

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HILT CONSTRUCTION & MANAGEMENT :  
CORPORATION, :

Plaintiff, :

-v- :

THE PERMANENT MISSION OF CHAD TO THE :  
UNITED NATIONS OF NEW YORK, :

Defendant. :  
----- X

No. 16 Civ. 6421 (VB)

**STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

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## PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 517, the United States of America (“the United States”) respectfully submits this Statement of Interest to protect the interest of the United States in this case concerning actions taken by Plaintiff Hilt Construction & Management Corporation (“Plaintiff”) to enforce the default judgment recently entered in the instant action.<sup>1</sup>

On August 12, 2016, Plaintiff, a New Jersey-based construction company, filed suit against the Permanent Mission of the Republic of Chad to the United Nations (“Chad Mission” or “Mission”), claiming that the Chad Mission had failed to pay \$1,400,460.00 for renovation services performed by Plaintiff on property owned by the Mission. Plaintiff’s action was brought pursuant to the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. 1602 *et seq.*, which provides the sole basis for jurisdiction over foreign states in courts within the United States and governs the execution of judgments obtained against foreign states.<sup>2</sup> The Chad Mission did not appear in the action, and on March 17, 2017, this Court signed an order entering default judgment against the Chad Mission. *See* Dkt No. 16.

By diplomatic note dated April 20, 2017, the Chad Mission informed the Department of State that Bank of America has restricted access to its official bank account, as a result of a restraining notice and information subpoena issued by Plaintiff’s counsel to Bank of America. According to Ambassador Moustapha Alifei, who is the head of the Chad Mission and accordingly oversees its administration, the restraint of the bank account will have a severe

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<sup>1</sup> Under this statutory provision, the Attorney General may send any officer of the Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” 28 U.S.C. § 517.

<sup>2</sup> The Chad Mission is considered a foreign state for the purposes of the FSIA. *See Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816, 820 (S.D.N.Y.1978).

impact on the Mission, as it is the account used for its diplomatic functions, and without access to the account, the Mission cannot operate. *See* Affirmation of Ambassador Moustapha Alifei (“Alifei Aff.”), ¶ 6. Dkt No. 18-2. On April 28, 2017, the Chad Mission alerted the Department of State that the New York City’s Marshal’s Office had delivered a Marshal’s Notice to the Chad Mission on April 24, 2017, directing it to pay \$1,665,315.43 to the Marshal’s Office in connection with the judgment entered in this action and stating that failure to do so immediately would compel the Marshal’s Office to physically levy upon the Mission’s personal property. *See* Exhibit B annexed to Declaration of James B. Donovan (“Donovan Dec.”).

In this Statement of Interest, the United States explains that (1) property of a UN mission, including official bank accounts used for mission purposes, is immune from attachment under international agreements to which the United States is a party, and therefore, Plaintiff cannot levy upon personal property on Chad’s Mission premises or restrict the Chad Mission’s bank account; and (2) even if the property was not immune from attachment, Plaintiff has failed to follow the applicable procedures required to enforce a default judgment against a foreign state and to attach its property. The United States, however, is not taking a position on whether the Chad Mission is immune from judgment or an award of damages against it in this case;<sup>3</sup> rather, this filing addresses only the immunity of the Mission’s property and Plaintiff’s inability to enforce the judgment against such property.

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<sup>3</sup> Indeed, in Plaintiff’s earlier action against the Chad Mission, discussed *infra*, this Court noted, in rejecting the Mission’s argument that Plaintiff’s claims should be dismissed on the ground that the Mission’s assets may not be attached, that the Second Circuit has upheld the award of damages against a foreign state despite affirming the inviolability of mission property. *See Hilt Constr. & Mgmt. Corp. v. Permanent Mission of Chad to the United Nations in New York*, No. 15 Civ. 8693 (VB), 2016 WL 3351180, at \*6 (S.D.N.Y. June 15, 2016) (citing *767 Third Ave. Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 300 (2d Cir. 1993)).

United States courts have recognized that international agreements to which the United States is a party mandate that permanent missions to the U.N. receive the same protections as embassies and that this immunity extends to property on mission premises and bank accounts used by missions for official, diplomatic purposes. The United States has a compelling interest in ensuring the immunity of official UN mission property, consistent with its obligations under those international agreements, so that foreign states are able to carry out diplomatic activities in the United States and the United States is afforded similar protections with respect to its diplomatic property overseas. The United States also has an interest in judgments against foreign states being enforced in a manner that comports with the requirements of the FSIA. Moreover, the United States has a specific foreign policy interest in this matter, as the Government of Chad has voiced its objection to both (1) the Marshal's Notice threatening to physically levy against personal property of the Mission and (2) the restriction of its bank account, and Mission officials have noted the harm that the Mission is experiencing as a result. For these reasons, the Government respectfully requests that the Court vacate the Marshal's Notice, as well as the restraining notice and information subpoena served on Bank of America, and enjoin Plaintiff from taking any further steps to enforce its default judgment that conflict with international law and the FSIA.

