

“Conditioning ESF assistance and cutting it off to nations that do not sign [BIAs] is not...the right response. It is a very, very heavy hand to the problem...At a time when we are fighting the war on terrorism, reducing this tool of diplomatic influence is not a good idea.” *House Foreign Operations Sub-Committee Chair, Jim Kolbe speaking on July 15, 2004, speaking in opposition to the Nethercutt Amendment.*

## **ESF Sanctions Hurt More Than They Help**

At a time when it needs its allies the most, it is critical that the U.S. government does not alienate these allies with legislation that is unhelpful at best and punitive at its worst. Contrary to what its supporters claim, the new version of the Nethercutt Amendment calling for Bilateral Immunity Agreements (BIAs) in FY06 will not only alienate our allies who are party to the International Criminal Court (ICC), it will also severely undermine the economic, political and military objectives we hope to achieve in these key states.

### **Background**

In June 2005, the House of Representatives passed the FY06 Foreign Operations Appropriations Act (H.R. 3057), containing a new version of the FY05 Nethercutt amendment. The Nethercutt amendment prohibits the U.S. government from granting Economic Support Funds (ESF) to countries that have not agreed to a bilateral immunity agreement (BIA) with the United States. BIAs are designed to provide immunity for U.S. servicemembers, nationals and contractors working for U.S. companies from the ICC.

### **Requiring U.S. allies to sign BIAs is redundant and would put those states in violation of international law**

Countries that have been adversely affected by the Nethercutt amendment are confused by U.S. attempts to sabotage efforts to strengthen international law and eradicate impunity for war criminals. All of the countries affected are either democracies or in the process of consolidating democracy. They have refused to sign a BIA with the United States because they believe it would put them in breach of their ICC treaty obligations. Many of the countries already have SOFAs, or Status of Forces Agreements, or other diplomatic arrangements with the U.S. that reserve full U.S. jurisdiction over American personnel and officials operating on their territory. Yet the U.S. has not been satisfied with these SOFAs. Rather, through the Nethercutt Amendment, the United States imposes sanctions on some of its closest allies in the war on terror and the war against drug trafficking.

### **The U.S.'s closest and most important allies are adversely affected: the case of Jordan and Kenya**

Like the FY05 version, the FY06 draft also contains waivers that allow the President to waive the restrictions on ESF to NATO member countries, major non-NATO allies, and for national security and national interest reasons. These waivers are similar to those in the American Servicemembers' Protection Act. However, the President has yet to use any of these waivers, thereby alienating allies in geo-strategically critical regions such as Latin America and Africa. By not applying waivers for ESF to countries like Brazil and Kenya, the U.S has applied the “very heavy hand” that Rep. Kolbe warned against.

# FACT SHEET

Kenya ratified the ICC treaty in March 2005 and has since been subjected to U.S. pressure to sign a BIA. The Bush administration has been criticized for alienating a nation that a White House funding request described as “the linchpin of East African stability and security.” Kenya was slated to receive \$8 million in ESF that would promote the economy, infrastructure, development projects, and political stability. Given Kenya’s pledge to fight terrorism, its troops in Darfur, and its commitment to regional security, the U.S. insistence on a BIA is both counterintuitive and embarrassing.

## **Given the mandate of the ICC as well as its principle of complementarity, BIAs are unnecessary**

President Bush’s chief complaint against the ICC has been that it will unfairly target U.S. military personnel serving abroad. As Commander in Chief, he is worried that the thousands of U.S. military forces currently deployed around the world will face trumped up charges of war crimes and the like by a politicized Court. Yet countless officials, both American and European, have assured the President that the Court is politically impartial, and furthermore, that even if U.S. military personnel commit war crimes, crimes against humanity, or genocide, they are very unlikely to be hauled into the ICC. This is because the ICC is by definition a court of last resort, meaning that it can only hear cases when national courts are destroyed or unable to handle the case, or are purposefully shielding the accused from justice.

Furthermore, the U.S.’s insistence that state parties to the ICC sign a bilateral immunity agreement is rooted in illogical and unfounded fears. In recent months the ICC has demonstrated its ability to address humanitarian crises that threaten to destabilize entire continents. The ICC is investigating war crimes in the Darfur, Sudan following a referral by the U.N. Security Council. The ICC is also investigating war crimes in the war-ravaged regions of Northern Uganda and the Democratic Republic of Congo. U.S. attempts to undermine the ICC will damage our relationship with our allies and could obstruct the very justice that the Court is trying to achieve.

## **BIAs have unintended negative consequences for the U.S.**

Key American officials, including chairman of the U.S. Joint Chiefs of Staff, Air Force Gen. Richard Myers have made it clear that government regulations such as the Nethercutt Amendment and the American Servicemembers’ Protection Act are actually counterproductive to U.S. political and military interests. Similarly, expressing concern over the prohibition on ESF in particular, General J. Craddock stated on behalf of Southcom that the sanctions are “restricting our access and interaction [with our allies]” thereby “hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy.” He is concerned that “extra-hemispheric actors” aka China “are filling the void.” Thus BIAs are not only unnecessary, but also affirmatively harmful to our own interests.

*For more information contact Golzar Kheiltash, Legal Analyst for International Law and Justice, 202-330-4117, [gkheiltash@globalsolutions.org](mailto:gkheiltash@globalsolutions.org).*