

ICTR-98-44-T
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UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 24 March 2009

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF
CERTIFICATE OF SAFE CONDUCT**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecution:

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INTRODUCTION

1. Joseph Nzirorera moves for reconsideration of a decision granting several of his witnesses a certificate of safe conduct.¹ He argues that the Chamber made a legal error by limiting the safe conduct protection to crimes falling within the jurisdiction of the Tribunal.² The Prosecution opposes the Motion in its entirety.³

DELIBERATIONS

2. The Chamber has the inherent power to reconsider its own decisions, but it is an exceptional remedy available only in particular circumstances. Reconsideration is permissible when, *inter alia*, there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.⁴

3. In the disposition, the Impugned Decision provided that:

the witnesses shall not be prosecuted, detained or subjected to any other restriction on their personal liberty, for acts of convictions falling within the jurisdiction of the Tribunal, during their presence in Tanzania and their travel between that country and their places of residence.⁵

4. Joseph Nzirorera argues that the certificate of safe conduct should have protected the witnesses from arrest for *any* acts or convictions prior to their departure from their home country, not simply those within the jurisdiction of the Tribunal.⁶ Nzirorera argues that the narrow disposition demonstrates that the Chamber conflated immunity from prosecution with immunity from arrest. Along with the assurance that the witnesses would not be prosecuted at the Tribunal, the Chamber also should have provided that the witnesses will not be arrested for crimes committed in any jurisdiction while in the process of coming to testify at the Tribunal – the essence of a safe conduct certificate.⁷

5. The Chamber notes that, in his underlying motion, Joseph Nzirorera sought a certificate for safe conduct for the witnesses because they are “subject to prosecution in Rwanda for

¹ Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct, filed 23 February 2009 (“Motion”); Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct, 17 February 2009 (“Impugned Decision”).

² Motion, para. 4.

³ Prosecutor's Response to Joseph Nzirorera's Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct, filed 27 February 2009 (“Prosecution Response”).

⁴ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision, 27 February 2009, para. 2.

⁵ Impugned Decision, p. 3.

⁶ Motion, para. 4.

⁷ Motion, para. 6.

alleged involvement in the genocide” and therefore the certificate was necessary to ensure that the witnesses are not “arrested on behalf of the Rwandan government.”⁸ Consequently, the Chamber agrees with the Prosecution that the relief provided in the Impugned Decision was strictly responsive to that sought by Nzirorera,⁹ and the current Motion could be viewed as an impermissible attempt to expand the request made in the underlying motion.

6. Nevertheless, the Chamber also finds Joseph Nzirorera has not demonstrated that the Chamber erred in law such that reconsideration of the Impugned Decision is warranted. As noted by both parties, a certificate for safe conduct appears to have been first considered by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Tadić* proceedings.¹⁰ The parties, however, disagree as to the correct interpretation of that decision.

7. In the *Tadić* Decision, the Chamber explained that “[o]rders for safe conduct as provided for between countries protect a person from prosecution and restriction of liberty *in the requesting country* in relation to acts which preceded his departure from the requested country for the purposes of appearing and testifying in response to a request.”¹¹ The Chamber noted that safe conduct provisions have been included in nearly all treaties of mutual assistance and several multilateral agreements, and cited Article 12 of the European Convention, which provides:

A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty *in the territory of that Party* in respect of acts or convictions anterior to his departure from the territory of the requested Party.¹²

8. On the basis of this discussion, it is apparent that the purpose of a certificate for safe conduct is to secure a witness' attendance from outside the requesting state's jurisdiction by precluding the prosecution or arrest of a witness by authorities in the requesting state.¹³ By

⁸ Joseph Nzirorera's Motion for Certificate of Safe Conduct, 19 January 2009, para. 5.

⁹ Prosecution Response, paras. 3-6.

¹⁰ *Prosecutor v. Tadić*, Case No. IT-94-I-T (“*Tadić*”), Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (“*Tadić* Decision”).

¹¹ *Tadić* Decision, para. 9, emphasis added.

¹² *Tadić* Decision, para. 9, emphasis added.

¹³ The Chamber notes that Joseph Nzirorera has also cited several mutual legal assistance treaties in support of his position; however the Chamber finds the language of these treaties to be either ambiguous or supportive of the Chamber's interpretation. For instance, the Inter-American Convention on Mutual Assistance in Criminal Matters states in Article 22 that “The appearance or transfer of the person who agrees to render a statement or to testify under the provisions of this convention shall require...that the receiving state grant safe-conduct under which the person, *while in the receiving state*, shall not: a. be detained or prosecuted for offenses committed prior to his departure from the territory of the sending state” (emphasis added). Similarly, the Treaty Between the Republic of India and the Russian Federation on Mutual Legal Assistance in Criminal Matters

analogy, in the context of the Tribunals, the purpose of such an order is to assure witnesses that they will not be prosecuted or detained by, on or behalf of, the Office of the Prosecution.¹⁴ Consequently, restricting safe conduct to acts falling within the jurisdiction of the Tribunals serves to tailor the immunity to the purpose for which it is given.¹⁵

