ICTR-98-44-T
03-03-2009
(45298-45279)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 3 March 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S SEVENTH RULE 66(B) MOTION:
SELECTIVE PROSECUTION DOCUMENTS

The Office of the Prosecutor:
Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:
Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:
Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera hereby moves, pursuant to Rule 66(B), for an order directing the prosecution to allow him to inspect the following items which are material to the preparation of his defence:

(A) all documents from the prosecution disseminated to the government of Rwanda, United Nations, or any of its member States, non-governmental organizations, or any other ICTR organs, in which it has explained reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994; and

(B) all memoranda in the possession of the prosecution which includes reasons for not prosecuting members of the RPF or RPA for crimes in Rwanda in 1994.

2. In August 2008, Mr. Nzirorera sought inspection of these same documents to support a Motion to Dismiss on the grounds of selective prosecution.[1]

3. The Trial Chamber rejected this motion on the grounds that since dismissal of an indictment is an *unavailable remedy* to a claim of selective prosecution, disclosure of documents establishing selective prosecution was not material to the defence of Mr. Nzirorera.[2]

4. Mr. Nzirorera now seeks disclosure of the documents on a different ground—as material to his defence that he should receive a reduction of sentence if convicted on the grounds that his rights under the ICTR Statute have been violated as a result of selective prosecution. He contends that such a reduction is an available, and appropriate remedy, for violation of his rights.

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[1] *Prosecutor v. Karemera et al*, No. ICTR-98-44-T, *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (19 August 2008)
[2] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (21 November 2008)

5. Mr. Nzirorera intends to present the evidence developed through this disclosure during the phase of the trial when he is given the opportunity to present evidence relevant to sentencing. Rule 85(A) provides that:

> Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
>
> (i) evidence for the prosecution
> (ii) evidence for the defence
> (iii) Prosecution evidence in rebuttal
> (iv) Defence evidence in rejoinder
> (v) Evidence ordered by the Trial Chamber pursuant to Rule 98
> (vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

6. Disclosure of the information relevant to a claim of selective prosecution is necessary at this time so that Mr. Nzirorera can use the information in phase (vi) of the trial.

7. Article 20(1) of the Statute provides that "all persons shall be equal before the International Tribunal for Rwanda." In the *Ndindiliyimana* case, the Trial Chamber held that selective prosecution, if made out, violates Article 20(1).[3]

8. The Appeals Chamber has held that "all violations demand a remedy".[4] While the Trial Chamber has held that dismissal of the indictment is not an available remedy for a violation of Article 20(1) through selective prosecution, Mr. Nzirorera may be entitled to the remedy of a reduction of sentence if convicted.

9. The ICTR has granted such a remedy in similar circumstances.

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[3] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-I, *Decision on Urgent Oral Motion for a Stay of the Indictment or in the Alternative a Reference to the Security Council* (26 March 2004) at paras 23 and 24

[4] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision on Prosecutor's Request for Review or Reconsideration* (31 March 2000) at para 74

10. In *Prosecutor v Barayagwiza*, the Appeals Chamber ordered a remedy to be fixed at the time of judgement for the violation of the accused's right to be charged promptly, right to prompt initial appearance and right to challenge the legality of his initial appearance.[5]

11. In *Kajelijeli v Prosecutor*, the Appeals Chamber ordered a sentence reduction for the violation of the accused's right to be informed of charges promptly, right to appear before a Judge after arrest, and right to prompt initial appearance.[6]

12. In *Prosecutor v Semanza*, the Appeals Chamber ordered a remedy to be fixed at the time of judgment for the violation of the accused's right to be informed promptly of the charges against him.[7]

13. These cases support the finding that, where an accused's rights are violated and dismissal of his indictment is a disproportionate remedy, a reduction of sentence may be ordered.

