Opinion on: The European Court of Human Rights Judgement in *Abu Qatada v. UK*

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On 17 January 2012, the European Court of Human Rights delivered the long awaited judgment in the case of *Omar Othman (Abu Qatada) v. UK*. It concerns the question whether Abu Qatada, a well-known radical Jordanian Islamist, who had been sentenced in absentia in 1999 in Jordan for terrorist-related charges to life imprisonment with hard labour after having been granted asylum in the United Kingdom, and who has been considered as a threat to British national security for many years, may be extradited to Jordan on the basis of diplomatic assurances by Jordan to the effect that he will not be subjected to torture upon return. The outcome of the Strasbourg judges came as a surprise to many of us: The seven judges ruled that the Memorandum of Understanding (MoU) signed on 10 August 2005 between the Governments of the UK and Jordan contained enough assurances that Abu Qatada's forcible return to Jordan would no longer expose him to a real risk of torture or other forms of ill-treatment contrary to Article 3 of the European Convention on Human Rights (§205). At the same time, the judges found, however, that his deportation would be in violation of Article 6 of the ECHR because there was a real risk of a flagrant denial of justice, meaning that the State Security Court in Jordan would "try him in breach of one of the most fundamental norms of international criminal justice, the prohibition of the use of evidence obtained by torture" (§§ 285 and 287).

The principle of non-refoulement, as we know it from Article 33 of the Geneva Refugee Convention 1951 and of Article 3 of the UN Convention against Torture 1984, is not explicitly mentioned in the ECHR. But the European Court of Human Rights, in constant jurisprudence since its 1989 landmark judgment in *Soering v. UK*, holds that States parties to the Convention may also violate the Convention if they expel, extradite or in any other way forcibly return a person to another country (within or outside Europe) where he or she faces a real risk of a serious violation of any of the Convention's human rights. In reality, the principle of non-refoulement was, however, only applied by the Court and similar bodies, such as the UN Human Rights Committee monitoring compliance with the International Covenant on Civil and Political Rights, in relation to the prohibition of torture, cruel, inhuman or degrading treatment or punishment, and to the death penalty. But in Soering, the Court has already stated that an issue of non-refoulement might exceptionally be raised under Article 6 ECHR by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a "flagrant denial of justice" in the requesting country. Nevertheless, in the 22 years since the Soering judgment, the Court has never found that an expulsion would be in violation of the right to fair trial in Article 6 (see §260). Therefore, in this sense, the Abu Qatada decision can be regarded as another landmark judgment further developing the principle of non-refoulement. The evidence in the present case was indeed overwhelming. Abu Qatada had been already sentenced in absentia by the Jordanian State Security Court in two trials (1999 and 2000) on the basis of statements by his co-defendants, Abdul Nasser Al-Hamasher and Abu Hawsher, which were clearly extracted by brutal torture, notably falanga, applied to them by the notorious Jordanian General Intelligence Directorate (GID) in Amman. On the basis of extensive evidence in relation to the torture practices of the GID and its close cooperation with the State Security Court, which regularly bases its judgments on evidence extracted by torture in the GID, the European Court found that Abu Qatada has met the high burden of proof required to demonstrate a real risk of a flagrant denial of justice when re-tried after his forcible return to Jordan.

In relation to the question of diplomatic assurances, the judgment is, however, disappointing. It is true that the Court has never ruled out before that

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diplomatic assurances with proper monitoring could, in principle, reduce the risk of torture to an extent that the deportation would no longer constitute a serious risk of torture in the receiving country (§193). On the other hand, many NGOs and experts, including the UN High Commissioner for Human Rights, the Council of Europe Commissioner for Human Rights and myself in the function as former UN Special Rapporteur on Torture, consider diplomatic assurances by States which are well-known for their practice of torture, as nothing but attempts to undermine the absolute prohibition of torture and the principle of non-refoulement. Why

