Cessation and Assessment of New Circumstances: a Comment on *Abdulla*, CJEU, 2 March 2010

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Abstract

This article comments on the ruling of the CJEU in *Abdulla*, on the interpretation of the cessation clauses of the Qualification Directive (QD) concerning the change of circumstances. Part 2 considers the referral, constituted of three questions. Part 3 comments on the decision, after two remarks on its context: the use of article 1C(5) of the 1951 Convention by EU Member States, and the very uneven way the QD has been transposed by them, as shown by the Commission's report.

The first question was on the meaning and scope of article 11.1(e) QD. The Court held that the 'change of circumstances' mentioned in article 11.2 QD must be interpreted by reference to article 7.2 on the definition and content of protection. It insisted on the scope and nature of the verification and assessment of facts and of circumstances by domestic authorities. The significant and non-temporary nature of such a change implies that there are no well-founded fears of acts of persecution amounting to some serious violation of basic human rights within the meaning of article 9.1 QD on acts of persecution. Hence a link between the cessation due to a change of circumstances and the definitions of protection and of persecution by the QD.

On the second question, concerning actors of protection (article 7.1(b) QD), the Court held that they may comprise international organisations controlling the state or a substantial part of its territory, including by means of a multinational force in that territory.

The third question related to the standard of proof. The Court held that during cessation proceedings a refugee does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left it. The standard, however, does not vary. On the relaxation of the burden of proof under article 4.4 QD, the Court held that this provision may apply when there are earlier acts or threats of persecution connected with the reasons for persecution examined.

It belongs now to domestic authorities and courts to apply this well-reasoned decision.

1. Introduction

For the first time in the history of refugee and asylum law a supra-national court adjudicates on issues relating directly to refugee and asylum

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law. The decisions of the Court of Justice of the European Union (The Court) are playing a more and more important role in the definition of the content and scope of refugee and asylum law inside the EU. Several referrals are now pending before the Court. Elgafaji, Abdulla and Boibol have been decided by a Grand Chamber, which shows the importance attached by the Court to these cases.

The Abdulla decision is a very important one for several reasons: the nature of the domestic court that is at the origin of the referral, the German Federal Administrative Court; the subject, cessation of refugee status and what it involves both for the rights of refugees and the obligations of domestic authorities; the high quality of the drafting and the detailed

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1 The European Court of Human Rights (hereafter: ECHR) plays an important indirect role in cases relating to asylum seekers, through the use of several instruments. First, art. 3: according to its case law it would be a breach of the Convention to return an alien to a country where there would be a serious risk for that person to be subjected to treatment prohibited by art. 3. This doctrine has been applied to extradition (Sorens v. DK (1989) ECHR 14 (7 July 1989)); to the expulsion of aliens (Chokali v. UK (1996) ECHR 54 (15 Nov. 1996)); to the expulsion of former asylum seekers whose application had been rejected (Cruz Vars and Ors v. Sweden (1991) ECHR 26 (20 Mar. 1991), Vlsanga and Ors v. UK (1991) ECHR 47 (30 Oct. 1991), Salah Sheik and the Netherlands (2007) ECHR 36 (11 Jan. 2007)); and to the sending back of asylum seekers to the country through which they first entered the EU, under the Dublin II Regulation (Ad vs Greece, 22 July 2010, and MSS v. Belgium and Greece (2011) ECHR 108 (21 Jan. 2011)). The second instrument relates to procedural rights: the right to an effective remedy under art. 13 ECHR (Jafari v. Turkey (2000) ECHR 369 (11 July 2000), Conva v. Belgium (2002) ECHR 14 (5 Feb. 2002), Gohrath and France, 26 Apr. 2007). The third instrument is art. 39 of the Court's Rules of procedure relating to interim measures. Since Mamakhulu and Askarv v. Turkey (2005) ECHR 64 (4 Feb. 2005), the States Parties are under an obligation to comply with them. The Court has repeatedly used it in cases relating to Sri Lanka. See, N. Mole, Asylum and the European Convention on Human Rights (Council of Europe Publishing, 2007).


3 Other pending cases relate to art. 3(2) of the Dublin II Regulation and varied provisions of the EU Charter of Fundamental Rights, Case C-411/10, QJEU, 9 Oct. 2010, C 274/21. The referral contains seven questions. For the English judgments, see, (2010) EWHC 705 (Adm), and NS, R (on the application of) v. Secretary of State for the Home Department (2010) EWCA Civ 990 (12 July 2010); on the Dublin II Regulation, Case C-493/10, QJEU, 15 Jan. 2011, C 13/18, on sexual orientation within the meaning of art. 10.1(d) QD, Case C-563/10, QJEU, 2 Feb. 2011, C 38/7; and on art. 3(1)(a) QD, freedom of religion, Cases C-71/11 and C-99/11.