14. In support of his application for disclosure of information which is material to the selective prosecution issue, Mr. Nzirorera incorporates by reference the arguments presented in *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents*[8] and *Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution.*[9]

15. In addition, Mr. Nzirorera presents the following evidence of RPF crimes to demonstrate that persons similarly situated to him have not been prosecuted:

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[5] *Barayagwiza v Prosecutor*, No. ICTR-97-19-AR72, *Decision on Prosecutor's Request for Review or Reconsideration* (31 March 2000) at para 75.
[6] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para 320.
[7] *Prosecutor v Semanza*, No. ICTR-97-20-A, *Judgement* (31 May 2000) at paras 127-30.
[8] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (19 August 2008)
[9] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Reply Brief: Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (25 August 2008)

16. Human Rights Watch has reported that during the course of combat and in the more lengthy process of establishing control throughout the country, RPF soldiers killed thousands of civilians. The exact number is estimated at between 25,000[10] and 100,000 people.[11]

17. In 1994, a UN Commission of Experts confirmed that serious violations of international criminal law and international humanitarian law had been committed by individuals on both sides of the conflict.[12]

18. In 1998, the Organisation for African Unity commissioned the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events. After its investigation, the panel published a report entitled *Rwanda: the Preventable Genocide*, which produced evidence implicating RPF officials in mass human rights violations.[13]

19. The report also included 'profoundly troubling accusations' of genocide made by former RPF Minister of Interior, Seth Sendashonga:

> "Seth Sendashonga who became RPF Minister of the Interior and was therefore privy to the most sensitive secrets, was one of the two Hutu "political heavyweights" in the government. He was also responsible for liaison between these moderate Hutu and the RPF. Sendashonga apparently wrote a series of memoranda to Vice-President Kagame about the killings and disappearances and the resulting disaffection among those prepared to collaborate with the regime to form a new Rwanda based on national instead of ethnic loyalties the ostensible goal of the RPF. Along with the RPF's chairman, Sendashonga also met with the protesters and the two promised to convey their concerns to Kagame. The Vice-President, however, was allegedly unmoved.

It is necessary to know that Sendashonga made these accusations after he had fled

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[10] Alison Des Forges *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch, New York, 1999) at ch 20

[11] Gerard Prunier *The Rwanda Crisis: History of a Genocide 1959-1994 (revised edition)* (Burst and Company, London, 1997) at p 360 - 362

[12] *Final Report of the Commission of Experts established pursuant to Security Council resolution* 935 GEN, 49th sess, UN Doc S/1994/1405 (1994) at p 1

[13] International Panel of Eminent Personalities, *Rwanda: the Preventable Genocide* (OAU, Kigali, 2000)

> to exile in Nairobi in mid-1995 and had become a full- fledged opponent of the government. A first attempt to assassinate him was botched the following February, although his nephew was wounded; an armed Rwandan diplomat was arrested nearby. He was killed on the second try two years later. Although there is no concrete proof his murder was an attempt to shut him up, Sendashonga himself had no doubts. He knew too much, he told a British journalist about a "deliberate policy of ethnic cleansing," an attempt at "social engineering on a vast, murderous scale." The purpose was nothing less than "to even up the population figures. Look at the Rwandan equation. How can a minority tribe of one-plus million govern a country dominated by a tribe of enemies who outnumber them three to one? They want to make it Hutu 50 per cent, Tutsi 50 per cent. But to do that they will have to kill a lot of Hutu."[14]

20. In the face of the evidence presented here and elsewhere, the Tribunal has still not prosecuted a single RPF member or a single Tutsi.

21. The Prosecutor cannot credibly contend that he intends to prosecute RPF members or Tutsi at this stage of the life of the Tribunal, when the institution is in the process of shutting down.

22. The Prosecutor's inaction has only confirmed what former Prosecutor Carla del Ponte, and her spokesperson, Florence Hartmann, have stated. The decision not to prosecute RPF crimes is a political one, resulting from pressure brought against the ICTR Office of the Prosecutor by the United States and Rwanda. [15]

23. In her memoir, Carla Del Ponte refers to several meetings in May 2003, where she was put under enormous political pressure by Rwandan authorities and the United States Ambassador for War Crimes not to prosecute RPF crimes. When Del Ponte

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[14] International Panel of Eminent Personalities, *Rwanda: the Preventable Genocide* (OAU, Kigali, 2000) at para 22.22

[15] Del Ponte, *Madame Prosecutor,* pp. 223-41; Hartmann, *Peace and Punishment*, pp 261-76. A copy of the relevant portions of Del Ponte's book is attached as Annex "A".

