ICC regrets collapse of Kenyan cases, hopes they will be revived

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The International Criminal Court (ICC) prosecution has finally expressed its regrets on the Kenyan cases that collapsed before full trial at the court and is now longing for a future Kenyan regime that will fully cooperate with it to revive the cases.

In a candid conversation on the sidelines of an international justice symposium in Arusha earlier this week, ICC’s Senior Trial Lawyer Anton Steynberg admitted to lapses in prosecutorial strategy that contributed to collapse of the cases.

Cooperate with prosecution

Steynberg, who faced both President Uhuru Kenyatta and Deputy President William Ruto in the ICC courtroom in the sunset days of their cases was however clear that the cases were weakened the most by “direct attack” on prosecution witnesses and the failure of the Kenyan State to genuinely cooperate with the prosecution.

“Our cases were weakened to such a situation as we didn’t think, in our right conscience, that we could proceed with them as it were. It is said the arc of the moral universe is long but it bends towards justice. Who knows, the next regime may be much more cooperative, or the next after the next,” he said. “I am not about to retire...I can wait.”

The symposium was theme was Fighting impunity in East Africa: Ensuring accountability for international and transnational organised crimes was sponsored by Wayamo Foundation. It featured presentations from among others former Chief Justice of Tanzania Mohamed Chande Othman, Kenyan Supreme Court Judge Isaac Lenaola, Kenya’s Deputy Director of Public Prosecutions, Nicholas Mutuku, among other senior international legal minds.

The Kenya case was exceptional. “The fact that they were able to turn it around into a positive and win top elective posts was beyond us. Together with other efforts, their unity and the residual fears of prosecution contributed to a peaceful general election in Kenya in 2013,” Steynberg told reporters.

He said the prosecution experience on Kenyan cases had led to change in policy of Office of The Prosecutor (OTP) with regard to investigations. Whereas little investigations had been done by the time OTP requested for summonses/arrest of the first six suspects and more was done after, this will not be the case in the future. The new strategy is to make the most of the investigations prior to the applications and then fill the gaps in between the applications, confirmations and trial.

Deployed more resources

“Perhaps at that stage (Ocampo Six stage) we should have done more. At that time, they were not in charge of the Government. We could have deployed more resources and minimised the risks for our witnesses. With benefit of hindsight and now wiser, a lot of things could have been done differently,” he admitted.

Mark Kersten of Munk School of Global Affairs, University of Toronto termed as “absolute tragedy” the post-cases collapse blame-games between the ICC, civil society and governments “with zero-interest on the plight of the victims.”

“The ICC used to be a child and acted as much (at the beginning of the Kenyan cases). It is now a teenager. The prosecution now appears more willing to learn and engage and now more than ever they desire a functioning court which can achieve the ends of justice,” Kersten said.

Brenda Hollis who prosecuted at the International Criminal Trials for the former Yugoslavia talked about the importance of a well-resourced and balanced outreach to beat powerful propaganda machines. In the Kenyan situation and for the longest, ICC relied on a one-woman-outreach mission from the ICC’s registry department led by Mariah Kamara which was assailed by heavy propaganda spewed by both the State and supporters of the accused.

“We have learned our lessons on this. Even for you in the media, you admit, you were out-resourced, outsmarted and out-maneuvered by publicity companies working at the behest of the accused persons,” Steynberg said. “We are now able to explain ourselves much better.”