

OP-ED

The ICC under fire

By Victor Peskin and Eric Stover

THE Kenyan parliament's recent vote to withdraw from the International Criminal Court could undermine the trials of Kenya's president and deputy president. But even more alarming, the vote casts a shadow over the ICC's global mandate to effectively prosecute those responsible for state-sponsored atrocities.

Kenya's final decision on withdrawing from the court will rest with President Uhuru Kenyatta, whose trial is scheduled for November, and Deputy President William Ruto, whose trial began last week. Both men are charged with crimes against humanity in connection with their alleged role in massacres after the 2007 Kenyan elections. Both have said they are not guilty.

If Kenya follows through on its threat, it could potentially trigger withdrawals by other African members of the ICC, which have long been dissatisfied with what they see as the court's singular focus on African crimes. The ICC has opened formal investigations in eight African countries but none in other conflict zones — such as Afghanistan — that lie in the court's jurisdiction. Even though 34 African countries have ratified the ICC's statute, many African leaders now see the 11-year-old court as anti-African.

At Kenyatta and Ruto's inauguration in April, Ugandan President Yoweri Museveni, who a decade earlier referred the first case to the ICC, congratulated Ken-

yans for their courage in electing the two ICC indictees and chastised the West for using the court "to install leaders of their choice in Africa and eliminate the ones they do not like." Weeks later, Ethiopian Prime Minister Hailemariam Desalegn accused the ICC of racist bias and "hunting Africans."

If Kenya and other African states head for the exit, it would deal a severe blow to the ICC. Member states provide funding and logistical support and serve to legitimize the ICC's campaign for

In prosecuting two Kenyan leaders, the court risks losing African support.

universal membership. Moreover, without a police force of its own, the ICC is at the mercy of states to provide safe access to crime scenes, protect witnesses and arrest and hand over fugitives.

That Kenyatta and Ruto are using every means at their disposal to evade accountability is nothing new. Over the last two decades, international indictees have developed ingenious strategies to avoid arrest and obstruct justice. But Kenyatta and Ruto have taken the obstruction of international justice to a new level.

On the one hand, they have honored ICC summonses and appeared for pretrial hearings. On the other, both have launched a multi-pronged offensive to undermine the ICC as an institution.

The court's chief prosecutor, Fatou Bensouda, alleges that the scale of interference with witnesses in the Kenyan cases has been "unprecedented." Over the last year, relatives of witnesses have been continuously approached with bribes and threats intended to motivate disclosure of witnesses' whereabouts. And in recent weeks, several key witnesses in the Ruto case have said they will not testify against the Kenyan leaders, citing family pressures and security concerns.

Kenyatta and Ruto have also deftly exploited their ICC indictments to rally nationalist sentiment. In the months before the hotly contested presidential election this year, Kenyatta, whose father led Kenya's independence movement and was the country's first president, portrayed the ICC as a tool of Western governments. U.S. diplomat Johnnie Carson, anticipating a potential Kenyatta victory, added fuel to the fire by warning Kenyan voters that "choices have consequences." That warning backfired as pro-Kenyatta surrogates-cum-pundits seized the opportunity to question American motives at this critical juncture in Kenya's history.

Beyond Kenya's borders, the ICC indictees have sought and received the support of their African counterparts. At an African Union summit in the spring, African leaders called on the ICC to refer the cases against Kenyatta and Ruto to a Kenyan court, a move ICC judges later rejected, citing security concerns for witnesses.

For its part, Kenya has been generous with its support for Su-

danese leader and ICC fugitive Omar Hassan Ahmed Bashir. At a 2009 African Union summit in Libya, Kenya voted for a resolution calling on AU states not to cooperate with the ICC's efforts to prosecute Bashir and criticizing the "publicity-seeking approach" of the ICC chief prosecutor. A year later, Nairobi further flouted the ICC's authority by hosting the indicted Sudanese president at a high-profile celebration of the new Kenyan Constitution. In response to a hail of criticism, a Kenyan government spokesman said that Bashir was "a state guest. You do not harm or embarrass your guest. That is not African."