refused, Rwanda and the United States successfully lobbied the UN Security Council for her removal as Prosecutor of the ICTR.[16]

24. This motion seeks disclosure.. Transparency, not secrecy, is required when serious allegations of selective prosecution are made. As former ICTR Prosecutor Luc Cote notes:

> It is not the political dimension of these decisions that is cause for concern. After all, is not the exercise of any discretionary power inherently a political act? What is really disturbing is their occult or secret nature. Their concealed practice based upon unknown criteria gives rise to criticism and casts doubt on their legitimacy and impartiality. Here we have to distinguish between the political dimensions of a decision from the political pressures exercised on a person who is making a decision. The former political component, which characterizes the exercise of prosecutorial discretion, may be acceptable while the latter is highly objectionable as it challenges the Independence not only of the Prosecutor but of the whole judicial institution. The international criminal tribunal, which has a mandate to examine armed conflicts of a political and/or ethnic nature where suspicion prevails and which needs to rapidly establish its credibility and independence, must exercise its powers in the most transparent way.
>
> [...]
>
> The case of the ICTR raised even more concerns insofar as all of those accused were from the same group (or associated with it), while crimes were committed on both sides of the conflict [...] Beyond the appearance of bias raised by this issue, that situation also challenges the image of independence of the Prosecutor. [17]

25. Absent disclosure and full consideration of the issue of selective prosecution, the legacy of the Tribunal will be stained by the perception that this is a victor's court. While the Prosecutor bears the responsibility for the charging decisions, the Trial Chamber has the ultimate responsibility to ensure that those decisions are not the product of political or ethnic criteria. The Trial Chamber can begin to exercise that responsibility

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[16] Del Ponte, *Madame Prosecutor*, pp. 231-4 and 236-9.
[17] Luc Cote "Exercise of Prosecutorial Discretion in International Criminal Law" (2005) 3 JICL 162, at p 171 , 177

by ordering disclosure of the documents which would reveal the reasons for the political and ethnic disparity among those charged.

26. It is therefore respectfully requested that the Trial Chamber order the prosecution to disclose the documents listed in paragraph 1 as material to the sentencing of Mr. Nzirorera if convicted.[18]

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

[18] The assistance of legal intern Sam Holden of New Zealand in the research and drafting of this motion is gratefully acknowledged.

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ANNEX "A"

MADAME PROSECUTOR

Confrontations with Humanity's Worst Criminals and the Culture of Impunity

A MEMOIR

CARLA DEL PONTE
with CHUCK SUDETIC

OTHER PRESS
NEW YORK

9

CONFRONTING KIGALI

2002 AND 2003

On April 2, 2002, six years after it had detained Théoneste Bagosora, the Rwanda tribunal opened his trial, the trial of accused *génocidaires* from the Rwandan military. This was the Rwanda tribunal's highest-profile media event, just as the Milošević trial was the Yugoslavia tribunal's. Colonel Bagosora had allegedly assumed de facto control of military and political decision making in Rwanda after surface-to-air missiles blew up the airplane carrying President Juvénal Habyarimana on the evening of April 6, 1994. The genocide began almost immediately. Unfortunately, on the day the trial opened, Bagosora and his three co-defendants refused to step outside their cells in protest, because their defense counsel had not received French translations of an expert report prepared for the prosecution and statements by prosecution witnesses. The judges allowed the prosecution to make its opening statement, but ruled out having the tribunal's security personnel bring Bagosora and the other three defendants to the dock.

"These four men are among the principal perpetrators of the genocide," I said in my prefatory remarks before the court. "Who is responsible for close to a million deaths in a few months? Who is responsible for all the other victims, mutilated, tortured, raped, left for dead?" The indictment alleged that Bagosora and the other commanders on trial were part of a group of senior Hutu officers who had, for several years, planned the systematic extermination of the Tutsis and moderate Hutus in order to secure the Hutu extremists' political dominance of the country. The indictment alleged that Bagosora was so opposed to peace talks with the Tutsi leadership in 1993 that he left one negotiating session saying he was returning to Rwanda to "prepare the apocalypse."

