105 S.Ct. at 3308. As a matter of law, but in the context of a criminal arrest, a detention of longer than 48 hours without a determination of probable cause violates the Fourth Amendment, in the absence of a demonstrated emergency or other extraordinary circumstance. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991). In contrast, immigration detention is not punishment. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984); *Carlson v. Landon*, 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Yet even in the immigration context, the Commonwealth's own procedures dictate that when an alien is arrested without a warrant pursuant to 3 CMC § 4382(b),[17] the alien must be taken before a judge of the Commonwealth Superior Court to determine the status of his presence in the Commonwealth "as promptly as is reasonably possible, and in no circumstances later than 48 hours" of the warrantless arrest. 3 CMC § 4382(c). Although the court need not determine at this juncture precisely how long a detainee need remain in custody before the detention becomes constitutionally impermissible, the Complaint asserts that Plaintiff was detained significantly beyond the 48 hour period necessary to determine status.[18] Taking the **[p. 14]** allegations of the Complaint as true, the court therefore finds that Plaintiff has stated a claim for unreasonable and excessive detention and for the failure to be brought before a judge or magistrate for a probable cause hearing in violation of Article I, § 3.

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[17] See Note 16, *supra*.

[18] The Complaint contends that the search of Jin Apparel occurred on May 12, 1997 (¶ 26); that Plaintiff was intentionally seized and arrested without a warrant during the search (¶ 27); that Plaintiff was never provided an administrative hearing to review her arrest (¶ 41); and that Plaintiff was not taken before a judge until June 11, 1997 (¶¶ 35-38).

Although the protections provided by Article I, § 3 are greater than those provided by the Fourth Amendment,[19] the court is unaware of any authority holding that the failure to adopt administrative rules or regulations, or denying Plaintiff the opportunity to communicate with an attorney, to a consular officer, and potential third party custodians lie within the constitutional safeguards encompassed by either the Fourth Amendment or Article I, § 3.[20] Nor has Plaintiff bothered to cite any cases even remotely suggesting that the Fourth Amendment provides redress for either of these claims. Accordingly, the court holds that there is a direct action under Article I, § 3(c) which encompasses Plaintiff's claims for unlawful arrest without probable cause, for unreasonable or excessive detention, for the failure to bring her before a magistrate or judge, and for the use of excessive force, so long as the force in question has occurred prior to the time that Plaintiff was taken before a judicial officer. Since the U.S. Supreme Court has ruled that a probable cause determination, following an arrest without a warrant, does not require a full panoply of adversary safeguards, including the rights to counsel, to confront and cross-examine witnesses and to **[p. 15]** compulsory process,[21] the court declines to read Article I, § 3 to require the safeguards which Plaintiff contends were denied her in this case. Moreover, since the cause of action established by

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[19] *See* CONSTITUTIONAL ANALYSIS at 7 (Article I, § 3 "expands upon the Fourth Amendment by dealing expressly with wiretapping and comparable techniques and by providing remedies to persons who are the victims of illegal searches or seizures"); *Babauta v. Superior Court*, 4 N.M.I. 309, 314 (1995) (acknowledging similarities between search and seizure protections in CNMI and Federal Constitutions, but noting that Article I, § 3 expands upon those rights guaranteed under the United States Constitution); *CNMI v. Dado*, Crim. Case No. 98-0261 (Super. Ct. Feb. 23, 2000) (CNMI Constitution affords more expansive individual liberties than those conferred by Federal Constitution); *CNMI v. Sablan*, Crim. Case No. 94-35F (Super.Ct. Nov. 1, 1994) (Article I, § 3 provides greater protection against unreasonable search and seizure than that guaranteed by the Fourth Amendment).

[20] Article I, § 5 of the NMI Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Like the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution, this provision contains both procedural and substantive components. *In re Seman*, 3 N.M.I. 60, 67 (1992). Although the CNMI Supreme Court has yet to determine whether substantive due process provides a right to be free from arbitrary and capricious state action. *Hall v. Lombardi*, 996 F.2d 954, 958 (8th Cir.1993) (quoting *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir.1989

[21] *See Gerstein*, 420 U.S. at 120, 95 S.Ct. at 868. 6 CMC § 6303 also requires a probable cause determination to be made at the preliminary examination. At the preliminary examination, a defendant is afforded all of the adversarial safeguards including the right to counsel. The purpose of this probable cause determination is different from the Fourth Amendment probable cause determination mandated by *Gerstein*. At the preliminary examination the evidence must establish probable cause for charging and bringing the defendant to trial. The Fourth Amendment probable cause determination is limited solely to pretrial custody. *Gerstein*, 95 S. Ct. at 867; *see also Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 387 (1970).

