WHY BARAYAGWIZA IS BOYCOTTING HIS TRIAL AT THE ICTR: LESSONS IN BALANCING DUE PROCESS RIGHTS AND POLITICS

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I. INTRODUCTION

On October 23, 2000, an eagerly anticipated joint trial, dubbed “the media trial,” began at the United Nations International Criminal Tribunal for Rwanda (ICTR or Tribunal), in Arusha, Tanzania.¹ One of the accused, Jean Bosco Barayagwiza, a former high-ranking Rwandan government official and a founding member of the hate-radio, Radio Television Libre des Mille Collines (RTLM), along with Ferdinand Nahimana, the ex-director of the RTLM, and Hassan Ngeze, ex-editor of the infamous Kangura newspaper were scheduled to appear in court. As he made his opening statement, the prosecuting attorney compared these alleged genocidaires to Nazi propagandist Heinrich Himmler. However, Barayagwiza (the accused) was absent from court.² He had issued a statement, “refusing to associate himself with a show trial” in which he claimed the proceedings were inherently unfair because “the ICTR was manipulated by the current Rwandan government and the judges and the prosecutors were the

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1. The trial began after several delays and postponements, the last of which was on September 18, 2000.

2. Hassan Ngeze was also sitting outside the courtroom, in protest of the incomplete translation of his newspaper’s articles, to be used as evidence against him and other discovery issues.
hostage[s] of Kigali." More recently he has demanded political prisoner status from the International Committee of the Red Cross.

Barayagwiza is not the first accused to claim ICTR proceedings are "unfair." He has, however, come closest to avoid having to answer charges made against him by the Tribunal's Prosecutor. On November 3, 1999, the ICTR Appeals Chamber dismissed the indictment against him, "with prejudice," and ordered his immediate release (November decision) because it found that Barayagwiza's procedural rights had been repeatedly violated. Shortly thereafter, the Rwandan government threatened to completely sever relations with the ICTR. The Tribunal's fear of the Rwandan threats becoming a reality was in all likelihood, partly the reason for its poorly reasoned, but properly concluded, reversal of the November decision, on March 4, 2000 "March decision."

In this essay I will discuss how the Tribunal and other actors created a situation where an alleged architect of the 1994 Rwandan genocide was almost released without a trial on the merits and how such a scenario may possibly be avoided in the future. In section II, I will examine how this particular accused person's case took some four and one half years to come to trial. I will then briefly outline the logical gaps in the November and March decisions and the effects of the controversy on the credibility of the international justice in section III. As a supporter of the Tribunal, I will conclude by offering a few recommendations on how to avoid such a potentially disastrous situation in the future, in section IV.

II. FROM RWANDA TO ARUSHA: BARAYAGWIZA'S JOURNEY TO A TRIAL ON THE MERITS

After the 1994 Rwandan genocide, Jean-Bosco Barayagwiza fled to the Republic of Cameroon. According to the findings of the ICTR Appeals Chamber, the Accused and approximately a dozen other Rwandans, including Nahimana, were arrested in that country on April 15, 1996. It was unclear whether the Cameroonian authorities made this arrest based on a request from the Tribunal's Prosecutor or international warrants emanating from Rwandan

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and Belgian authorities. Nevertheless, the ICTR’s Office of the Prosecutor (OTP) requested that the Accused be provisionally detained under Rule 40 (Provisional Measures) of the ICTR Rules of Procedure and Evidence (RPE)\(^8\) only two days later. On May 6, 1996 the Prosecutor sought a three-week extension for the detention of the Accused in Cameroon and ten days later he\(^9\) sought the transfer of four of the Rwandans detained by Cameroon, excluding Barayagwiza. At the end of May 1996, the Court of Appeals in Cameroon issued a decision to adjourn without consideration of the Rwandan government’s extradition request based on the pleadings of the Cameroonian Deputy Director of Public Prosecutions who grounded his arguments on Article 8(2) of the Tribunal’s Statute (ICTR primacy over national courts).\(^10\)