It would seem illogical that Rwanda's Tutsi leaders, the leaders of the community that had suffered the genocide, would want to stymie criminal

proceedings against accused Hutu *génocidaires* like Bagosora. In early June 2002, however, Rwanda's Tutsi-dominated government introduced new travel regulations for the country's citizens, and these new rules were implemented for at least one reason that had nothing to do with regulating the movement of Rwandans in general. Kigali, of course, denied this, but it had imposed these regulations, at least in part, to restrict the movement of witnesses traveling from Rwanda to the tribunal in Arusha to testify. Despite repeated requests, the Rwandan government refused to authorize the temporary transfer of a number of detained witnesses whose testimony was crucial to prosecuting genocide cases. On June 26, the judges adjourned until August the trial of Rwanda's former information minister, Eliezer Niyitegeka, because no prosecution witnesses had turned up. After six aborted hearings in two weeks, on June 27, the judges adjourned until October the tribunal's largest trial, which involved six Hutu defendants facing charges related to massacres of Tutsis at Butare. Again, none of the prosecution witnesses had arrived from Rwanda. And soon, the "media" trial involving Jean-Bosco Barayagwiza, the defendant who had almost walked free on a procedural question in 1999, would be in jeopardy.

The Tutsi-dominated Rwandan government was effectively blackmailing the tribunal, sabotaging its trials of accused Hutu *génocidaires* in order to halt the Office of the Prosecutor's Special Investigation of crimes allegedly committed by the Tutsi-dominated Rwandan Patriotic Front (RPF) in 1994. By now, Rwanda's military prosecutor, having provided the prosecution nothing, seemed to be hiding from us. The authorities brought genocide survivors into Kigali's streets to protest that the tribunal's progress was too slow, that suspected *génocidaires* were working for the tribunal as defense investigators and in other capacities, and that judges had allowed defense counsel to demean witnesses, including Tutsi rape victims, in open court. Some of these complaints were not without merit, but halting the genocide trials was the Rwandan government's objective, so long as there was a possibility that the tribunal would indict Tutsi leaders and army officers. The motive, it seemed, was preserving the Tutsi regime's legitimacy and, by extension, the rule of President Paul Kagame.

On Friday June 28, 2002, my team members and I went to the presidential compound in Kigali in an attempt to resolve this problem with Kagame. He kept us waiting for twenty minutes, I'm sure to make a point, and on this occasion he made no attempt at false modesty. The venue was a spacious salon decorated in a rococo kitsch worthy of Louis XV. At one end of the room, Kagame had placed himself on a golden chair, like a throne, with a Rwandan flag draped behind. "Why this ostentation?" I thought. "Why this overcompensation, with all the misery in Rwanda?" To Kagame's side sat Gerard Gahima, Rwanda's prosecutor general; Martin Ngoga, Rwanda's eyes and ears in Arusha; and a number of Rwandan army officers. I took a seat, stage-left as I recall. After Kagame and I had exchanged compliments, the substantive discussion began. Once again, I informed Kagame that we needed the files of the military prosecutor's investigations of the killings of the archbishop and the other clergymen and other alleged atrocities committed by the RPF in 1994. I confess that I am sometimes too blunt. I admit that at times I can be gruff. But on this occasion, I was reserved to a fault, almost reticent. It was President Kagame who launched into a diatribe.

"No," he declared. "Absolutely not." He instructed me that the tribunal must not investigate the Tutsi militia, the militia he had commanded, the militia that had metamorphosed into Rwanda's army.

"You are destroying Rwanda," Kagame charged. "You must investigate and prosecute the genocide. You haven't gotten Kabuga, go and get him. Don't look into the military. We have done this, and we will do this."

By now, he was fuming: "You will disrupt the reconstruction of the nation. . . . I'm rebuilding this country. . . . I have to maintain internal order. . . . If you investigate, people will believe there were two genocides. . . . All we did was liberate Rwanda."