### **BACKGROUND**

In its complaint, Plaintiff alleges that it entered into an agreement with the Chad Mission in October 2014 to provide construction materials and services to the Mission's property in New Rochelle, New York. *See* Dtk No. 1 ¶ 12. Plaintiff alleges that it performed the required labor but has not been paid the total amount owed, with \$1,400,460.00 outstanding. *See id.* ¶ 15. Plaintiff

sought a judgment against the Chad Mission for its purported failure to pay the full amount owed, in addition to interest, attorneys' fees and costs. *See id.* ¶ 15.

Plaintiff had previously filed an identical complaint against the Chad Mission and then-Ambassador on November 5, 2015. *See* Case No. 15-8693, Dkt No. 1. Following briefing by the parties on the defendants' motion to dismiss, the Court dismissed the claims against the Ambassador with prejudice and dismissed without prejudice the claims against the Chad Mission, on the ground that service of process upon the Mission was defective under the FSIA. *See Hilt Constr. & Mgmt. Corp.*, 2016 WL 3351180, at \*4-5.

Plaintiff then refiled its complaint on August 12, 2016, naming the Chad Mission as the sole defendant. *See* Dkt No. 1. On October 24, 2016, Plaintiff filed an affidavit of service and proof of delivery of the summons and complaint to the Ministry of Foreign Affairs of the Republic of Chad. *See* Dkt No. 12. The Chad Mission did not answer the complaint or otherwise move, and on March 17, 2017, the Court signed a default judgment against the Chad Mission in the amount of \$1,400,460.00 with interest, which was entered on March 20, 2017. *See* Dkt No 16.

The Chad Mission received a notice from the Bank of America dated April 12, 2017, informing the Mission that it had restricted its account due to a restraining notice and information subpoena issued by Plaintiff's counsel, which was dated March 17, 2017. *See* Alifei Aff. ¶ 3. The notice from Bank of America stated that in response to the restraining notice, it had debited the account of \$53,518.54 and would be holding the funds to satisfy the legal order pending further instruction from the court or attaching party, with the attachment of future deposits into the account also possible. *See* Exhibit A annexed to Donovan Dec. The bank account at issue allows the Chad Mission to perform its diplomatic functions and funds Mission



operations, including its payroll, and therefore the Mission cannot conduct its activities if the restraint is not removed. *See* Alifei Aff. ¶¶ 6, 7. The Chad Mission contacted the Department of State to object to the attachment of its bank account and to request the assistance of the United States in this matter.

On April 28, 2017, the Chad Mission appeared in the action and filed a letter motion requesting an emergency order to vacate the restraint on the bank account, to which the Mission attached, *inter alia*, the affirmation of Ambassador Moustapha Alifei attesting that the account at issue is used by the Chad Mission for official diplomatic purposes. *See* Dkt Nos. 18, 18-2. Also on April 28, 2017, the Chad Mission notified the Department of State that, on April 24, 2017, the New York City’s Marshal’s Office delivered a Marshal’s Notice to the Chad Mission directing it to pay \$1,665,315.43 to the Marshal’s Office “immediately” in connection with the judgment entered in this action and stating that failure to do so “will compel me to PHYSICALLY LEVY upon your personal property in order to satisfy this judgment.” Donovan Dec. ¶ 3; Exhibit B annexed to Donovan Dec. (original emphasis). Finally, on May 1, 2017, the United States Mission to the United Nations learned that the New York City Marshal’s Office also delivered to Bank of America a notice directing payment of the funds in the Chad Mission’s account to the Plaintiff in this action. *See* Donovan Dec. ¶ 4.