Thereafter, Barayagwiza wrote to the Tribunal’s Prosecutor complaining about his detention in Cameroon. On October 15, 1996 the Prosecutor responded that he was not being held in Cameroon at his behest. Over four months later, the Cameroonian court rejected Rwanda’s extradition request, and ordered Barayagwiza’s release, but he was immediately re-arrested upon a request from the OTP. On March 3, 1996, an ICTR judge signed an order, pursuant to Rule 40 \textit{bis} (Transfer and Provisional Detention of Suspects), which required Cameroon to transfer the Accused to the Tribunal’s Detention Unit in Arusha. The Accused was finally shown a copy of the Rule 40 \textit{bis} order, which included the general nature of the charges against him, on March 10, 1997, almost a year after his initial arrest. On September 29, 1997, more than six months after the March transfer order, and some sixteen months after his initial arrest, Barayagwiza filed a writ of \textit{habeas corpus}, which apparently has not been heard as of the writing of this essay. It is interesting to note that at that point the OTP still had not submitted an indictment against the Accused for confirmation. This only took place on October 22, 1997, the day after the President of Cameroon signed a decree ordering the Accused’s transfer to Arusha. Thus, the Appeals Chamber found that, based on the record, from March 4 through October 22, 1997 the Tribunal took no action with regard to the Barayagwiza matter.\(^11\)

When Barayagwiza was finally transferred to Arusha, on November 19, 1997, the Tribunal’s winter judicial recess was imminent. Most of the judges were preparing to leave Arusha and some were not scheduled to return until


\(^9\) Richard Goldstone, of South Africa, was the ICTR Prosecutor until October 1996, at which time Louise Arbor began her tenure.


\(^11\) November decision, supra note 5, ¶ 44.
February of the following year. Therefore, in scheduling an initial appearance—the common law equivalent of an arraignment—for Barayagwiza, the Tribunal’s Registry not only had to address the usual scheduling difficulties of identifying dates suitable for the OTP and the Defense Counsel, but also may have faced a shortage of judges. The accused finally made his initial appearance on February 23, 1998, after spending nineteen months in the Cameroonian jails, during the bulk of which time he was not formally made aware of the charges against him, and an additional three months in the Tribunal’s detention facilities, despite the fact that Rule 62 of the RPE required this proceeding to take place “without undue delay.”

The day following his initial appearance, on February 24, 1998, the Accused filed an Extremely Urgent Motion seeking to nullify his arrest, which was not heard by the Trial Chamber until September 11, 1998. A decision dismissing the motion was issued on November 17, 1998. The Accused appealed the decision some ten days later and the Appeals Chamber, after receiving additional submissions from the parties, issued an order, on June 3, 1999, directing the Prosecutor to specifically address six questions regarding the delays, and to provide supporting documentation.\(^1\)

The Appeals Chamber then ordered Barayagwiza’s release on November 3, 1999, finding that “the combination of delays at virtually every stage of the Appellant’s case”\(^1\) made the case so egregious that it had no choice but to dismiss the indictment with prejudice to the Prosecutor as to avoid putting the Accused through a revolving door of being re-arrested by the Prosecutor.\(^1\) The Appeals Chamber simultaneously ordered the immediate release of the accused, while directing the Registrar to make necessary arrangements to deliver Barayagwiza to the authorities of Cameroon,\(^1\) with one Judge filing a separate opinion and another appending a declaration to the November decision on this matter, the relevant substance of which is discussed infra.

The order for a return to Cameroon caused Barayagwiza to file a motion for review of the modalities of his release.\(^1\) He complained that there was no reason for him to be returned to Cameroon, as he had no legal status, family or business there, nor did he have any means to support himself.\(^1\) That motion was quickly withdrawn when the Prosecutor asked to be heard on the same

12. Id. ¶ 11.
13. Id. ¶ 109.
14. Id.
15. Id. ¶ 113(4).
16. March decision, supra note 6, ¶ 4.
17. The Appeals Chamber should have anticipated this problem and, in fact, Judge Nieto-Navia, in his separate statement, and Judge Shahabuddeen in his a dissenting opinion, appended to the November decision, raised this question, available at http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm (last visited Apr. 12, 2001).
point. The Prosecutor also filed a motion for review and reconsideration claiming she had "new facts," which would alter the November decision. Therefore, the Accused remained in the custody of the Tribunal.