I tried to interrupt. I tried to explain to President Kagame that our initial request was relatively modest: the investigation of the murders, by members of the RPF, of an archbishop, two bishops, nine priests, and three girls. The RPF had even admitted to the killings. We needed only the facts, the names, the witnesses, the evidence. President Kagame interrupted me, just as Yugoslavia's President Koštunica had done during our first encounter. It was as if Kagame was dispatching orders: "You misunderstood what I told you before. Now I'm telling you what we are doing. Don't touch. . . . Stop the investigation. . . . We know what you are doing. . . . We will not allow you to do this. It is damaging our country. It is possible that soldiers have committed crimes. But we have punished these soldiers. And we will do it."

Then Kagame, clearly alluding to Bruguière's inquiry into the 1994 assassination of Rwanda's president, raised well-known allegations that the French army, whose personnel certainly did not perform admirably

in Rwanda at all times during 1994, had intentionally abetted the slaughter. "France was involved in the genocide," Kagame insisted. "Go and investigate the French participation in the genocide."

"You give me the evidence," I replied, "and I'm ready to do it. But I'm not going to do anything based upon your baseless accusations. Give me evidence."

I was incensed. The heat of Kagame's accusations stunned aides on both sides of the room. Gerard Gahima was aghast. Laurent Walpen stared through the window. I notified Kagame that I would continue the Special Investigation. I told him I would report Rwanda's failure to cooperate to the United Nations Security Council. And, with that, the last conversation I ever had with Kagame came to an abrupt close. I refused even to consider answering questions from journalists. This was a mistake. I should have exploited the opportunity to explain to the world how Rwanda's government was obstructing justice in order to blackmail the tribunal to drop an investigation of these men who had become the country's political and military elite.

I departed Kigali pursued by a nagging realization that Rwanda's cycle of impunity, which had emerged from colonial times and produced numerous massacres and one certified instance of genocide, would continue to turn. The Rwanda tribunal, it seemed, was going to administer nothing more than victor's justice. Hundreds of thousands of armed exiled Hutus were clamoring for a return to their native land, just as Kagame's Tutsis had done before April 1994; it seemed inevitable that sooner or later the horrors would return. I was concerned that the United Nations Security Council would do nothing of any consequence in reaction to President Kagame's announced refusal to cooperate with the tribunal and Rwanda's campaign to frustrate the tribunal's work. Only Bruguière's investigation, I thought, could do something significant to break the pattern of impunity. I could only conclude either that Kagame feared he would be indicted or that Rwandan military officers, including men who felt vulnerable to the tribunal's Special Investigation and Bruguière's inquiry, had threatened to overthrow Kagame if he ordered the government to cooperate with these investigations. Rumors of a coup wafted through the capital. International pressure had forced Rwanda to sign a peace treaty and withdraw most of its troops from the neighboring Democratic Republic of Congo, so there were plenty of available men with guns, and over many of their heads hung the question of accountability for atrocities committed in Congo after the 1994 genocide.

On July 23, I went before the United Nations Security Council and reported that the Rwandan government was intentionally hindering the progress of the genocide trials in Arusha as a way of pressuring me to halt the investigations of crimes the Tutsi-dominated RPF had allegedly committed while Hutus were engaged in the genocide:

> Powerful elements within Rwanda strongly oppose the investigation of the Prosecutor, in the execution of the [Rwanda Tribunal's] mandate, of crimes allegedly committed by members of the Rwandan Patriotic [Front] in 1994. Despite assurances given by President Kagame to the Prosecutor in the past, no concrete assistance has been provided in response to repeated request[s] regarding these investigations. Currently, there is no genuine political will on the part of the Rwandan Authorities to provide assistance in an area of work that they interpret to be political in nature, when, obviously, the Prosecutor limits herself to the technical implementation of her judicial mandate.
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> In these circumstances, the Prosecutor is effectively unable, at this stage, to achieve the investigation of crimes alleged to have been committed by the Rwandan Patriotic [Front] in 1994.