Article I, § 3(c) provides for redress against the Commonwealth, only, it does not encompass any of the claims Plaintiff appears to be asserting against the individual defendants.

Having determined that Plaintiff may sue directly under Article I, § 3 for unlawful arrest without probable cause, for unreasonable or excessive detention, for the failure to bring her before a magistrate or judge, and for the use of excessive force, the court now determines whether the Complaint sets forth a claim upon which relief can be granted.[22] With respect to her claim for unlawful arrest, Plaintiff asserts that she was lawfully present in the Commonwealth at the time of her arrest. She also contends that Defendants had sufficient opportunity to obtain a warrant but failed to do so, and that she fully cooperated with DOLI officers during the raid and made no attempt to flee or escape from the premises. Notwithstanding her cooperation and lawful status, Plaintiff claims that Defendants Nakamura, Taitano, and Does 1 and 2 seized and arrested her without a warrant or personal knowledge of facts upon which to form an objectively reasonable belief that she was likely to escape before a warrant could be obtained (Complaint at ¶ 64). Viewing these allegations as true, the court finds that Plaintiff has sufficiently alleged a violation of her right against unreasonable seizure, in violation of Article I, § 3. **[p. 16]**

Plaintiff contends that although she was arrested on May 12, 1997, she was not taken before a judge until June 11, 1997. For the reasons set forth above, the court therefore concludes that the Complaint contains sufficient factual allegations to support a direct action under Article I, § 3 for unlawful, unreasonable, and excessive detention. *See* discussion at page 13, *supra*. With regard to her claim for unreasonable and excessive force, Plaintiff contends that the two assaults occurred on or about May 17 and May 18, while she was being detained at the DOLI Detention Center, and long before she was brought before a judge of the Superior Court to determine whether there was

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[22] In its moving papers, the Commonwealth has not bothered to address the sufficiency of Plaintiff's Article I, § 3 claims, relying instead on its position that Article I, §3(c) does not provide a direct cause of action. In considering a motion to dismiss, the court will thus construe the Complaint in the light most favorable to Plaintiff as the nonmoving party, and accepts all allegations in the complaint as true. *Cepeda v. Heffner*, 3 N.M.I. 121, 126 (1992); *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 272, 283 (1990). The CNMI Supreme Court has established the following test: "A complaint must contain either direct allegations on every material point necessary to sustain recovery on any legal theory…or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *In re Adoption of Magofna*. 1 N.M.I. 449, 454 (1990).

probable cause to detain her and/or determine her status in the Commonwealth (¶ 55). In the first instance, Plaintiff accuses Defendant Omar of striking her hard in the face without warning or cause; in the second instance, Plaintiff contends that Defendant Omar pulled Plaintiff by the feet from her bed, causing Plaintiff's head to strike a hard object. Plaintiff maintains that in neither case, was the force objectively reasonable or necessary to maintain order and discipline at the Immigration Detention Center (¶¶ 83-84) and that the use of force caused her to suffer injury and damages. The court finds these allegations sufficient to support a direct cause of action under Article I, § 3.

B. Claims Under Section 1983

A government official is personally liable under 42 U.S.C. §1983 for abuse of power of office that results in the deprivation of a right, privilege, or immunity secured by the U.S. Constitution or federal law. *Gomez v.* Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980); *L.W. v. Grubbs*, 974 F.2d 119, 120 (9th Cir.1992), *cert. denied*, 508 U.S. 951, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993); *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir.1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990).[23] Section 1983, however, "is not itself a source of substantive rights..." *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). Rather, **[p. 17]** section 1983 provides a means of vindicating federal rights conferred by, for example, the Fourteenth Amendment and other provisions of the U.S. Constitution.[24] *David v. Scherer*, 468 US 183 (1984). Since the Commonwealth is not a "person" that can be sued under §1983, Plaintiff cannot assert § 1983 claims against either the CNMI or officers acting in their official capacity. *Charfauros v. Bd of Elections*, 96-1106 (N.M.I. Super. Ct. May 29, 1997). Before addressing liability under section 1983, therefore, the court first determines whether the individual

