

The Nethercutt Provision: Cutting Off Our Nose to Spite Our Face

Introduction

The International Criminal Court (ICC) is the only permanent international court to try individuals accused of the worst violations of genocide, war crimes and crimes against humanity when national courts are destroyed or unable to handle the case, or are purposefully shielding the accused from justice. This court embodies fundamental American values of accountability, equality and justice. Furthermore, the ICC abides by the highest standards of judicial fairness and expedience, thereby making participation in the ICC essential to American leadership and credibility. The United States should move toward constructive engagement with the ICC, assisting the court's efforts to bring to justice the world's worst criminals while monitoring and guiding its development from "inside the tent."

Yet instead of moving toward constructive engagement with the ICC, the U.S. has turned its back on the Court and is attempting to strong-arm other countries—mostly U.S. allies—to do the same under the Nethercutt Provision.

- **The Nethercutt Provision undermines important foreign policy goals such as fighting terrorism, ending corruption, and establishing the rule of law, and does not increase protections for U.S. troops abroad.**
- The Nethercutt Provision ties U.S. foreign assistance to countries' support of the ICC by pushing these countries to sign Bilateral Immunity Agreements (BIAs). BIAs require ICC member countries to exempt all U.S. nationals and non-national contractors (even those no longer employed by the U.S. government) from accountability before the ICC for widespread and systematic war crimes, crimes against humanity, and genocide. Countries that refuse to sign BIAs stand to lose all of their Economic Support Fund (ESF) Assistance. **Meeting the demands of the Administration would require ICC member countries to put all U.S. citizens on their territory, even mercenaries and common criminals, above the laws that they expect their own citizens and leaders to obey.**
- Existing SOFAs (Status of Forces Agreements) and other bilateral arrangements already give the U.S. full jurisdiction over U.S. servicemembers and officials serving abroad for alleged crimes they commit as a part of their official duties. In addition, the ICC's highly limited jurisdiction can never take effect as long as a competent national court looks into allegations, **even if it decides not to prosecute. This debate is not about U.S. soldiers.**
- The ICC is not targeting Americans, and its Prosecutor has already refused to consider allegations of abuse in Iraq leveled against U.S. and U.K. troops. This debate is an ideological one, with anti-UN radicals in Congress trying to discredit the ICC and strong-arm countries into breaking their commitment to the Court. **The U.S. should be fighting alongside Ireland, Mexico, and South Africa to end genocide and ethnic cleansing—not against them.**
- The ESF funds that the U.S. gives to these countries is used for crucial programs and projects designed to promote stability, democracy, the rule of law, and human rights, while **fighting corruption, terrorism, and drug trafficking.** Given the vital role that ESFs play abroad, the Nethercutt Provision is simply not worth the cost of endangering international security and stability.

Legislative History of Nethercutt Amendment

On July 15, 2004, the House attached an anti-ICC amendment to the Fiscal Year 2005 (FY05) Foreign Operations, Export Financing, and Related Programs Appropriations Act (H.R. 4818). Dubbed the Nethercutt Amendment after the Congressman who introduced it, the amendment would cut ESFs to all countries that belong to the ICC but have not signed a BIA with the US.

Rep. Jim Kolbe (R-AZ), the Republican chair of the appropriations subcommittee, spoke strongly against this amendment when it came to the House floor: **“At a time when we are fighting the war on terrorism, reducing this tool of diplomatic influence is not a good idea...If we accept [this amendment], the U.S. will be hamstringing itself, placing a straitjacket on its diplomatic tools, when we have a lot of U.S. national security objectives that must carry the same or equal weight as securing [BIAs].”** While the amendment originally failed by voice vote, it later passed by a roll call vote of 241 to 166.

The Nethercutt language has again been included in the House version of the Fiscal Year 2006 (FY06) Foreign Operations Appropriations Bill, H.R. 3057. It is not included in the Senate’s version of FY06, and its inclusion will be decided at the Senate-House Conference Committee. However, it is highly unlikely that the Nethercutt provision will be taken out of the final version of the Bill.

Text of FY06 Nethercutt Provision

The House version of the FY06 Nethercutt Provision in the Foreign Operations Appropriations Bill (H.R. 3057) reads:

SEC. 574. (a) None of the funds made available in this Act in title II under the heading ‘Economic Support Fund’ may be used to provide assistance to the government of a country that is a party to the International Criminal Court and has not entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.

(b) The President may, with prior notice to Congress, **waive the prohibition of subsection (a) with respect to a North Atlantic Treaty Organization (‘NATO’) member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), Taiwan, or such other country** as he may determine if he determines and reports to the appropriate congressional committees that it is important to the **national interests of the United States** to waive such prohibition.

(c) The President may, with prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.

