

Court Jesters: Remember the International Criminal Court? House Republicans Sure Do

By Mark Goldberg

September 1, 2004

The American Prospect Online

As America's reputation in the world dwindles to pathetic new lows, and with the United States seeking international support in Iraq and in the fight against terrorism, one might think this an inopportune moment to bait some of our closest foreign allies into unnecessary diplomatic rows. And yet, undeterred, Republican Representatives Tom DeLay and George Nethercutt teamed up on the House floor, and on July 15 they successfully pushed an amendment to the Foreign Operations Appropriations bill that would accomplish just that.

The "Nethercutt Amendment" would withhold economic assistance to America's NATO partners, as well as to some major non-NATO allies such as Jordan, South Africa, and Japan, until these countries sign what are known as "bilateral immunity agreements" (BIAs) that exempt U.S. nationals and foreign contractors from the jurisdiction of the International Criminal Court (ICC).

Based in The Hague, Netherlands, the ICC is the first permanent court capable of trying individuals accused of the most serious violations of international humanitarian and human-rights law, namely genocide, crimes against humanity, and war crimes. Fearful of the ICC's potential to encroach on U.S. sovereignty, the Bush administration and conservatives in Congress have tried to undermine the court ever since the treaty that created the court entered into force in the summer of 2002.

The Nethercutt Amendment, however, may be their most aggressive attempt to limit the court. The bill would use the threat of withholding aid from the State Department's Economic Support Fund to blackmail a bevy of U.S. allies into granting Americans immunity from prosecution before the ICC. So far, 92 countries have concluded a BIA with the United States, but there are holdouts. Under the Nethercutt Amendment, these countries would have their economic assistance stripped bare.

So, for example, the \$250 million Jordan is slated to receive in fiscal year 2005 to support a wide array of governance reforms -- and to reward that country for its continuing cooperation on Iraqi reconstruction efforts -- would be conditional upon Jordan's accession to a BIA.

Jordan, however, is unlikely to sign such an agreement. It has been highly committed to the court since its inception, and Jordan's Prince Zeid Ra'ad Zed al-Hussein is president of the ICC's governing body, the Assembly of State Parties. Like many other countries that adhere to the ICC, Jordan considers these immunity agreements illegal under the obligations set forth in the Rome Statute that created the court.

Furthermore, many ICC member states simply lack the political will to enter into a BIA with the United States. For example, many eastern European and Baltic countries see their future with the

European Union. They refuse to sign a BIA so as to curry favor with the rest of Europe, which strongly supports the court.

According to Citizens for Global Solutions, a Washington-based nonprofit that closely monitors the ICC, the Nethercutt Amendment would also jeopardize regional initiatives to combat drug trafficking and international organized crime, as it would slice \$8 million from a coordinated effort to reduce cocoa production and drug trafficking in Peru; \$9 million from the State Department's "third border initiative," which helps Caribbean countries combat drugs, arms, and human trafficking; and \$1 million used to help South Africa combat counterfeiting and financial crimes.

Insofar as the Nethercutt Amendment would force the United States to abandon some of its most strategic allies at this particularly vulnerable juncture in U.S. history, many foreign-policy heads have questioned its wisdom. As one prominent human-rights expert put it, "Is picking a gratuitous fight with our allies, at this moment, really worth it?"

George W. Bush, however, is convinced that Americans will be the targets of politically motivated prosecutions, and he has fought the ICC since taking office. This relatively new diplomatic posturing is simply the culmination of a long-standing Republican hostility to the court that's grown shriller ever since Bill Clinton signed the Rome Statute on December 31, 2000. In a letter to UN Secretary-General Kofi Annan in May 2002, the Bush administration formally signaled America's intent to "unsign" its name to the statute, a maneuver virtually unheard of in U.S. diplomatic history.

The following month, former Senator Jesse Helms introduced the American Servicemembers' Protection Act (ASPA), which is similar to the Nethercutt Amendment except that it only affects military aid. Additionally, ASPA includes broad exemptions for NATO partners and major non-NATO allies, as well as presidential authority to waive it on a country-by-country basis.

Since ASPA became law on August 3, 2002, Undersecretary of State for Arms Control and International Security John Bolton has led the administration's effort to secure as many BIAs as possible. Bolton, whom Helms praised during the undersecretary's confirmation hearing as "the kind of man with whom I'd want to stand at Armageddon," is known for his rebukes of treaties that might place strictures on U.S. sovereignty. To this end, Bolton's achievements include engineering the administration's withdrawal of the Anti-Ballistic Missile treaty; rejection of the Comprehensive Nuclear Test Ban Treaty, an increasingly hard-line approach to North Korea; and opposition to the inspection and verification requirements of the Biological Weapons Convention. (Bolton would not respond to repeated requests for an interview.)

Yet Bolton is perhaps most famous for his crusade against the ICC. Under the threat of withholding military aid, Bolton's negotiating team has strong-armed some 92 small countries into signing immunity agreements with the United States. Other allies that have refused to sign these agreements -- such as Brazil, Croatia, and Costa Rica -- have had their military aid stripped.

Sometimes this can be to awkward diplomatic effect. On July 1, 2003, the Bush administration suspended military assistance to Latvia for refusing to sign a BIA -- even though the country had joined the "coalition of the willing" well before the invasion of Iraq. As a result, for five months Latvian troops were supporting the U.S.-led occupation even as the United States halted military-assistance programs. Finally, in November 2003, Bush signed a waiver exempting Latvia from ASPA.

Many of the 201 House Republicans and 40 Democrats who voted for the Nethercutt Amendment are not staunch ideologues of the DeLay, Nethercutt, and Bolton variety. Rather, as one Democratic Hill staffer explained, "Most of the members who voted for this amendment weren't rabid ICC haters. They just bought into Nethercutt and DeLay's blatantly distorting rhetoric about the court."

During the floor debate on the amendment, DeLay took the opportunity to serve up the kind of red meat that would play well in certain constituencies, particularly in a time of war. After referring to the ICC as "Kofi Annan's kangaroo court," he warned his colleagues of what they might face in November if they voted against the amendment: "If you want to go home to your constituents and tell them that you think their tax dollars should go to foreign countries who allow American soldiers to be imprisoned and shipped off to Brussels without their constitutional rights, then by all means vote 'no' on the Nethercutt Amendment."

Despite DeLay's high-octane rhetoric, this bill has less to do with U.S. soldiers than it does with anti-UN election-year posturing. Status-of-force agreements and other bilateral arrangements already guarantee full U.S. jurisdiction over American personnel abroad. Furthermore, the ICC's own jurisdiction is highly limited; it defers investigations to a national court, even if that court decides not to prosecute.

Though the State Department officially opposes the Nethercutt Amendment as currently worded, it would support a version of the bill that gives the president the authority to exempt countries on a case-by-case basis. As this bill moves to the Senate, there is still a chance it will be killed in conference. Yet, as one Democratic congressional press secretary warned me, the State Department compromise raises the possibility that the amendment could still get sneaked into an omnibus spending package.

One thing is certain: This won't be the last time that the radical conservatives forsake better U.S. interests in their crusade against the ICC.

Mark Goldberg is a Prospect writing fellow.