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[23] States are not "persons" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68-70, 109 S. Ct. 2304, 2310-11, 105 L. Ed. 2d 45 (1989). Likewise, the Territory of Guam is not a "person" under 42 U.S.C. § 1983. *Ngiraingas v. Sanchez*, 495 U.S. 182, 192, 110 S. Ct. 1737, 109 L. Ed. 2d 163 (1990). As a result, Covenant § 502(a)(2) indicates that the CNMI is not a "person" under 42 U.S.C. § 1983. *DeNieva v. Reyes*, 966 F.2d 480 (9th Cir. 1992).

[24] 42 U.S.C. § 1983 ("1983") provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured.

defendants have been sued in their individual capacities. *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

1. Allegations of Personal Liability

Plaintiff predicates her § 1983 claims against Defendants Nakamura, Taitano, Omar, Zachares, Sablan, Ayuyu, and/or Demapan on essentially five events whereby she was allegedly deprived of her rights under the U.S. Constitution and federal law: (1) the illegal seizure, arrest, and detention (¶ 96);[25] (2) the failure to file charges and take Plaintiff before a neutral and detached magistrate for a determination of probable cause (¶ 98-99); (3) the failure to provide Plaintiff with reasonable access to a telephone or other means of communication (¶ 100); (4) the denial of her right to contact a consular post or officer (¶101); and (5) the unreasonable use of excessive force (¶¶104-106). Defendants argue that because all of Plaintiff's allegations involve conduct within the individually-named defendants' official capacities, the entire complaint should be dismissed as against them.

Plaintiff argues that "[o]n the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Hafer v. Melo*, 112 S.Ct. 358 (1991). Plaintiff further points out that the Complaint makes clear that the **[p. 18]** individually named Defendants "are being sued in their individual capacities for acts undertaken while acting under color of law, statute, custom, ordinance or usage of the Commonwealth of State law." Complaint at ¶ 14. Plaintiff points out, moreover, that she is seeking damages only from the individually-named Defendants in their personal capacities, and not from the government. Motion at 14. Liability under section 1983, however, arises only upon a showing of personal participation by the defendant in the alleged constitutional deprivation,[26] or if the defendant sets into " 'motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.' " *See Gini v. Las Vegas Metropolitan Police Dept.*,

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[25] Plaintiff contends, alternatively, that Sablan, Ayuyu, Demapan, and/or Zachares controlled, directed, approved of, and/or ratified these actions. Complaint at ¶ 97.

[26] *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989); *Arnold v. Int'l. Business Machines, Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981).

40 F.3d 1041, 1044 (9th Cir.1994) (*quoting Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir.1987). Moreover, because neither Sablan, Ayuyu, or Demapan can be held liable in his individual capacity under a theory of *respondeat superior*,[27] to hold any of these defendants liable in their individual capacities, Plaintiff must establish that the alleged constitutional violations occurred at these Defendants' direction or with their knowledge and consent. *E.g.*, *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir.1985) Accordingly, Plaintiff must allege that Sablan, Ayuyu, and Demapan knew "about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what [they] might see. [Each of these Defendants] must in other words act either knowingly or with deliberate, reckless indifference." *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988). Plaintiff must, therefore, plead some type of a causal connection or affirmative link between the alleged constitutional violation and some action or inaction by each of these defendants by themselves. *See Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir.1983).

Plaintiff contends Nakamura, Taitano, and Does 1 and 2 were DOLI employees who, "under color of law, statute, custom, ordinance or usage of the Commonwealth of the Northern Mariana Islands," **[p. 19]** participated in the raid and unlawfully seized and arrested her without a warrant, and without personal knowledge of facts indicating she would escape before a warrant could be obtained (¶¶ 26, 64). Plaintiff names Omar and Does 3 and 4 as being the jailers and guards who unlawfully held and detained her at the Immigration Detention Center(¶ 25), and further accuses Omar of striking her on two separate occasions (¶¶ 55-57, 103-106), and refusing to assist her or call for medical treatment (¶¶ 57-61). Plaintiff maintains that Sablan, Ayuyu, Demapan, and Zachares "guided, controlled directed, approved of and/or ratified" the warrantless seizure, arrest and detention (¶¶ 66, 97) or that they failed to prevent it (¶ 67). Charging Sablan, Ayuyu, Demapan, and Zachares with the additional failure to establish policies and procedures or a system of disciplining detainees at the Immigration Detention Center, as well as the failure to discipline Omar and the