The tribunal's president, Judge Navanethem Pillay of South Africa, formally reported Rwanda's failure to fulfill its obligation to cooperate. The United States and other countries privately pressed Kigali to resume cooperation, which the tribunal appreciated greatly, because, even before the Rwandan genocide, even while they were refugees in Uganda, Kagame and the Tutsi leadership had looked to the United States and Great Britain as its main allies outside of Africa. The director of Human Rights Watch, Ken Roth, wrote the president of the Security Council, United States Ambassador John Negroponte, urging action to enable the tribunal to prosecute those persons on all sides of the Rwandan conflict who were accused of the gravest crimes committed in 1994. Roth explained why the Rwandan government in 2002 could not be trusted to investigate and prosecute persons who had been, in 1994, ranking members of the RPF:

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The Rwandan government suggests that the tribunal should try only cases of genocide and leave prosecution of [RPF] crimes to Rwandan courts. It asserts that these courts have tried, convicted, and punished [RPF] members who committed abuses. But the trials have been few and the penalties of those convicted have been light. Only one senior officer, a major, has been tried for massacres committed in 1994. Convicted by court martial in January 1998 after confessing to having ordered the slaughter of more than thirty civilians, he was sentenced to life in prison, but he successfully appealed his sentence and was freed soon after. By June 1998 five others had been convicted of capital offenses committed in 1994, but four were privates and one a corporal, and all received light sentences. The corporal, convicted of having killed fifteen civilians, was punished by only two years in prison.

Most Rwandans know nothing of these [RPF] trials or discount their importance because of the small number and light penalties involved. Victims of [RPF] abuses in 1994, their families, and many other Rwandans continue to demand justice for these crimes.

The Rwandan government has just launched an innovative popular justice program called [*gacaca*] courts, with the stated purpose of delivering justice and contributing to reconciliation. Although the law establishing these new jurisdictions mandates them to try crimes against humanity and war crimes, Rwandan government authorities have made it clear from the start that these popular courts are to deal only with accusations of genocide. Despite such clear orders, Rwandans continue asking [*gacaca*] courts to list those killed by [RPF] soldiers among the victims of 1994 and they ask that these local courts bring implicated [RPF] soldiers to justice. So far their requests have been in vain.

Rwandan authorities have told Rwandans, as they have told the Security Council, that Rwandan courts will deal with [RPF] crimes. Had Rwandan prosecutors wanted to try these crimes, they have had ample time to act. . . . *Victims of* [RPF] *crimes have virtually no chance of obtaining justice in any Rwandan court, whether military court or* [gacaca] *court.* Failing to provide them justice at the international tribunal as well will feed resentment and desire for revenge, explosive sentiments in a region where armed groups continue to operate in opposition to recognized governments. [Emphasis added.]

The United Nations Security Council waited months to respond to the reports Judge Pillay and I made on Rwanda's failure to cooperate, and the response the council managed to muster was only a mild reprimand. I pulled the prosecution's investigators from Kigali. Staying there would produce nothing without the government's cooperation. We had received no documents from Rwanda on the reported RPF atrocities. The investigators had interviewed the few witnesses willing to talk. And operations outside of Rwanda, after numerous trips throughout Africa and Europe, had passed the point of diminishing returns. I sent the investigators to Geneva to draft a status report on the evidence at hand. From it, I concluded that the quality of the evidence was still insufficient to submit an indictment and always would be, unless the team was able to obtain the evidence held in Kigali. The witness crisis waned in September 2002. The Rwandan government, clearly trying to save face after Judge Pillay and I had voiced our complaints before the Security Council, started spreading stories that, by withdrawing my investigators, I had suspended the Special Investigation. Then, the Rwandan authorities allowed the flow of prosecution witnesses to Arusha to resume. The genocide trials delayed in the spring, including the trial of Bagosora and the other accused military *génocidaires*, began anew in the autumn.

I did not drop the Special Investigation. I was still determined to fulfill my mandate by seeing to it that justice was done on all sides of the Rwanda conflict. On November 18, I said as much to representatives of the Alliance for the Liberation of Rwanda, a Hutu opposition group operating in exile within the Democratic Republic of Congo. The Rwandan government wasted no time issuing a press release criticizing me for consorting with "terrorists":

> Carla Del Ponte's meeting with a known Rwandan terrorist and genocidal organization . . . comes as a culmination of her deliberate policy of dangerously veering from the issues of justice, to a point where she is now wining and dining people whose confessed ideology and practice is genocide. Today, the people of Rwanda have lost faith in Del Ponte's objectivity and capacity to deliver justice. . . . It is in light of these shocking revelations, therefore, that the Government of Rwanda calls upon the international community and the United Nations Security Council in particular to hold her accountable for her deliberate conduct.