should a State party to the UN Convention against Torture, such as Jordan, which in gross violation of its international treaty and customary law obligations, resorts to widespread and routine torture, all of a sudden stop its torture practices only because the UK, which has a vital interest in deporting Abu Qatada, requests it to make an exception in this particular case? In my former role as UN Special Rapporteur on Torture, I repeatedly travelled to London to convince the British Government to abstain from signing MoUs with countries like Jordan, Libya and Lebanon to this effect. But the then Home Secretary, Charles Clarke, strongly objected to my request by stating in a very blunt language that the security of the British people mattered more to him than "human rights of a few terrorists". In other words, he did not even deny that there was a continuing risk of grave human rights violations for persons which his Government, for security reasons, wished to deport to their countries of origin. He, therefore, made a balancing of interests which, in fact would be admissible under Article 33(2) of the Geneva Refugee Convention. But such a balancing of interests is not permissible in relation to the absolute prohibition of torture under Article 3 of the UN Convention against Torture and Article 3 ECHR, as both the UN Committee against Torture and the European Court of Human Rights have stressed repeatedly (e.g. *Agiza v. Sweden* and *Saadi v. Italy*).

In the Abu Qatada case, the European Court considered a wealth of evidence, including my own findings of routine torture by the GID and total impunity for torture as a result of my fact-finding mission to Jordan in June 2006 (§§ 109-111). The Court concluded that "torture is perpetrated systematically by the General Intelligence Directorate, particularly against Islamist detainees. Torture is also practiced by the GID with impunity." (§191). Furthermore, the Court found it "unremarkable that the parties accept that, without assurances from the Jordanian Government, there would be a real risk of ill-treatment of the present applicant if he were returned to Jordan" (§1923). But after a thorough review of the MoU and its provisions relating to monitoring by the Jordanian NGO Adaleh, it surprisingly came to the conclusion that this MoU in fact had removed the risk of ill-treatment: "the Jordanian Government is no doubt aware that not only would ill-treatment have serious consequences for its bilateral relationship with the United Kingdom, it would also cause international outrage" (§196). Notwithstanding all warnings that Adaleh has no experience in monitoring of places of detention and that it finds itself in a very vulnerable position dependent on funding by the British Government which has a vested interest that Adaleh will not find any evidence of torture, the Court "is satisfied that, despite its limitations, the Adaleh Centre would be capable of verifying that the assurances were respected". With all due respect to the wisdom of the European Court of Human Rights, these assumptions seem to me a little naïve. When I visited the GID Headquarters in Amman after having been officially invited by the Jordanian Government with all assurances that I had the right of interviewing all detainees in private, the head of the anti-terrorism department simply denied me the right to speak in private with detainees. My strong protests to the Minister of Foreign Affairs did not change anything, because the GID was simply more powerful. How shall a small Jordanian NGO like Adaleh, without the full authority of the United Nations behind its back, ensure its right to speak in private with GID detainees? When I reported to the UN Human Rights Council about the routine practice of torture in the GID and other detention facilities of Jordan, the Council did not even adopt

a resolution urging the Government of Jordan to stop its practices of torture. On what experience does the European Court of Human Rights base its assumption that the torture of only one further individual, Abu Qatada, would "cause international outrage". Only because the British Government received a diplomatic assurance from the Jordanian Government that the GID would make an exception in his case in order to facilitate the deportation of this most wanted individual?

When I recently met the British Foreign Secretary Ken Clarke in Vienna shortly after the delivery of the Abu Qatada judgment, he left no doubt that the British Government considers this judgment as a victory despite the fact that Abu Qatada is still prevented from being deported. He assumed that another diplomatic assurance from the Jordanian Government to the effect that the State Security Court would not base any future judgment against Abu Qatada on any evidence which has been extracted by torture would have to be sufficient to get the green light from Strasbourg for the deportation of Abu Qatada. I am afraid that his assumption is right because such a diplomatic assurance would be much easier to monitor than any assurance that torture would not be applied in the future. Unfortunately, the Abu Qatada judgment will not only lead to the deportation of this particular individual, it will encourage the British and other governments that were already in the past in favour of diplomatic assurances from torture countries to further develop more professional MoUs, similar to the British-Jordanian one. In most countries, rich governments will find local NGOs willing to monitor detention facilities if they are adequately paid. But the absolute prohibition of torture and the principle of non-refoulement will be further undermined by this unfortunate practice.