The November decision also set into motion a flurry of filings from the parties and angry and highly publicized protest from not only the Government of Rwanda, but also from many others in the international community, such as the European Union, Human Rights Watch and a number of academics. The Rwandans announced that they would suspend cooperation with the Tribunal and officially condemned the decision at the United Nations. They did allow the OTP to continue its operations in Kigali, but did not grant the Tribunal's then new Chief Prosecutor a visa to enter the country for some time. Simultaneously, interventions were made by international justice NGOs to mend relations. They convinced Rwanda to remain engaged with the Tribunal, by inter alia, filing a request to appear as amicus curiae to address the Tribunal on the modalities of release, if that question was reached.

By mid-February the Prosecutor produced "new facts" supported, in part, by a Cameroonian judge's explanations of the politics of the transfer process from Cameroon to Arusha. To further prove her case that Barayagwiza was not simply forgotten, the Prosecutor produced a United States State Department affidavit to show that attempts to transfer Barayagwiza was an on-going process for which the OTP had sought outside assistance, in the form of U.S. intervention. These claims were all made in an effort to show that the lengthy delays should not have been attributed to the Prosecutor. The Rwandan amicus curiae memorial was filed also by the time the Appeals Chamber heard oral arguments in Arusha.

On March 31, 2000 the Appeals Chamber ruled that because the new facts showed that "the violations suffered by the [Accused] and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the

18. Id.
23. March decision, supra note 6, ¶ 65(1).
24. Id. ¶ 65(2).
25. March decision, supra note 6, ¶ 8.
[November] Decision is founded,“26 the November decision should be “altered.”27 Therefore, it rejected Barayagwiza’s application for release, and decided that for the violations suffered the Accused would be entitled “to a remedy to be fixed at the time of the judgment at first instance.”28

In August 2000, Barayagwiza’s case was joined with three others involved with Rwanda’s hate media and allegedly responsible for the genocide,29 one of whom pled guilty.30 This trial was scheduled to begin on September 18, 2000, but faced delays yet again, this time as a result of the numerous motions filed by the defense.31

III. A BRIEF ANALYSIS OF THE NOVEMBER AND MARCH DECISIONS

At the outset, I should note that I do not intend to recount all the factual findings and legal reasoning behind these decisions, because Professor William Schabas has published an analysis of the November and March decisions, in which he examines the issues in dispute and the findings, in sufficient detail.32 So, I will briefly outline the points relevant to my argument that this and future international criminal tribunals should take due process rights more seriously.

A. The November Decision

In the November decision, the Appeals Chamber found that: 1) the failure to hear Barayagwiza’s writ of habeas corpus and the delay in considering and deciding his extremely urgent motion; 2) the period of his provisional detention having been too long-spanning some eighteen months; 3) the failure to promptly inform the accused of the charges against him; and 4) the protracted wait to answer charges against him - 96 days after his transfer to Arusha, all combined amounted to such an egregious breach of his due process rights that the Prosecutor should no longer have the authority to try him.33

26. Id. ¶ 74.
27. Id.
28. Id. ¶ 75.
29. In addition to Nahimana and Ngeze, mentioned in the introduction of this essay, the Prosecutor joined Georges Ruggio, an Italian-Belgian RTLM announcer who resided in Rwanda prior to and during the 1994 genocide.
30. Georges Ruggiu pleaded guilty to incitement to genocide and crimes against humanity and agreed to testify for the Prosecutor in the media trial. He was sentenced to 12 years imprisonment in June 2000. Prosecutor v. Ruggio, Case. No. ICTR-97-32-I.
31. Hirondelle Report, Defence Motions Delay Start of Media Trial (2000) (reporting that a number of motions filed by Nahimana and Barayagwiza would need to be ruled upon before the trial could begin).
33. Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify
At this juncture in the discussion, the outcome of this decision, in terms of whether the accused should have been tried by the Tribunal, is unimportant. What is of consequence is that the majority failed to give appropriate weight to the gravity of the crimes allegedly committed, vis-à-vis the gravity of the due process violations, since the order was not based on the merits of the case, and that the majority apparently did not sufficiently consider: 1) the logistical requirements of his release; 2) whether the Accused could subsequently be tried in another jurisdiction; 3) the impact of his release on the reconciliation process; and 4) to a lesser degree, the inevitable fallout with the Government of Rwanda, without whose cooperation the Tribunal would have to suspend its operation. Although as the Appeals Chamber noted in the March decision, Rwanda’s non-cooperation would have to be addressed by the United Nations Security Council, based on Article 28 of the ICTR Statute.