A response was clearly in order. During a speech in London on November 25, 2002, I tried to clarify:

> For me, a victim is a victim, a crime falling within my mandate as the [Rwanda tribunal's] prosecutor is a crime, irrespective of the identity or ethnicity or the political ideas of the person who committed the said crimes. The political and military leadership of Rwanda has to accept to respond to the allegations of crimes that may have been committed by their own side. If they are genuinely interested to foster true peace and reconciliation in their country and in the [region], they should fully and unconditionally cooperate.

At the end of 2002, my dream job, the job I had described to the *Time* reporter four years earlier, was available. The International Criminal Court was finally opening its doors. A two-day conference in The Hague marked the occasion. During the receptions and breaks in the formal discussions, I received encouragement from representatives of several governments and nongovernmental organizations to seek appointment as the new court's chief prosecutor. My diplomatic adviser, Jean-Jacques Joris, warned me that I would not get the job for a variety of reasons: the Swiss government was apparently promoting a candidate for one of the judicial positions on the new court; the Milošević and Bagosora trials would last for several more years; and the tribunals for Yugoslavia and Rwanda had not finished their other work. Still, I wanted the job, and I knew this opportunity might never again present itself, this opportunity to continue working in international prosecution, to meet fantastic challenges and, yes, enjoy perquisites. I was confident I had the experience, energy, and judgment to launch the International Criminal Court's prosecution effort. I informed Secretary-General Annan of my interest in the position, and he phoned me late one night while I was having dinner with some Dutch friends. "Listen Carla," he said, "if they make the offer, say you are at their disposal." I later met with Prince Abdulluh of Jordan, who was chairing the selection committee. He seemed to imply that my chances were good. But the inference I drew from his words was mistaken.

At the end of his presidency, Bill Clinton had signed the Rome Statute, the treaty that established the International Criminal Court. The Bush administration, however, opposed the new court's existence, arguing, I think solely to gather political points from a largely uninformed electorate, that the court might mount politically motivated prosecutions of United States political and military leaders. President Bush, in an unprecedented act, effectively erased Clinton's signature from the Rome Statute. And the State Department began forging bilateral agreements with a number of countries—most of them weak and dependent upon United States largesse—to exempt each other's citizens from prosecution before the new court. The Department of State announced on March 3, 2003, that the United States and Rwanda had signed such a bilateral agreement. President Paul Kagame was visiting Washington at the time. He held discussions with President Bush at the White House a day after this bilateral agreement was announced. My advisers and I suspected that, in return for Rwanda's signature on the agreement, President Kagame had sought United States support in the campaign to prevent the Rwanda tribunal from completing its Special Investigation and bringing indictments against senior Rwandan military officers, and perhaps Kagame himself, in connection with massacres Tutsis had allegedly committed in 1994.

A sign that this was indeed the case emerged during the next trip I took to Washington, D.C., in May 2003. The United States ambassador-at-large for war crimes, Pierre Prosper, called me to meet with Rwanda's prosecutor general, Gerard Gahima; Rwanda's ambassador to Washington, Richard Sezibera; and the Rwandan diplomat monitoring the tribunal in Arusha, Martin Ngoga. On May 15, 2003, an elevator lifted my team members and me to an upper floor of the State Department's headquarters. We were surprised to enter a well-appointed, formal reception room. My earlier meetings in Foggy Bottom had usually taken place in the matchbox of an office Prosper was now inhabiting, and when I entered the spacious reception room I mistakenly assumed for a minute that the State Department was feting me for some reason. The honor actually belonged entirely to the Rwandans. Prosper's people had billed this meeting, at least to me, as a general conversation about cooperation between the Office of the Prosecutor and Rwanda's government. After a few minutes of amorphous discussion, we hit upon the real topic of the day: the Special Investigation. Prosper yielded the floor to the Rwandans. They wanted their local judicial authorities, the Tutsi-dominated authorities and not the international tribunal, to conduct the investigations into alleged wrongdoing by members of the RPF. The Rwandans' demands did not surprise me. Prosper surprised me, because he backed the Rwandans. He suggested that I surrender responsibility for investigating and prosecuting the alleged