

Rep. ESHOO (CA)_148 Cong Rec H 7189, October 08, 2002

Hence I would urge the Administration to make it clear to Saddam that in the event he continues to defy the will of the United Nations he will inevitably find himself in the docket before Nuremberg-like proceedings -- either the newly established International Criminal Court or perhaps an ad hoc tribunal -- for egregious violations of internationally recognized human rights and arms control conventions.

Potentates, whether petty or mighty, who through violation of international law attempt to take the world hostage must be held accountable.

Likewise, the U.S. and UN should make clear that if any individual in Iraq participates in usage or unleashing of a weapon of mass destruction, they also will be held accountable as war criminals.

Tragically, the United States has not been able to become a party to the new ICC, which will be the first permanent international court with jurisdiction to prosecute the most heinous individual violators of human rights -- genocide, war crimes, and crimes against humanity.

By background, the United Nations, many human rights organizations, and many U.S. allies have expressed support for the new court. The Administration, however, has renounced any U.S. obligations under the treaty.

Although the U.S. has valid concerns about the ICC -- chiefly that the ICC might become politicized and capriciously assert jurisdiction over U.S. soldiers or high officials charged with "war crimes" -- our belligerent opposition to the Court also carries obvious downside risks to American leadership.

America's well-deserved reputation as a champion for human rights and extension of the rule of law has been called in question. Our efforts to play hardball in the UN Security Council by threatening to withhold support for UN peacekeeping missions unless the U.S. is granted immunity from the ICC alienated friends and allies abroad. The withholding of military assistance to members of the ICC may be seen as an attempt to undermine the court and influence the decisions of other countries to join the ICC. By demanding special treatment in the form of immunity from the ICC, the United States is seen as bolstering the perception of its preference for a unilateral approach to world affairs and a determination to operate in the world exclusively on our own terms. As a result, U.S. efforts to build coalitions in support for the war against terrorism as well as the enforcement of UN resolutions against Iraq may have been impaired.

As an early advocate for the establishment of a permanent international criminal court based on balanced recognition of international statutes, I confess to being chagrined both at the inability of the international community to accommodate legitimate American concerns, and the all-or-nothing approach of our government that has left us without effective means to ensure that the ICC operates in ways that are consistent both with credible rule-of-law principles and with sensitivity to U.S. interests designed to advance democratic governance.

The problem is that as a great power called upon to intervene in areas of the world or disputes such as the Balkans, Afghanistan and troubled areas of the Middle East, the U.S. is vulnerable to charges being leveled against actions which we might

reasonably consider to be peacekeeping, but another power or government might charge to be something very different. For instance, what would happen if Serbia were to bring a case against an American naval pilot when such a pilot is operating under both a U.S. and NATO mandate? The President has suggested we should, exclusive of all other countries, be allowed to veto over applicability of international law with regard to the ICC. Many other countries, including strong U.S. allies, have angst about this demand because they see this approach as establishing the principle of one country being entitled to operate above the law.

This is not an irresolvable dilemma. When the ICC treaty was under negotiation, it was the assumption of many that the Security Council where all the permanent members have a veto would play a determinative role in bringing matters before the ICC. If such was the case, the United States because of its veto power within the Security Council could fully protect itself as could the other permanent members. Unfortunately, because the past administration played an ambivalent role in development of the treaty, it failed to get the nuances right. This common sense approach was not adopted and the Bush administration was put in the embarrassing position of objecting to an important treaty because of the failed diplomacy of its predecessor.

Based on discussions with European officials it is my understanding that there may be an inclination to seek a reasonable compromise on treaty language, even at this late date. It would appear to be an umbrage to many countries to craft a provision excluding the United States alone from ICC jurisdiction, but it would seem reasonable on a process basis to return to a Security Council role. On this basis the U.S. and the international community could be credibly protected.

The court would function as a treaty organization founded on state consent, while respecting Security Council authority to refer any matters affecting international peace and security to the court's jurisdiction. This approach has the advantage that it does not make a pure exception for the United States. Understandable concerns of some countries about inequitable protection of the nationals of permanent members of the Council would need to be balanced against the enhanced durability and legitimacy of the court. A protocol to the Treaty enjoining this approach should be actively pursued today.

Laws, to be effective, must constrain governments in their foreign policies as well as individuals in domestic acts. In order to hold governments accountable there must be individual accountability at the highest as well as lowest levels of society. Justice must be brought to the international frontier or life for too many will, in Hobbes' piercing phrase, continue to be "nasty, brutish, and short."