The ICC is made by states and can just as easily be unmade by states. Yet the ICC does exercise some control over whether Kenya and other African states head for the court's departure gate. A key question is whether the prosecution can rebound from a string of botched investigations that have damaged the court's reputation. A weak prosecution case against Kenyatta and Ruto could further their specious rhetoric that the international court is bent on undermining African sovereignty.

In the months ahead, the ICC — perhaps as much as the Kenyan leaders themselves — will be on trial in the court of international public opinion.

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Bait-and-switch on Syria

JONAH GOLDBERG

CHEMICAL weapons are evil, but you could also say they're cursed. They have a talismanic power to bend and distort U.S. foreign policy. You can ask George W. Bush or Barack Obama.

In 2003, then-Deputy Defense Secretary Paul Wolfowitz gave a lengthy interview to Vanity Fair that caused a huge uproar, largely because the magazine shamefully distorted what he was trying to say. Wolfowitz explained that within the Bush administration there were a lot of arguments for why we should invade Iraq. Some had to do with the fact that Saddam Hussein was a state supporter of terrorism. Some had to do with how Hussein treated his own people. Others emphasized alleged links between the regime and 9/11. And so on.

Each of these arguments had proponents and opponents, Wolfowitz explained. The result was that "we settled on the one issue that everyone could agree on": weapons of mass destruction.

The problem with focusing solely on a single issue turned out to be disastrous for the administration, given that the WMD never materialized. It should have been clear to everyone that few important decisions in life boil down to a single issue.

Something similar has happened to the Obama administration.

"I'm less concerned about style points; I'm much more concerned about getting the policy right," President Obama told ABC's George Stephanopoulos on Sunday, in response to the widespread criticism that his foreign policy has been a hot mess of late.

It's a fair point, even if a bit hypocritical for a president who goes by the moniker "No Drama Obama."

The last few weeks have had more drama than a "Desperate Housewives" franchise during sweeps week. Still, if in some Mr. Magoo-like way the administration has blindly blundered into a policy victory, that's preferable to smoothly sticking the landing on a policy failure.

The question, however, is: What policy?

In his ABC interview, the president repeatedly said that his goal is to do something about chemical weapons: "And what I've said consistently throughout is that the chemical weapons issue is a problem. I want that problem dealt with."

"That's my goal," he declared. "And if that goal is achieved, then it sounds to me like we did something right."

That is a huge bait-and-switch.

Until the Aug. 21 chemical weapons attack in the Damascus suburbs, the administration was not primarily concerned with chemical weapons. It was concerned with doing whatever it could — short of intervening militarily — to see to it that Bashar Assad either step down or be forced out. In 2011, Obama said: "For the sake of the Syrian people, the time has come for President Assad to step aside." And, a year later: "I have indicated repeatedly that President al-Assad has lost legitimacy, that he needs to step down." And last May at a news conference with the Turkish prime minister: "We both agree that Assad needs to go.... That is the only way we're going to resolve this crisis. And we're going to keep working for a Syria that is free from Assad's tyranny."

That goal is now dead. The Russian deal Obama just agreed to amounts to a huge boon to Assad in that it brings him into the so-called international community America has spent the last two years trying to kick him out of. This "represents an astonishing victory for the Assad regime," writes Bloomberg's Jeffrey Goldberg (no relation). So long as Assad only massacres his own people — including children — with old-fashioned weapons, he's immune to international force. Worse, Assad is now our partner because getting his WMD is now more important than getting rid of him. We've gone from siding with the rebels to acting like a boxing ref with no investment in who wins so long as neither side strikes any low blows.

Obviously, in reality, the president's short-term goal was to avoid getting into an unpopular war precipitated by his own ill-considered statements or being humiliated by a congressional no vote precipitated by his decision to punt the issue to Capitol Hill. But what made that goal achievable was the curse of chemical weapons.

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Amending congressional pay

A lone campaigner revived a 200-year-old proposal and got it passed.