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[27] "It is well established that section 1983 does not impose liability upon state officials for the acts of their subordinates under a *respondeat superior* theory of liability." *Rise v. State of Oregon*, 59 F.3d 1556, 1563 (9th Cir.1995) (*citing Monell v. Department of Social Services of New York*, 436 U.S. 658, 691-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). " Rather, state officials are subject to suit under section 1983 only if 'they play an affirmative part in the alleged deprivation of constitutional rights.' " *Rise*, 59 F.3d at 1563 (*quoting King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir.1987).

ratification of her actions (¶¶ 86-87, 113-114), Plaintiff further accuses these defendants of violating her constitutional and statutory rights. All of these Defendants, as well as Does 3 and 4, Plaintiff maintains, knew, or should have known, that she had been seized, arrested, detained, and not taken or presented before any Judge or Magistrate (¶¶39, 98-99). Plaintiff thus accuses Defendants of deliberately refusing to release her from custody (¶ 40) and causing bail to be set. Finally, she claims that Sablan, Ayuyu, Demapan, Zachares, Omar and Does 3-4 failed to advise her of her right to contact an official of the Chinese government, and prevented her from communicating with an attorney (¶¶ 50-51, 100-101).

Viewing the allegations of the Complaint in the light most favorable to Plaintiff, the court finds, at this preliminary stage of the proceedings, that Plaintiff has pointed to specific actions by each of the individually-named Defendants which appear to paint a picture of callous and deliberate indifference, so as to qualify as actions subject to redress under section 1983. Moreover, when state officials are named in a complaint that seeks damages under 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities. *See Ashker v. California Dept. of Corrections*, 112 F.3d 392 (9th Cir. 1997); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.1990), *cert. denied*, 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991) (articulating further that under § 1983, a plaintiff may sue a state officer in his **[p. 20]** individual capacity for alleged wrongs committed by the officer in his official capacity).[28] Accordingly, Defendants' attempt to dismiss the Complaint on these grounds cannot be sustained.

2. Qualified Immunity

Qualified immunity protects law enforcement officials from liability for civil damages unless their conduct violates "clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under the

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[28] "Where state officials are named in a complaint which seeks damages under 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities.... Any other construction would be illogical where the complaint is silent as to capacity, since a claim for damages against state officials in their official capacities is plainly barred." *Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1284 (9th Cir.1994)); *see also Baylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir.1988) (action was against the officials in their official capacity because complaint sought damages from the state).

doctrine of qualified immunity, officials who carry out executive and administrative functions and are sued for monetary relief in their personal capacities may assert the defense of qualified immunity. The defense requires a two-part inquiry: (1) whether the law governing the officer's conduct was clearly established, and if so, (2) whether, under the law, a reasonable officer could have believed his conduct was lawful. *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir.1995). Plaintiff bears the burden of proving the existence of a "clearly established" right. *Id.* Should she satisfy that burden, then the Defendants bear the burden of establishing that their actions are reasonable, even if they violate Plaintiff's constitutional rights. *Id.* The Ninth Circuit has articulated a three-step analysis to determine whether an official sued under section 1983 is entitled to qualified immunity. The court considers: (1) whether a plaintiff has identified a specific right that has been allegedly violated, (2) whether that right was so clearly established as to alert a reasonable official to its parameters, and (3) whether a reasonable official could have believed his or her conduct was lawful. *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1388 (9th Cir.1997).

Defendants maintain that the Complaint fails because Plaintiff cannot possibly prove the intentional violation of clearly established rights. Defendants contend, moreover, that even if Plaintiff can articulate the intentional violation of clearly established rights, they are still not liable since undisputed facts **[p. 21]** demonstrate that Plaintiff was ordered deported by the Superior Court after an evidentiary hearing. Accordingly, Defendants believe that there is ample evidence to confirm that they did not intentionally violate the rights at issue here.