Therefore, the Chamber’s decision was inadvisable for the circumstances of this particular case. That is to say, given the information available to the Judges at that juncture, the Chamber could have addressed specifically to which jurisdiction the Accused should be delivered upon his release, so that perhaps he could be given a fair trial, since the reason for release were procedural. Alternatively, the Chamber could have found other means by which to sanction the Prosecutor, and others responsible for the due process violations, and to allow for compensation should the Accused be found innocent after a trial on the merits.

B. The March Reversal

In the March decision, which contained a brief four-and-one-half page analysis of the merits of the Prosecutor’s claims, the Appeals Chamber “altered” its November decision. It found the Accused’s due process rights had been violated, however, based on the “new facts” presented by the Prosecutor, these violations were neither grave, nor were the Prosecutor omissions offensive. Therefore, the Appeals Chamber decided that:

34. The majority based its decision to return Barayagwiza to the authorities of Cameroon based on Rule 40 Bis of the RPE which states that the accused “shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.” R.P.E. supra note 8. In the circumstances of this particular case it was inadvisable to order the return Barayagwiza to Cameroon, as that state is not a signatory to the 1949 Genocide Convention. As such, he could have evaded justice there because Cameroon would not have been under an obligation to try him.

35. The United Nations Resolution establishing the ICTR explicitly recognizes reconciliation as a purpose for the establishment of the Tribunal.

36. Id. ¶ 51.
For the violations of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgment, at first instance, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation; b) If the Appellant is found guilty, his sentence shall be reduced to take into account the violation of this rights.  

There are two primary concerns I would like to raise with regard to the March decision. First, the so-called new facts offered by the Prosecutor did not meet the two-prong test that a party must satisfy in order to introduce such facts under the RPE. Second, the remedy offered by the Appeals Chamber is problematic.

First, with regard to the introduction of new facts, in order to compel the Chamber to review or reconsider a final decision, a party must show that the facts were not available to the party at the time of the proceedings "nor would they have been discovered through the exercise of due diligence" and that "if it had been proven, [the fact] could have been a decisive factor in reaching a decision . . . ." In the March decision, the Appeals Chamber remarked, "In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120 [the first prong of the above mentioned test] as directory in nature." Feeling bound by the interest of justice, the Appeals Chamber simply disregarded the fact that the OTP was aware of the "new facts" in question prior to filing its response to the Barayagwiza's initial appeal. In fact, the OTP had even failed to exercise due diligence in providing answers to the questions the Appeals Chamber judges had raised about the events of the due process controversy, prior to rendering the November decision. Instead the OTP only felt obligated to perform its duty diligently after the Appeals Chamber ordered the release.

In effect, in the March decision, the Appeals Chamber distorted its own rules in an effort to achieve the desired result, that is, to allow the Prosecutor to proceed with the case while acknowledging that "the appeal process . . . is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." The March decision simply claimed that the ICTR statute does not explicitly address the situation presented and cites

37. Id. ¶ 75.
38. ICTR supra note 8, R. 120.
39. ICTR supra note 8, R. 120.
40. March decision, supra note 6, ¶ 65.
to clearly distinguishable cases noting that it "does not cite these examples as authority for its actions in the strict sense."  

Second, the remedy offered for the violations is no remedy at all. Deciding that the sentence shall be reduced if the Appellant is found guilty is already standard procedure. With regard to "compensation if he is found not guilty," it is interesting to note that first, it is unclear what sort of compensation is contemplated here; and second, nothing in the ICTR Statute or Rules provides for such measures. Only in October 2000 did the ICTR President send a letter to the United Nations Secretary General, to be forwarded to the Security Council, proposing an amendment to the Statute to allow for compensation to remedy situations of wrongful arrest and/or conviction, violation of rights, deprivation of liberty and the like.  

Furthermore, political considerations apparently also influenced the alteration of the November decision despite the judges' insistence that the revision of the decision was in light of the new facts and that political considerations had no role in their deliberations. The majority's decision, as well as the separate statements of Judges Vohrah and Nieto-Navia, openly acknowledge the Rwandan threats of non-cooperation. In fact, the majority remarked that "the Tribunal is an independent body whose decisions are based on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the [UN] Security Council."  

To this Professor Schabas has written "Me thinks they insist too much," although he acknowledged "the volume of new facts sheds a very different light on the nature of the prosecutorial abuse." The outcome, that release was not warranted because the nature of the due process violations Barayagwiza suffered were not as grave and as attributable to the Prosecutor, is an appropriate one nonetheless.

It is unfortunate that the majority's decision is generally not well reasoned and lowers certain procedural standards. Furthermore, a number of other questions remain outstanding in the March decision. For example, it fails to answer why the habeas petition filed three years ago, which is still before the Tribunal, is now irrelevant to the violation of due process rights of the Accused when it was treated previously as an egregious violation. Additionally, the new facts did not show that the Prosecutor had fulfilled its obligation to timely inform the Accused of his rights. They simply showed that Barayagwiza knew

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42. Id. ¶ 69.
43. Id. ¶ 75 (3)(b).
45. November Decision, supra note 5.
46. Schabas, supra note 28, at 568.
47. Id.
the nature of the charges against him in Cameroon in 1996, although not through the actions of the OTP.

Ultimately, the March decision's conclusion is correct—the procedural violations suffered by the accused did not outweigh the crimes with which he is charged. However, in order to deter the Prosecutor from engaging in such negligent behavior, the Tribunal did have alternatives. It could have released the Accused into the custody of another jurisdiction where he would have been given a fair trial, including Rwanda or Belgium, or it could have sanctioned the prosecution team responsible for this case, through personal fines or reference to their national bars. Instead the Appeals Chamber rendered a weakly reasoned decision setting bad precedent.

III. WHAT ARE THE IMPLICATIONS OF THE BARAYAGWIZA CONTROVERSY FOR THE CREDIBILITY OF THE TRIBUNAL?

What procedural delays mean for the credibility of the Tribunals and, by extension, for furthering the rule of law internationally, is that opponents of such institutions become armed with examples of why international justice will not work. This also sets the stage for Barayagwiza and other accused persons to have an excuse to boycott "unfair" trials, halting the wheels of justice. When the Tribunal puts itself in situations where it is faced with non-cooperation from Rwanda, and forces the Appeals Chamber to render decisions with negative implications for the reconciliation process, it damages not only its own reputation, but also hampers the pursuit of international justice by extension.

Although it has accomplished more than the International Criminal Tribunal for the former Yugoslavia in many ways, it is no secret that the ICTR has had its share of judicial, prosecutorial and administrative troubles. Some of these troubles are attributable to the logistical difficulties—due to the lack of infrastructure in Arusha—and others to the exceedingly unclear lines of responsibility within the Tribunal, which results in a severe lack of accountability in this 700 plus person bureaucracy. This lack of accountability has led to insufficient support for the work of the judicial chambers. One of the violations cited in the November decision was the 96 days that the Accused was forced to wait to make his initial appearance. This, as the Appeals Chamber later discovered, was a scheduling problem, which I will discuss below.

48. For example, the ICTR has arrested over 40 persons who presided over the 1994 genocide, both at a national or regional level. The former Rwandan Prime Minister, Jean Kambanda, pled guilty to genocide in 1998 and was cooperating with the Prosecutor. The ICTY is still struggling to capture many suspects at the top of its wanted list.

49. The original Registrar and Deputy Prosecutors of the Tribunal were forced to resign due to serious questions of competence and a lack of efficiency in their respective offices.
In fact, an expert report regarding the problems of support for the work of Chambers, issued in July 2000, noted that “there is evidence of poor communication, blurred lines of responsibility, a lack of training at crucial levels and some tensions in terms of relationships, all of which serve to frustrate the overriding objective of providing efficient, effective and expeditious support to the judiciary and Trial Chambers.”50 It is also interesting to note that for the six years it has been in existence, the ICTR has never had an effective Deputy Registrar, whose duties include, inter alia, the proper operations of court management, which includes scheduling hearings. Indeed, the position has been left unfilled for prolonged periods of time, which points to hiring difficulties.