(d) The prohibition of this section shall not apply to countries otherwise eligible for assistance under the Millennium Challenge Act of 2003, notwithstanding section 606(a)(2)(B) of such Act

- **Waivers**

Like the FY05 version, the Nethercutt provision in FY06 provides waivers for NATO Allies, key non-NATO allies, and other countries if the President determines that it is in the national interests of the U.S. But unlike the FY05 version, the FY06 provision requires the President to give Congress notice before he invokes a waiver. The Nethercutt provision waivers are similar to the waivers set forth in the American Servicemembers Protection Act (ASPA). ASPA threatens to withhold military aid to countries that are party to the ICC. It is critical to note that while they exist, **none of the waivers have been invoked by the President.** Thus, key ICC member countries still stand to lose millions of dollars in ESF and military aid.

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Key Points

- **Squandering goodwill at a critical time:** At a time when we need our allies the most—from Iraq to Afghanistan to the war on terrorism, we're squandering the goodwill of key friends and allies with an extreme and unnecessary measure.
- **Test of time—nothing to fear from the ICC:** The countries affected by this measure are flabbergasted by the continuing U.S. fear of the ICC. The citizens of these countries—Jordan, Ireland, South Africa, Trinidad & Tobago—make up the Court's judges and administrators. The Prosecutor has already dismissed attempted allegations against the U.S. and U.K. as groundless. Instead, the Court is looking at massive war crimes in Uganda and D.R. Congo, both members of the Court that have requested its assistance.
- **Sanctions friends and allies:** The countries affected have many things in common. They are all democracies, some of them trying to consolidate democracy for the first time. They are all friends of the U.S. and work with us to fight terrorism, drug trafficking, and other threats to international security. And for all of them, strong support for this Court is a central pillar of their foreign policy.
- **Countries cannot legally sign BIAs:** These countries have concluded that they cannot legally sign the BIAs proposed by the Administration because these agreements are broader and more extreme than what is allowed under the ICC's treaty and would put them in breach of their existing treaty obligations. Many of these countries have standing SOFAs (Status of Forces Agreements) and diplomatic arrangements with the U.S. which provide full U.S. jurisdiction over the official acts of U.S. personnel, officials, and servicemembers operating on their territory and which they believe adequately addresses U.S. concerns.
- **Will increase diplomatic tensions:** Many of these countries have already lost millions of dollars in U.S. military assistance over their position; cutting more aid will not change their minds. Rather, it will undermine our diplomatic relations and weaken our ability to cooperate with them in the war on terrorism and other U.S. priorities.
- **Hurts our immediate foreign policy objectives:** BIAs cut off millions to Kenya (despite its contributions to regional stability) and Caribbean nations working to improve security along our "Third Border," against terrorism. ESF assistance is used to increase cooperation in international security and terrorism, as well as promote economic and democratic development, strengthen human rights, and further peace processes.

Impact of Sanctions in FY06

Specific countries and programs that would be affected include:

- **Ireland**

This amendment jeopardizes \$8.5 million for the International Fund for Ireland and \$3.5 million for the Walsh Visa Program, both intended to further the Northern Ireland peace process. Ireland, like all European Union countries, is a strong ICC supporter and also has a judge presently serving at the Court. The European Union (EU) has concluded that no EU country could legally sign a Bilateral Immunity Agreement as proposed by the U.S. as it would put them in breach of their legal commitments under the ICC's treaty. No EU country has publicly signed an agreement; all but one EU country (Czech Republic) are full members of the ICC and thus would be ineligible for ESF monies under this measure.
- **Cyprus**

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Cyprus will lose \$13.5 million intended to further its peace process, including “programs and activities that encourage tolerance, cooperation, and trust between Greek and Turkish Cypriots. The former President of the Cypriot Supreme Court is now a judge at the ICC.