By Jesse Rifkin

REGORY Watson's college essay received a C — and changed America.

The next time someone goes on about how one citizen can't make a difference in this country or how the political system cannot be changed, tell them the story of Watson and the 27th Amendment. On Constitution Day, Sept. 17, the power of the individual citizen in America is not dead.

In 1982, a University of Texas political science professor assigned an essay about the governmental process. Watson, then a student, came across a long-forgotten constitutional amendment proposed in 1789 and chose that topic for his paper.

Rep. (and future president) James Madison had proposed that any pay increase Congress voted for itself would not take effect until after the next election. That way, current representatives could not vote themselves a self-serving immediate pay raise, and would have to risk that any vote for a raise could benefit successors who might be ideological or political rivals.

Watson, now a policy analyst for GOP Texas state Rep. Bill Cal-

legari, thinks the founders were right to be concerned, giving a modern-era example.

"Congress in December 1981 had given itself a unique tax break applicable only to members of Congress and tried to hide it in a bill to address the needs of persons in the coal mining industry who became afflicted with black lung disease," Watson told me in an interview. "In my mind, that was nothing more than a backdoor pay raise for members of Congress."

Though Congress passed Madison's amendment, it failed to achieve the required ratification from three-quarters of state legislatures to become law. Watson felt that recent events merited reconsideration of the amendment, yet his essay earned a C.

"Both the [teaching assistant] and the professor took the position that the issue was trivial, so trivial in fact that to them it was a nonissue," Watson recalled. "Both also took the position that what was then a 192-year-old proposed constitutional amendment was no longer pending before the state legislatures."

Watson's solution: Make it a live issue before state legislatures.

Over the next decade, Watson embarked on a one-man mission to revive moribund state ratifications, raising awareness coast to coast and stoking anti-Congress public sentiment. Starting in Maine in April 1983 and ending in Michigan in May 1992, Watson slowly resuscitated the proposal

almost single-handedly.

"I was the one who did all of the letter writing, faxing and telephone calling to the state lawmakers," Watson said. "In many cases, I even went so far as to supply the state legislators with a draft model resolution to use in their state in order to accomplish ratification."

The 27th Amendment, proposed in September 1789, was ratified by the last state needed in May 1992. No other constitutional amendments have passed since.

With modern political polarization at unprecedented levels, could a constitutional amendment ever occur again?

"Yes," Watson said, "because if a proposal is very, very, very common sense ... state lawmakers in both parties in the state capitals will realize that the American people — and the voters in their particular state — would want them to support it."

"The problem," he acknowledged, "is getting it out of Congress and over to the states."

Watson believes a more likely scenario is the one set forth in a provision in Article V of the Constitution, under which three-quarters of states ratify first, triggering Congress to follow. No amendment has ever passed this way, but with Congress solidly gridlocked, there's a first time for everything. "Congress refuses to send to the states for ratification even the most common-sense proposals for amending the U.S. Constitution," Watson said.

Watson sees contemporary

amendment proposals worth considering, citing a proposal introduced in August by Reps. Ron DeSantis (R-Fla.) and Matt Salmon (R-Ariz.). It would "stop Congress from arrogantly exempting itself from the laws that it deems fit to impose upon the rest of the American people," Watson explained.

Watson's story exemplifies the power of one ordinary individual to effect change at the highest government levels — perhaps a uniquely American ideal. The 27th Amendment curtailed congressional pay raises; since its 1992 passage, congressional pay has increased 34.4% (and has remained unchanged since 2009) relative to 67.1% inflation. By contrast, congressional pay had skyrocketed 44.7% in the five years before passage of the amendment.

In an era in which many Americans feel their voices go unheard at the highest levels of public policy decision-making, Watson is the opposite of disillusioned. "Back then, I was dependent on communicating via U.S. Postal Service — and at considerable monetary expense, to say nothing about how laborious and time-consuming the process was," Watson said. "Today, by contrast ... an entire state's lawmakers could be communicated with through email at the mere click of a mouse."

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