Plaintiff counters that Defendants bear the burden under Com. R.Civ. P. 7(b)(1)[29] of asserting the defense of qualified immunity with sufficient particularity so as to enable Plaintiff to frame a response. This, Plaintiff claims, Defendants have utterly failed to do. Not only have Defendants failed to identify any rights and privileges they claim have not been clearly asserted, but Defendants have entirely failed to identify any specific rights in the Motion at all. Indeed, the only "right" which Defendants bother to mention in their discussion of qualified immunity is the "right" to be free from bad-faith prosecution. See Motion at 8 ("A good-faith prosecution cannot give rise to a § 1983

[29] In material part, Com. R. Civ. P. 7(b)(1) requires every motion to "state with particularity the grounds therefor...."

claim."). Since the Complaint does even charge Defendants with any acts of prosecution, however, there is no reason for the court to consider the merits of this challenge.

Throughout the Complaint, Plaintiff contends: (1) that she was wrongfully seized, arrested without legal cause and detained in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution (¶¶ 68, 99), (2) that she was denied her clearly established right to due process and a review by a neutral and detached magistrate of probable cause (¶¶ 68, 98); (3) that she was denied her clearly established rights to be released from custody as promptly as possible, or alternatively, denied the right to bail (¶ 72); (4) that she was denied her clearly established rights, under the Fourth, Fifth, and Fourteenth Amendments to reasonable access to a telephone or other means of communication to retain an attorney and raise bail (¶¶ 76-77, 100); (5) that she was denied her clearly established right under the Vienna Convention to contact a consular officer (¶¶ 78, 101); and (6) that she was denied her clearly established right to be free from the use of excessive force (¶¶ 82, 104-105). Without passing upon the merits of these allegations, the court notes that the Complaint further articulates specific facts which she claims give rise **[p. 22]** to the violation of these rights. Defendants, in contrast, entirely avoid even mentioning one of the so-called rights or constitutional violations which they contend has not been clearly established.

Defendants are the proponents of the instant Motion. Absent the identification of specific rights to which Defendants object, the court will not speculate as to which, if any, of the rights identified by Plaintiff were clearly established, or as to the factual basis on which they predicate their defense of qualified immunity from the claims alleged in the Complaint. This court cannot say whether Plaintiff's allegations are accurate, nor will it determine, except upon proper motion, which of the various rights amount to a cognizable constitutional violation. Thus, taking Plaintiff's allegations as true for purpose of this motion, this court cannot conclude at this juncture that any individually-named Defendant has qualified immunity from the section 1983 claims.

The Ninth Circuit has indicated that a trial court may establish qualified immunity as a matter of law on a motion to dismiss, for summary judgment, or for a directed verdict. *Thorsted v. Kelley*, 858 F.2d 571, 573 (9th Cir. 1988). A better procedure, the court believes, would be for Defendants

to file an answer raising the defense, to which Plaintiff could file a reply tailored to the specific allegations in the answer concerning qualified immunity. *See Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc).[30] In filing any future motions, however, Defendants are reminded that they bear the burden of proving a qualified immunity defense. *Gomez*, 446 U.S. at 640, 100 S.Ct. at 1924. To prove the defense, Defendants must identify the right or privilege being challenged, establish that the right was sufficiently established so as to alert a reasonable official to its parameters, and provide sufficient facts to establish whether the official accused of violating the right could have believed his or her conduct was lawful. *See Neeley v. Feinstein*, 50 F.3d 1502, 1509 (9th Cir. 1995). To date, Defendants have failed to satisfy this burden. **[p. 23]**

C. Claim for Assault and Battery

Defendants seek to dismiss Plaintiff's Fifth Claim against Defendant Omar for assault and battery on grounds that the claim is barred by sovereign immunity and the Government Liability Act, 7 CMC § 2201 *et seq.* The law is clear that absent a waiver of sovereign immunity, the Commonwealth, along with its agencies and officers, cannot be sued on the basis of its own laws, without its consent. *David v. CNMI*, 3 C.R. 157,161 (D.N.M.I. App. Div. 1987; *Balsadua v. Hobie Cat Co.*, Civil No. 94-0487 (N.M.I. Super.Ct. Sept. 11, 1996). It is equally clear that the Commonwealth has not waived immunity for intentional torts, but has specifically excepted from waiver "[a]ny claim arising out of assault, battery, false imprisonment, [or] false arrest ...." 7 CMC § 2204(b). Since Defendant Omar is not a sovereign and since she is being sued individually, she has no claim to sovereign immunity. Because the Act has no applicability to tort actions brought against an individual government employee sued in his or her individual capacity, the Motion to dismiss is denied on these grounds.