## **ARGUMENT**

### **I. PROPERTY ON CHAD’S UN MISSION PREMISES AND THE OFFICIAL BANK ACCOUNT OF CHAD’S U.N. MISSION ARE IMMUNE FROM ENFORCEMENT ACTION**

Under international agreements to which the United States is a party, Plaintiff cannot enforce its judgment against property on UN Mission premises or UN Mission bank accounts used for official Mission purposes. While the FSIA identifies limited exceptions to the

presumption of foreign state immunity, *see* 28 U.S.C. § 1610(a), the FSIA does not displace immunities enjoyed by foreign state property under international agreements to which the United States was a party at the time of the statute’s enactment. 28 U.S.C. § 1609 (providing that the FSIA provisions addressing the immunity from attachment and execution of a foreign state’s property are “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.”); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) (“Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.”).<sup>4</sup>

At the time the FSIA was enacted, the United States had already entered into several international agreements which establish its obligations to protect the property of UN missions from interference. The Vienna Convention on Diplomatic Relations (“Vienna Convention”), to which both the United States and Chad are parties, provides that “[t]he premises of the mission, their furnishings and other property thereon ... shall be immune from search, requisition, attachment or execution.” Vienna Convention, art. 22, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. The Vienna Convention also provides that “the receiving state shall accord full facilities for the performance and functions of the mission.” *Id.* art. 25. Diplomats accredited to the United Nations and the permanent missions through which they operate receive the same protections afforded to diplomatic missions, including to diplomatic property, under these provisions of the Vienna Convention. In particular, the U.N. Charter provides that the representatives of its Members shall “enjoy such privileges and immunities as are necessary for

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<sup>4</sup> Because international agreements govern the immunity of the account, the FSIA’s exceptions to immunity from attachment in Section 1610(a) are simply “inapplicab[le] to an analysis of the validity of attachment.” *767 Third Ave. Assocs.*, 988 F.2d at 297.

the independent exercise of their functions in connection with the Organization.” U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. The UN Headquarters Agreement further specifies that representatives to the U.N. “shall . . . be entitled . . . to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it.” Agreement Between the U.N. and the United States Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, T.I.A.S. 1676.<sup>5</sup>

In interpreting these international agreements, the Second Circuit Court of Appeals has held that the protections afforded to diplomatic missions and their property under the Vienna Convention extend to permanent missions to the U.N. *See 767 Third Avenue Assocs.*, 988 F.2d at 298 (determining that the Vienna Convention, which codified principles of customary international law concerning diplomatic relations, establishes the inviolability of permanent missions to the U.N.). Accordingly, property on UN mission premises, like property on embassy premises, is immune from attachment or execution. *See Vienna Convention art. 22(3)*. This Court in fact noted that “foreign missions and their premises are immune from attachment and execution under the Vienna Convention” in its decision dismissing Plaintiff’s original action due to improper service of the complaint. *Hilt Constr. & Mgmt. Corp.*, 2016 WL 3351180, at \*6–7. Accordingly, Plaintiff is clearly foreclosed from executing upon personal property on Chad’s Mission premises, and the New York City Marshal’s Notice must be vacated.

Further, courts have drawn on these international agreements to recognize that bank accounts of UN missions that are used for mission purposes are immune from enforcement as

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<sup>5</sup> *See also* Convention on the Privileges and Immunities of the United Nations, art. IV, § 11(g), Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 7502 (entered into force with respect to the United States Apr. 29, 1970) (stating that representatives of U.N. members shall enjoy “such . . . privileges, immunities and facilities . . . as diplomatic envoys enjoy”).

well, because a mission's access to its bank funds in the receiving state is critical to the mission enjoying "full facilities for the performance and functions of the mission." For example, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992), despite the entry of a default judgment against Uganda's U.N. mission, the court held that "attachment of defendant's bank account is in violation of the United Nations Charter and the Vienna Convention because it would force defendant to cease operations." Similarly, in *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172, 2011 WL 5245206, at \*4 (E.D.N.Y. Nov. 2, 2011), the court vacated the plaintiff's execution of a default judgment against the bank accounts of Congo's U.N. Mission on the ground that "[b]ank accounts used by the mission for diplomatic purposes are immune from execution under [Article 25 of the Vienna Convention] as facilities necessary for the mission to function." (citing *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at \*1 (S.D.N.Y. Oct. 23, 1993)).

Here, Ambassador Alifei has submitted a sworn statement that the bank account restricted by Plaintiff's restraining notice is used by the Mission for the fulfilment of its diplomatic duties and general operations. *See* Alifei Aff. ¶ 6. Indeed, Ambassador Alifei attests that without access to the bank account, the Mission cannot continue to perform its official functions or to pay its employees. *See id.* ¶¶ 6, 7. He further states that the account is not used for commercial purposes. *See id.* ¶ 6. Any additional investigation into the complete range of uses is unnecessary, as courts have held that a mission official's sworn statement is sufficient to establish that the mission's bank account is used for diplomatic purposes, even if it were possible that a portion of the account funds other activities. *See e.g., Sales*, 1993 WL 437762, at \*2 (rejecting plaintiff's contention that some funds may be used for non-diplomatic purposes and noting, to remain consistent with principles of sovereign immunity, reliance on the foreign

state's declaration as to use of an account is necessary to avoid "painstaking examination of the Mission's budget and books of account"); *Liberian E. Timber Corp. v. Gov't of Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987) ("Indeed, a diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities.").

Because the Chad Mission's bank account supports its diplomatic activities and operations, it constitutes mission property immune from enforcement. Accordingly, Plaintiff's restraint on its account should be vacated to ensure compliance with the United States' international obligations and to permit Mission operations to continue, and the associated information subpoena seeking information about the account should also be withdrawn.

## **II. PLAINTIFF'S ENFORCEMENT EFFORTS ARE IMPERMISSIBLE UNDER THE FSIA**

Even if the property at issue were not immune from enforcement under the United States' international agreements, Plaintiff's efforts to enforce the default judgment would be impermissible under the FSIA. Section 1609 of the FSIA states, "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

Section 1610(c) prohibits the restriction of a foreign state's property unless, after a reasonable period of time has elapsed from the entry of judgment and the provision of any notice required under Section 1608(e), the court issues an order permitting attachment or execution.

"[E]xecution depends on a judicial determination that the property at issue falls within one of the

exceptions to immunity . . . .” *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

Here, there is no indication in the docket that Plaintiff sought an order from the Court or that the Court determined that personal property at the Chad Mission or the Chad Mission’s bank account were not immune from enforcement. *See generally* Dkt. That the Court granted Plaintiff’s request for a default judgment is immaterial, as the decision as to whether a foreign state is liable in an action is separate from the subsequent determination concerning the way in which the judgment may be enforced, if at all. *See, e.g., Avelar*, 2011 WL 5245206, at \*5 n.8 (“[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor’s unilateral delivery of a writ to the sheriff or marshal.”). Moreover, to the extent that Plaintiff’s notices were properly executed under New York State law, these procedures do not satisfy the FSIA such that the property of a foreign state may be attached. *See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000), *aff’d sub nom. First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) (vacating restraining notice as plaintiff failed to seek a court order pursuant to §1610(c) before serving it); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782, 1997 WL 811474, at \*2 (S.D.N.Y. May 28, 1997) (finding restraining notice to be “procedurally defective” under the FSIA).

In addition, a foreign government’s failure to appear to contest a judgment or enforcement action does not constitute a waiver of immunity such that attachment of property is proper without an express determination by the court that an exception to immunity applies. *See, e.g., Walters*, 651 F.3d at 293-94. In any event, it is unclear whether the Chad Mission was

served with a copy of the default judgment in the manner required by the FSIA and thus had knowledge of it, as Plaintiff has not filed an affidavit of service. *See* 28 U.S.C. § 1608(e) (requiring a copy of any default judgment be sent to the foreign state in the same manner prescribed for service of process, set forth in § 1608(a)). Moreover, Plaintiff's counsel signed the restraining notice issued to Bank of America three days *before* the Court filed the default judgment, despite the fact that enforcement against a foreign state's property is not permitted without a court order issued "a reasonable time" after the entry of judgment and the provision of requisite notice. *See* Exhibit A annexed to Donovan Dec., p. 4, Dkt No. 16; 28 U.S.C. § 1610(c). Plaintiff therefore has failed to comply with the requirements of the FSIA governing the enforcement of judgments, and as a result, even if the property at issue could be attached, which it cannot, Plaintiff's restraining notice would be improper.

### **CONCLUSION**

As discussed above, Plaintiff's effort to levy upon personal property at the Chad Mission and its restraint of the Chad Mission's official bank account are impermissible under international agreements to which the United States is a party and procedurally defective under the FSIA. Moreover, Plaintiff's actions threaten the ability of the United States to ensure that foreign missions in the United States can perform their official functions without interference and maintain bank accounts supporting their operational needs. Accordingly, the United States respectfully requests that the Court vacate the Marshal's Notice, as well as Plaintiff's restraining notice and information subpoena, direct Bank of America to lift any resulting restrictions on the Chad Mission's bank account, and enjoin Plaintiff from taking further action to enforce the default judgment without the Court's approval.

Dated: May 3, 2017  
New York, New York

Respectfully submitted,

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