9. Such a conclusion is supported by the facts underlying the *Tadić* Decision. The applicant explained that the witnesses sought assurances regarding their safety from arrest as a suspect or detention as an accused:

[i]t should be noted that the Prosecution may frustrate a fair trial for an accused if the Prosecution would use its powers under...the Rules against any witness of the Defence. The Defence has requested the Prosecution to abstain upon the use of these powers by granting vital witnesses of the Defence a safe conduct. The Prosecution has refused to issue such safe conducts.¹⁶

In granting safe conduct, the Chamber held that:

It must be borne in mind that an order for safe conduct grants only a very limited immunity from prosecution. Immunity is granted with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for the purpose of giving testimony. The Trial Chamber regards this limited restriction on the powers of the Prosecutor reasonable in light of the importance for the administration of justice of having the witnesses physically present before this Trial Chamber.¹⁷

10. The Chamber does not accept, as Joseph Nzirorera urges it to,¹⁸ that because the disposition in *Tadić* did not explicitly limit the certificate of safe conduct to crimes within the

provides, in Article 11, that "A person *present in the jurisdiction of the Requesting Party* in response to a request seeking that person's attendance shall not be detained or subjected to any other restriction of personal liberty... nor shall that person be prosecuted for any acts or omissions which preceded that person's departure from the jurisdiction of the Requested Party" (emphasis added.).

¹⁴ See *Prosecutor v. Delalić*, Case No. IT-96-21, Order Granting Safe Conduct to Defence Witnesses, 25 June 1998, which provides that "the witnesses...shall not be prosecuted, detained or subjected to any other restriction on their personal liberty while in the Netherlands, or in transit, for the purpose of testifying in the present case, *by or on behalf of the Prosecution*, in respect of acts within the jurisdiction of the International Tribunal and allegedly committed prior to their departure from their home country", emphasis added; See also *The Prosecutor v. Nyiramasuhuko*, Case no. ICTR-97-21-T ("*Nyiramasuhuko*"), Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005, para. 22, where the Chamber denied a defence request for immunity from arrest connected to charges of genocide under the jurisdiction of the ICTR, Rwanda or any other country because it was "too broad" and did not fall within the scope of immunity that the Chamber may grant to a witness.

¹⁵ See *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Decision on Motion for the Protection of Defence Witnesses, 6 October 1997, p. 5, where the Chamber notes that "protective measures for witnesses should not hinder due process or be used as a way of providing immunity to the witnesses against possible prosecution."

¹⁶ *Tadić*, Partly Confidential Motion to Summon and Protect Defence Witnesses, filed 18 April 1996, pp. 4-5.

¹⁷ *Tadić* Decision, para. 12.

¹⁸ Motion, para. 9.

jurisdiction of the Tribunal, the Chamber was making a distinction between immunity from prosecution and immunity from arrest. Indeed, the *Tadić* Chamber explicitly rejected a defence request to make a general order for immunity for witnesses in transit for the purposes of appearing before the Tribunal.¹⁹ It is evident that the Chamber intended the immunity granted to be a narrow one.

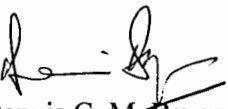
11. The Chamber also notes that in a later decision, the ICTY considered whether the accused had been given an assurance of safe conduct from arrest, rather than from prosecution. Even in this context, the Chamber held that the terms of a legally binding guarantee of safe conduct are specific; immunity is granted only with respect to crimes within the jurisdiction of the International Tribunal.²⁰ Subsequent decisions of both this Tribunal and the ICTY appear to have consistently limited a certificate of safe conduct to crimes falling within the jurisdiction of the tribunals.²¹

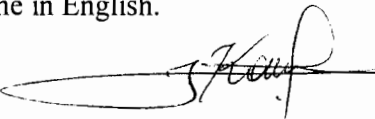
12. Accordingly, the Chamber finds that Joseph Nzirorera has not demonstrated that the Impugned Decision was wrong in law such that reconsideration is warranted.

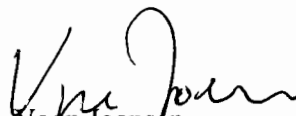
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

REJECTS Joseph Nzirorera's Motion in its entirety.

Arusha, 24 March 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



¹⁹ *Tadić* Decision, para. 16.

²⁰ *Prosecutor v. Dokmanović et al.*, Case No. IT-95-13a-PT (“*Dokmanović et al.*”), Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997, para. 83.

²¹ See *Dokmanović et al.*, Decision Regarding Defence Motion to Protect Witness, 27 August 1997; *Dokmanović et al.*, Order on Defence Motion for Safe Conduct, 12 June 1998; *Dokmanović et al.*, Decision on Defence Motions for Safe Conduct, 22 April 1998; *The Prosecutor v. Blaškić*, Case No. IT-95-14, Orders Granting Safe-Passage to Defence Witness “D/A”, “D/B”, “D/C”, “D/E”, “D/F”, “D/G”, 7 September 1998; *Nyiramasuhuko*, Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005; *Nyiramasuhuko*, Decision on Nyiramasuhuko's Strictly Confidential *Ex-parte* – Under Seal – Motion for Additional Protective Measures for Defence Witness BK, 15 June 2006; *Nyiramasuhuko*, Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005.