United States Department of State

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www.state.gov

TO: Stephen J. Rapp

Determination to Grant Waiver of Ethics Pledge Restriction on Participating in Particular Matters Involving Former Employers

Background Regarding Ethics Pledge

Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," (EO) Section 1 requires all covered political appointees to abide by several commitments. One of those commitments provides that a covered appointee may not for a period of two years from the date of his appointment participate in any particular matter involving specific parties that is directly and substantially related to his former employers. (Obama Ethics Pledge, Paragraph 2). A major purpose behind this restriction is to ensure that political appointees not leave the public with the appearance that any official actions they take are influenced by their former employers rather than by the interests of the United States. For purposes of applying this restriction, the term "particular matter" has been interpreted to include "meetings or other communication relating to the performance of one's official duties with a former employer or client." DO-09-011, OGE Memorandum to Designated Agency Ethics Officials, March 26, 2009.

However, a waiver of the restrictions contained in Paragraph 2 may be granted upon a certification either that the literal application of the restriction is inconsistent with the purpose of the restriction or that it is in the public interest to grant the waiver. EO, Sec. 3(b). By memorandum dated February 23, 2009, the Office of Government Ethics announced that the Director of OMB had determined that the Designated Agency Ethics Official of each executive agency was the most appropriate designee to grant such waivers, after consultation with the Counsel to the President. *See* DO-09-008, OGE Memorandum to Designated Agency Ethics Officials, February 23, 2009.

Background Regarding Your Appointment

You are the Ambassador at Large for War Crimes Issues at the U.S. Department of State. In that capacity, your duties will include advising the Secretary of State directly and formulating U.S. Policy responses to atrocities committed in areas of conflict and elsewhere throughout the world.

Your duties will also include coordinating U.S. Government support for war crimes accountability in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Iraq, and other regions where crimes have been committed against civilian populations on a massive scale. Your duties will require coordination with the United Nations and the various international tribunals, including the Special Court for Sierra Leone.

Most recently, you were an employee of the United Nations, serving as Independent Prosecutor of the Special Court for Sierra Leone (the "Sierra Leone Court").[1] For the purposes of the Obama Ethics Pledge, we consider you an "employee" of the Sierra Leone Court, as well as the United Nations. You are seeking a waiver of Paragraph 2 of the Ethics pledge with respect to your former employers on the basis that the literal application of the restriction is inconsistent with the purpose of the restriction and/or that the waiver would be in the public interest.

Waiver of Paragraph 2 of the Ethics Pledge

You were appointed to your position with the United Nations directly by the Secretary General. Your official title was Chief of the Office of the Legal Affairs in the Executive Office of the Sierra Leone Court, holding the rank of Under Secretary. In this capacity, you served as Independent Prosecutor of the Sierra Leone Court. The United Nations underwrote your salary and benefits and the Sierra Court underwrote your expense reimbursement.

In your role as Ambassador at Large for War Crimes Issues, you will be called upon to work with the United Nations and the Sierra Leone Court in many areas. This interaction will include constant contact with United Nations and Sierra Leone Court officials at all levels with respect to particular matters involving specific parties, most noticeably, communications with respect to operations of the Sierra Leone Court and other United Nations-affiliated courts; oversight of those institutions on behalf of the United States Government on such matters as appointment of judges, prosecutors, and other senior officials and on personnel and

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[1] The Special Court for Sierra Leone was established jointly by the Sierra Leone Government and the United Nations to hear and decide criminal cases involving violations of International and Sierrean humanitarian law. It is funded entirely from donations from governments, including the U.S., which has traditionally donated $80 million per year for the Court's maintenance.

budgetary matters; information sharing; cooperation of member-states; arrests of fugitives; ongoing cases for violations of International Humanitarian Law; disposition of prisoners; U.S. diplomatic efforts on behalf of the tribunals; and other issues related to U.S. support for the courts. You may also be called upon to consult with the United Nations with respect to creating a new Court or dismantling an existing one. If you are not able to participate in these communications, you will be unable to adequately perform your duties as Ambassador at Large for War Crimes Issues. For this reason, I believe that a waiver of Paragraph 2 of the Ethics Pledge is prudent in order to avoid even the appearance of a conflict of interest.

It is my determination that the literal application of the restriction in this situation would be inconsistent with the purposes of the restriction. Because the United Nations is an international organization consisting of many countries, including the United States, and the Sierra Leone Court is a tribunal tasked with creating a forum for the trial of violations of international humanitarian law, the interests of these organizations are generally consistent with the interests of the United States. The United States provides significant funding to both the United Nations and the Sierra Leone Court and is the largest single contributor to both. Also, because neither organization is organized for the purpose of generating a monetary profit, there is no concern that you would take official action motivated to increase the revenues of either of these organizations. I therefore believe that as Ambassador at Large for War Crimes Issues, you will not leave the public with the appearance that your actions are influenced by the interests of your former employers, rather than by the interests of the United States.

I also believe that a waiver of Paragraph 2 of the Ethics Pledge is in the public interest because your work as Ambassador at Large for War Crimes Issues will also require you to formulate U.S. policies in responding to atrocities committed throughout the world as well as develop policies and practices intended to prevent future atrocities. Such functions will for the most part require working on a broad strategic and policy level and will not entail making decisions on particular matters involving specific parties.

You have extensive experience with respect to war crimes issues, and it is precisely your understanding of these issues that helps bring value to this position. You have spent the past two years working as Independent Prosecutor of the Sierra Leone Court, and the six years before that in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, first as a Senior Trial Attorney and then as the Chief of Prosecutions. As a

result of these experiences, you have developed an intimate knowledge of the United Nations and the United-Nations affiliated Courts, including their managements programs and policies, and the way they function and interact. You have also developed extensive knowledge of the interpretation and application of international humanitarian law. It is essential that the United States have an effective, credible voice in the Department of War Crimes Issues on many important issues that arise in that area of the law and in those forums.

Finally, although you were paid by the United Nations and work at the Sierra Leone Court, your position as Independent Prosecutor of the Sierra Leone Court did not require you to advocate on behalf of either the United Nations or the Court. Instead, your office functioned independently from both organizations, receiving instructions on its programs from no outside organization.

Based on these factors, I hereby determine that a public interest waiver in your case is appropriate. I certify that the nature of your previous employment arrangements should not restrict your ability to provide services to the Department of State with regard matters involving the United Nations or the Sierra Leone Court, and I therefore waive Paragraph 2 of the Ethics Pledge. The Counsel to the President concurs in this waiver.

Furthermore, to the extent a reasonable person with knowledge of the relevant facts may question your impartiality in matters relating to the described organizations, I have made a separate determination, pursuant to 5 C.F.R. § 2635.502, that the U.S. Government's interests in your ability to participate in these matters, given the critical responsibilities associated with your position as U.S. Ambassador at Large for War Crimes Issues, outweighs the concern that a reasonable person may question the integrity of the Department of State's programs and operations.

9/8/09
Date

James H. Thessin
Designated Agency Ethics Official