D. Absolute Immunity

Finally, Defendants contend that all claims against Defendants Sablan and Zachares should be dismissed on grounds of absolute immunity. According to Defendants, Sablan and Zachares are

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[30] Judge Munson endorsed such an approach in *Gorromeo v. Zachares*, Civil Action 99-018 (June 29, 1999) (Order Denying Defendants' Motion to Dismiss, Motion for Definite Statement, and Motion for Sanctions).

shielded from suit because, as the former Secretary of Labor and Immigration and as a former Special Assistant Attorney General for Immigration, they cannot be liable for enforcing CNMI immigration laws.

Prosecutors are entitled to absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Immunity, though granted liberally, is not impenetrable. *Imbler* cemented the notion that prosecutors are absolutely immune from suit when they function as advocates. 424 U.S. at 430-31, 96 S.Ct. 984. Accordingly, prosecutors engaged in traditional prosecutorial functions – i.e., those activities "intimately associated with the judicial phase of the criminal process" – are absolutely immune from suits under §1983. *Id.* at 430, 96 S.Ct. 984.

Investigatory or administrative functions, on the other hand, generate only qualified immunity. *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 507, 139 L.Ed.2d 471 (1997). Thus, in *Burns v.* **[p. 24]** *Reed*, the Court ruled that providing legal advice to the police during their pretrial investigation of the facts was protected only by qualified, rather than absolute, immunity. 500 U.S. at 492-496, 111 S.Ct., at 1942-1945. Similarly, in *Buckley v. Fitzsimmons*, the Court noted the "difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." 509 U.S. 259, 261, 113 S.Ct. 2606, 2609, 125 L.Ed.2d 209 (1993).

In determining immunity, the court accepts the allegations of the Complaint as true. *See Buckley*, 509 U.S. at 261, 113 S.Ct. at 2609. Among other things, the Complaint alleges that Zachares, a former Assistant Attorney General assigned to the Department of Labor and Immigration, worked in and exercised actual authority and in several non-attorney capacities, including the role of high-ranking, senior government official; policy-maker, supervisor, and trainer; as well as investigator and day-to-day operations manager (¶¶ 21,22). It further contends that Zachares was not acting as an attorney when functioning in these roles (¶ 23). Plaintiff contends that Zachares directly participated in the investigation and decision to arrest her without cause (¶ 28), and

she accuses Zachares of helping to plan the raid (¶ 29). With regard to Sablan, the Complaint asserts that this Defendant was only acting in an administrative capacity as DOLI Secretary (¶ 16). There are no allegations that he ever gave legal advice, and in no way can the allegations of the Complaint be construed to allege that Sablan acted as an advocate.

The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Burns*, 500 U.S. at 486, 111 S.Ct. 1934 (1991). In this case, however, the Motion fails to address any of the allegations in the Complaint. Not only have Defendants failed or refused to examine the functions performed by Sablan and Zachares and point out whether the functions are similar to those that would be entitled to immunity, *see Buckley*, 509 U.S. at 268-69, 113 S.Ct. at 2612-13, but conspicuous in its absence from Defendants' moving papers is any legal authority granting absolute immunity to any governmental official for enforcing immigration laws. Having failed to meet their burden of proof at this juncture, the defense of absolute immunity fails. **[p. 25]**

CONCLUSION

Accordingly, it is hereby ORDERED that Defendants' motion to dismiss Plaintiff's complaint is DENIED. Defendants are further ORDERED to file an answer to the Complaint no later than 9:00 a.m. on November 8, 2000. Plaintiff's Motion to Deny Defendants' Motion to Dismiss is DENIED. A status conference is scheduled for November 8, 2000 at 9:00 a.m. at which the court will establish deadlines for the briefing and hearing of other pending motions.

SO ORDERED this 25 day of October, 2000.

BY THE COURT:

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge