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English court refuses to extradite in Rwanda genocide case: will a domestic prosecution follow?

Emilie Pottle considers the latest development in Rwanda's attempts to extradite five men accused of genocide, and whether the refusal to extradite gives rise to an obligation on the UK to prosecute them under universal jurisdiction

By Emilie Pottle · October 10, 2017

The Divisional Court has dismissed the appeal of the Government of Rwanda in the high-profile extradition proceedings against five alleged *génocidaires* in the case of *Rwanda v Nteziryayo and ors.* The men will not be extradited to Rwanda to stand trial for genocide and it now appears that, if they are to be tried at all, it must be in the UK.

The judgement of the Divisional Court affirmed the decision of District Judge Emma Arbuthnot on 22 December 2015 to discharge the extradition requests on two grounds: double jeopardy–one of the requested persons had been tried in a domestic 'Gacaca' court—and article 6 of the European Convention on Human Rights. The Judge accepted the evidence of the requested persons that there was a real risk they might suffer a flagrant breach of their rights to a fair trial if extradited to Rwanda.

The background to this latest decision reveals the evolving measures employed by the international community to promote justice and end impunity for international crimes.

Following the genocide in Rwanda in 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) which was intended to bring to trial those most responsible for the genocide and other serious violations of law perpetrated in Rwanda. Security Council Resolution 1824, passed on July 2008, called for the completion of the work of the ICTR by 2010. The Tribunal did not complete its work as hoped and Security Council Resolution 1996, as passed in December 2010 calling for the Tribunal to transfer cases which did not involve those suspected of being "most responsible" for crimes to Rwandan domestic courts. Five such individuals have been tried in Rwanda since 2009. At the same time, international donors made significant investments in the Rwandan justice system, providing capacity-building to the judiciary and the prosecution authorities.

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In 2009, before any cases had been transferred, a previous extradition request by the Government of Rwanda for four of the five men was refused by the Divisional Court on grounds that they would be at real risk of a flagrant denial of justice if extradited to Rwanda. This latest decision arises from a second request, made in 2013. The Government of Rwanda's case was that its justice system had gone through a sea-change since 2009. The Government pointed to changes in witness protection, video-link facilities, and changes in Rwandan law allowing international judges to try cases of *génocidaires* transferred or extradited to Rwanda.
The District Judge was not persuaded that these improvements were sufficient to protect the men's rights under Article 6 of the ECHR. She found that, "if extradited, as things presently stand, the defendants would be denied the effective representation of counsel…without such representation and funding, the High Court in Rwanda would be presented with the prosecution case and the RPs would find it impossible to present their side of what happened."

The District Judge carefully considered the progress of the so-called 'transferred cases'–the defendants transferred from the ICTR in Arusha to Rwanda. She was concerned about the quality of the representation by the defence advocates in those cases.

The judge also found that the conviction of one of the requested persons, Celestin Mutabarkua, in "Gacaca" proceedings, meant that his extradition ought to be barred pursuant to the double jeopardy bar.

Double Jeopardy

The Divisional Court affirmed the District Judge's decision on the question of double jeopardy in respect of Mutabaruka, it allowed the cross-appeal of Emmanuel Nteziryayo, holding that his extradition should also be barred because he had been previously acquitted and convicted by Gacaca courts.

The effect of the Gacaca trials on these extradition proceedings is perhaps a lesson in the far-reaching consequences of trials which do not meet internationally recognised standards of fairness. It was accepted by all parties to the litigation that the standards of the Gacaca proceedings fell far below that which is required by Article 6 of the ECHR. This meant that extradition to serve the sentences imposed in the Gacaca trials was impossible. To extradite the men to face fresh trials in regularly constituted courts was also impossible, owing to the double jeopardy rule, unless the Gacaca proceedings could be annulled. The Court was not satisfied the Government of Rwanda provided sufficient evidence to show that this was possible. As it stands the decision of the Divisional Court effectively bars the defendants' prosecution in any forum, including the UK.

In the author's view the Court took an overly technical approach to the application of the double jeopardy bar in Mutabaruka's case. The Court refused to admit fresh material on appeal which tended to show the proceedings could be annulled because no good reason had been shown for the failure to adduce it at first instance. Though the efficient conduct of proceedings generally requires both parties to call all of their evidence at first instance, in this case the court arguably lost sight of the bigger picture. Mutabaruka's extradition was sought for the most serious of offences, if there was credible evidence that the Gacaca proceedings could be annulled the court ought to have considered it.

Fair Trials

The Divisional Court affirmed the decision of the District Judge on the fair trials issue. The Court considered further evidence from the Government's expert, Martin Witteveen, which had not been disclosed during the proceedings below. Mr Witteveen, though supportive of extradition to Rwanda, became increasingly concerned about the ability of defence advocates to properly investigate the case for the defence and to present that case in court. In a confidential memo to a prosecution lawyer at the ICTR he noted:

45. What looms is a situation where defendants are convicted without [sufficient] evidence and, through strict control and direction by the Ministry, embraced by the judges, capable and experienced defence attorneys are sidelined and replaced by handpicked lawyers who do not have any trust from their clients, are not conducting any credible defence investigation and are cooperative with the court. From the outside it will look consistent with fair trial. In fact it is flawed"
Before dismissing the Government of Rwandan's appeal the Divisional Court provided a final opportunity to provide renewed assurances to secure the men's extradition to Rwanda. The Government has indicated that it will not provide the assurances. A formal order dismissing the appeals will be sealed shortly.

Domestic Prosecution

In their judgement, Foskett LJ and Irwin J repeatedly emphasized the imperative to try the men whose extradition was not barred by reason of double jeopardy, "We also recognise fully that there should be no impunity for those guilty of such terrible crimes as are alleged here." In the accompanying press summary the Court was unusually candid, effectively calling for trials in the UK, "If they are not returned to Rwanda, these three can still be tried here, provided the Government of Rwanda cooperates. If their guilt is established, that means there will be no impunity for those guilty of genocide. If they are innocent, their innocence will be established."

Following the Divisional Court's decision to refuse extradition in 2009, amendments were made to the International Criminal Court Act 2001 to enable UK courts to exercise jurisdiction over international crimes committed on or after 1 January 1991. These amendments were made with the specific intent to facilitate domestic prosecutions for crimes committed in Rwanda and the Balkans in the 90s.

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Accordingly, the Metropolitan Police commenced an investigation in 2010 into the alleged war crimes committed in Rwanda by the four men whose extradition had been refused. The Rwandan authorities were not prepared to cooperate with that investigation. Now that this second set of extradition proceedings is at an end, it remains to be seen whether the Rwandan authorities are prepared to change tac and support domestic prosecutions in the UK. If they do, any ensuing prosecution will be part of a growing trend of domestic prosecutions for international crimes. A recent **report** by Trial International on universal jurisdiction reports that in 2016 authorities in Austria, Finland, France, Germany and Sweden brought charges for alleged crimes in Syria.

It is probably too soon to say whether this trend will take hold in the UK, where prosecutions under universal jurisdiction principles have been rare. Though domestic prosecutions geographically removed from the location of the offences present a host of challenges, they are sometimes the only option if impunity is to be avoided.