- **Mexico**
Mexico ratified the ICC treaty in November 2005 despite strong U.S. pressure to either withhold ratification indefinitely or face \$11.5 million in economic aid cuts. This aid is intended for critical rule of law and anti-corruption programs that are essential for Mexico’s progress and interaction with the U.S. Mexico is not only a key NAFTA partner, it also shares a border with the U.S. It is therefore crucial that the U.S. support Mexico in its effort to build a strong civil society and a transparent, accountable government that adheres to the rule of law. As an ICC member, Mexico already stands to lose 3.5 million in much-needed military assistance.
- **Ecuador**
Under this measure, \$13 million will be withheld from what the State Departments considers “a staunch counter-drug ally of the United States.” These funds are intended to help strengthen democratic institutions, fight corruption and foster economic development. Ecuador has already seen \$15.56 million in military aid withheld for FY05 because of its support for the Court.
- **Peru**
This measure will cut \$8 million from a coordinated effort to decrease coca production and shipment, thereby helping “lower the risk of instability in areas facing the quadruple threat of increased coca cultivation, narco-trafficking, terrorism and minimal central government presence.” These funds are also intended to promote democracy by aiding reform, enhancing local governance, and assisting Peru’s Truth and Reconciliation Commission for human rights abuses committed under its former regime.
- **Peru-Ecuador Peace**
The measure would cut \$4 million in funds to help implement the 1998 peace agreement between these two countries, which enables them to work more cooperatively in combating drug trafficking in the border region.
- **Paraguay**
Paraguay will lose \$2.55 million intended to help consolidate and strengthen democracy and the open market economy, as well as to fight corruption and terrorism.
- **Venezuela**
According to the State Department, Venezuela is a leading supplier of foreign oil to the U.S. and a major trans-shipment route for illegal drugs destined for the U.S., but is also in the midst of a democratic crisis. This measure would cut \$500,000 to strengthen democratic institutions and reform the judicial system of a country that is of major strategic importance to the U.S.
- **Barbados, St. Vincent and the Grenadines, and Trinidad and Tobago**
These Caribbean countries would lose ESF funds appropriated for the Third Border Initiative (a \$6 million project), which improves immigration systems and border security and also funds “disaster preparedness and coordination exercises.” Launched by President Bush after September 11, this initiative is meant to counter “illicit trafficking in persons, drugs, and firearms, potential terrorism, and other transnational criminal activities” that pose a direct threat to U.S. security. These three countries have also seen their military aid withheld over their support for the Court; Trinidad and Tobago in particular was a force behind the creation of the Court and has a judge currently serving on its bench.

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- **South Africa**

The State Department considers South Africa “a cornerstone of regional stability and the essential foundation for economic growth in southern Africa,” as well as a strong partner in fighting terrorism and international crime. The \$1.3 million that would be withheld under this measure is intended to improve South Africa’s ability to combat financial crime and counterfeiting, as well as “enhance trade and private sector development and promote human rights.” South Africa has already lost millions in U.S. military aid because it cannot legally sign one of these agreements. A strong supporter of the Court because of its own history with human rights abuses, South Africa has a judge currently serving on the Court.

- **Kenya**

The State Department has described Kenya as “the linchpin of East African stability and security.” Kenya has already lost millions of U.S. dollars in military financing and training aid. Nonetheless, the U.S. has relentlessly pushed Kenya since March of this year, when Kenya joined the ICC, to sign a BIA. The U.S. is threatening to cut the \$ 8 million that is slated for ESF to Kenya. These funds are intended to promote the economy, infrastructure, development projects, and political stability in Kenya. Given Kenya’s pledge to fight terrorism, its troops in Darfur, and its commitment to regional security, it is crucial that the U.S. respect Kenya’s obligations under the ICC and refrain from strong-arming Kenya into signing a BIA.

- **Nigeria**

Nigeria signed a BIA with the U.S. in June of 2003 but the Nigerian Senate has recently declared the agreement null and void and has asked the Nigerian President to rescind it. Should the agreement be renounced, Nigeria stands to lose \$5 million in ESF aid. This aid was intended to promote the development of democracy in Nigeria, including rule of law and human rights projects, promote economic stability, sustainable development, foster U.S. investment opportunities, and combat terrorism. If the U.S. withdraws its support to Nigeria, it risks alienating an African country that plays a key role in the region’s stability.

- **Africa Regional Fund**

Eight African democracies would be ineligible for assistance from this \$9.7 million fund meant to help “strengthen [African countries’] capabilities to impede the flow of terrorist finances, improve border and airport security, and improve judicial systems.” Affected countries include Benin, Democratic Republic of Congo, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania. These strategically important countries have already sacrificed their military assistance; further cutting funding from them will jeopardize U.S. interests in the region. For example, according to the State Department:

–“Niger is the poorest Muslim country on earth, and it is ringed by unstable neighbors making its territory difficult to police. Its impoverished people are a ready target for anti-Western extremists, but the Government of Niger considers extremism a threat and supports the coalition against terror.”

–“While small, Benin plays an outsized role both as an example of a functional democracy and a country with an increasingly free-market economy in a region struggling to make permanent progress in these important areas of U.S. interest.”

–Mali “is a model of democracy in the region” and has “been an active partner in the war against terrorism.”

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-Tanzania is “a vital partner in assuring the stability of East Africa. Having suffered an Al-Qaeda terrorist attack (the 1998 bombing of the U.S. Embassy in Dar es Salaam), Tanzania is a strong supporter of the war on terrorism.”

- **Safe Skies for Africa**

This \$3 million program helps improve aviation safety and security in select African countries, with the intention of fostering economic growth and combating terrorism, narcotics trafficking and weapons smuggling, while also doing more to keep airline passengers safe. Countries that would be affected include Namibia, Mali, and Tanzania; Benin, which is under consideration for inclusion in the program, would now be ineligible as well.