How was the Barayagwiza case affected by this lack of proper support? There are two possible problem areas that could be considered here. Fault was primarily placed with the OTP in the November decision. But the Appeals Chamber also acknowledged that the Registry, and Chambers contributed to the delays as well. Furthermore, as mentioned above, in the March decision Cameroon was also apportioned some responsibility for the delay in the transfer.

The Appeals Chamber was right to note that there were no clean hands in the matter. The Registry works alongside the OTP on transfers of accused persons. Obviously, the OTP left Barayagwiza detained in Cameroon for months before it made a serious attempt to transfer him, while it had transferred a number of other Rwandans with whom he was detained, and not until after the Accused had filed a writ of habeas. Therefore, the OTP bears some responsibility. Perhaps the Registry could have been more insistent with Cameroon on expediting the transfer, also.

With regard to the delay in scheduling the initial appearance, the scheduling of the judicial calendar is the responsibility of the Court Management Section of the Office of the Registrar. However difficult a task it may be to find common dates on which all parties are available, an organized and persistent Registry official could ensure that all concerned are consulted for availability and the final approval is given by the appropriate judges for a hearing to take place, in a timely manner.

In the Barayagwiza matter, although it may be true that the Defense Counsel agreed to a February 3rd initial appearance date, one must ask the question, “why?” When the Accused was transferred in November 1997, the Judges were about to depart for their winter recess and some were not scheduled to return until February. Therefore, the long judicial recesses, which the Registry has had no difficulties in publicizing when it suits its purposes, have

also been a factor in contributing to the delays and the Barayagwiza case was no exception.51

The situation also begs the question why the Registry does not find creative solutions to address the lingering problems of delays. For example, for the Barayagwiza initial appearance, if it was just some of the judges who were away late into February, why did the Registry not suggest that a substitute judge sit in with the rest of the appropriate chamber to hear the accused plead to the charges? If counsel was not available, why could the Registry not substitute temporary local counsel for the proceedings? Perhaps it is again a question of training and experience.52

The ICTR is in a sense a victim of its own success. The Tribunal’s investigators have located and arrested over 40 of the indicted persons, most of whom are reputed to have been the true architects of the genocide, either nationally or within their own regions. Like Barayagwiza, the majority of the accused have been in detention for three years or more. The pace of trials has simply not kept up with the pace of arrests. As of the writing of this essay, only eight persons have been judged by the Tribunal, two of who, had pleaded guilty and thus avoided protracted and expensive trials. If the Tribunal is to dispense justice effectively and efficiently, it must avoid situations similar to Barayagwiza in the future.

IV. AVOIDING FUTURE BARAYAGWIZA SCENARIOS

As a supporter of the Tribunal, there are three basic suggestions that I offer for preventing persistent and problematic procedural delays. First, structurally, the organization is set up to fail. There is no single head of the Tribunal, as there are in most domestic courts.53 For the purposes of this portion of the discussion, I am referring only to the Judicial Chambers and the Registry, as obviously, the OTP should be left independent in conducting its operations to avoid any appearance of impropriety. Although there is a President of the Tribunal, she is unable to interfere in the administration of the Tribunal. United Nations officials initially vested this power in the Office of the Registrar, who is responsible for all administrative, budgetary and recruitment matters. Thus, there is no ultimate authority and much slips through the proverbial cracks. The United Nations needs to clarify who is ultimately responsible and reform the Tribunal’s structure so that accountability is maintained and requirements for

51. Although there is at least one judge in Arusha during recess, a suspect must make his initial appearance before a full chamber.
52. In the last year, serious efforts have been made to ensure that certain staff and even the Judges participate in various training seminars.
53. In most national courts, the judges have clear authority over the administrative arm of the court.
administering an effective operation are satisfied. Due process rights cannot be
guaranteed otherwise.

Second, the Tribunal must clarify lines of responsibility not only between
but also within each organ. Moreover, it must either ensure that personnel in all
organs are persons highly experienced in the relevant fields of international
criminal law, court administration and the like, or provide sufficient training for
those who may need it. On this issue the expert report of July 2000 notes that
"[t]here is overwhelming evidence that a number of those working in the
Tribunal either do not understand the real purpose of the Tribunal or, for some
of those who do, do not relate their individual routines and responsibilities to
the achievement of that purpose, directly or indirectly."54 As in most large
bureaucracies, at the Tribunal the buck rarely stops. Until recently, there has
been very little accountability in any of the three organs, although those familiar
with the Tribunal’s history will recall that the first Deputy Prosecutor and the
Registrar were asked to resign in 1997.

Recent media reports told of serious disarray in the OTP. In mid-2000
three senior trial attorneys were asked by the Chief Prosecutor to resign
immediately, but “benefiting from the recourses available from the UN system,
it turns out that they will, at worst, simply be distanced from the trials, awaiting
the expiration of their contracts.”55 In addition, another senior attorney
associated with the media trial left the Tribunal for another United Nations post,
just days before the trial was scheduled to begin, reportedly because the OTP
was unprepared to begin the highly publicized trial. In protest, two others on
the same team left the Tribunal. Instances of lack of accountability like these
are not uncommon in other organs of the Tribunal and obviously slow the pace
of the proceedings. When responsibilities are plainly carved out and well
trained, or better yet, experienced personnel are in place, when a Barayagwiza
situation arises again, the problem can be addressed at its source.

Finally, the Tribunal’s rules must be clarified and amended to allow
sanctions to be imposed against both the defense and prosecution and the judges
should not hesitate in addressing unprofessional behavior. As it stands, Rule 46
of the RPE, speaks to the issue of misconduct “by counsel” and what the
Chambers are empowered to do against counsel, in such cases. Although, at
last, at plenary session in 2000, the judges agreed that “counsel” in Rule 46
refers to both parties, the implications in the text point primarily to the defense.

A few defense counsel have been referred to their national bars for
misconduct in the past. More recently, the judges have been denying defense
counsel fees for frivolously filed motions. As of the writing of this essay,

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however, no Prosecutor has been subjected to Rule 46 sanctions. In order to ensure that a balance is maintained, especially in cases like the one in question, the judges should have and indeed exercise the option against both parties.

Should the Tribunal ever face a Barayagwiza situation again, where it is deemed that releasing the accused is not an option, after making finding of due process violations and before hearing the merits of the case it should then have alternatives for addressing the problem. It should be able to impose sanctions against the individual prosecutor or the prosecuting team for misconduct. For example, the prosecuting attorney could be held in contempt or monetary fines could be imposed. The prosecuting attorney could also be referred to his or her national bar. The efficacy of such an approach may be limited in a United Nations Tribunal, but the option should still exist. In the Barayagwiza controversy, it seems that division of responsibility was unclear and one could say there was negligence on the part of the OTP. But what if a situation arises where the misconduct is intentional? In this context, the judges have the tools with which to conduct proper trials with the accused person’s due process rights in tact. They must use these tools even handedly.

V. CONCLUSION

The Tribunal barely saved itself from embarrassment in the Barayagwiza case. The situation would not have unfolded as it did had the Tribunal’s three organs acted diligently, acknowledging that the due process rights of an accused were respected. If safeguards and policies exist and are enforced properly, the Tribunal can better ensure that due process rights are protected.

If the Appeals Chamber had truly desired to take the instant case out of the Prosecutor’s hands it could have arranged that Barayagwiza be transferred to a jurisdiction where he would face a fair trial. But it chose to keep the case at the ICTR, using faulty legal reasoning and lowering standards. It also was forced to negotiate a delicate standoff with the Government of Rwanda, whether it chooses to acknowledge this fact or not.

To avoid similar future circumstances, the ICTR must reform its structure, ensure that each section and each organ is clear about its responsibilities and that accountability is not swept under the rugs of the United Nations employment/staff rules, and finally hold the Prosecutor to the same standard as the Defense Counsel.