4 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adam, Hamrin Masa Rashi and Dier Jamal v. Bundesrepublik Deutschland.
character of the questions sent to the Luxembourg Court; and the content of
the latter's decision and of the conclusions of Advocate General Mazak.\(^5\)

This article will examine the referral in *Abdulla* before commenting on
the Court's decision.

2. The referral

The case before the German administrative courts related to one of the
cessation clauses of the QD. It concerned Iraqi nationals who had
entered Germany before 1999 and 2002 and who had been recognized
as refugees in 2001 and 2002. In 2004–5 the Federal Administration ini-
tiated a procedure of cessation based on the change of circumstances in
Iraq. These persons ceased to be recognized as refugees in 2005. The
lower administrative court quashed the decisions on the ground that the
change of circumstances in Iraq was not a durable one and could not
justify them. The appeals court quashed the judgment and upheld the
decisions, holding the change to be a durable one and an absence of fear
of persecution. The Federal Administrative Court decided to send three
questions to the Court, the second and third ones being divided into
three and two sub-questions.

The questions were as follows:

   to be interpreted as meaning that — apart from the second clause of Article
   1(C)(5) of the Convention of 28 July 1951 relating to the status of Refugees\(^7\)
   (Geneva Convention on Refugees) — refugee status ceases to exist if the refugee's well

\(^5\) Advocates General assist the Court. Under art. 252, second para., TFEU: 'It shall be the duty of
the Advocate-General, acting with complete impartiality and independence, to make, in open court,
reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the
European Union, require his involvement'. His opinion 'is not binding on the Court, but will be con-
sidered with very great care by the judges when they make their decision. It is printed, together with
the judgment, in the law reports', T. C. Hartley, *The Foundations of European Community Law*
(Clarendon Press, 3rd ed., 1994), 60. The Advocate General’s opinion 'tends to be a comprehensive and thoroughly
reasoned account of the law governing all aspects of the case. The style and content of the AG's
opinion are virtually always more readable than those of the Court's judgments, and often shed light
on the meaning of an obscure judgment', P. Craig and G. de Burca, *EU Law: Texts, cases and materials*
(Oxford University Press, 3rd ed., 2003), 94. In this case, as in many others, it is a useful complement
to the Court's decision.

\(^6\) '1. A third country national or a stateless person shall cease to be a refugee, if he or she: . . . (e) can
no longer, because the circumstances in connection with which he or she has been recognised as
a refugee have ceased to exist, continue to avail himself or herself of the protection of the country of
nationality'.

\(^7\) 'C. This Convention shall cease to apply to any person falling under the terms of Section A if: . . .
(5) He can no longer, because the circumstances in connection with which he has been recognized
a refugee have ceased to exist, continue to avail himself of the protection of the country of his
nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article
who is able to invoke compelling reasons arising out of previous persecution for refusing to avail
himself of the protection of the country of nationality'.

\[^2\]  \[^3\]  \[^4\]  \[^5\]  \[^6\]  \[^7\]
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founded fear of persecution within the terms of Article 2(c) of that Directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of Directive 2004/83?

2. If question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(e) of Directive 2004/83 also require that in the country of the refugee's nationality,

(a) an actor of persecution within the meaning of Article 7(1) of Directive 2004/83 be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,

(b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of Directive 2004/83, which leads to the granting of subsidiary protection under Article 18 of that Directive, and/or

(c) the security situation be stable and the general living conditions ensure a minimum standard of living?

3. In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be

(a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or

(b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of Directive 2004/83?

3. The Court's decision

3.1 Preliminary remarks

The following preliminary remarks relate to the use of article 1C(5) of the Geneva Convention and to the transposition of the QD.

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8 ‘Actors of protection. 1. Protection can be provided by (a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State’.

9 ‘Serious harm - Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

10 ‘Granting of subsidiary protection status – Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V’.

11 ‘Assessment of facts and circumstances . . . 4. the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated’.
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3.1.1 On the use of art 1C(5) of the Geneva Convention

Many commentators mention the infrequent use of the cessation clause contained in article 1C(5) by States Parties. This is no longer the case. According to O'Sullivan, "Germany commenced application of Article 1C(5) in 2003 and to date has revoked the refugee status of approximately 14,000 Iraqi refugees due to the findings as to the change of circumstances." According to the UNHCR Statement already mentioned: "After the request for a preliminary ruling was filed with the ECJ, the German Office for Migration and Refugees stopped revoking the status of Iraqi refugees from Central and Southern Iraq on the basis of the "ceased circumstances" clause." The use of this clause is also attested by the case law of the French CRR/CNDA and by the UK Border Agency Instruction. A 2003 UNHCR study gives examples of general declarations of official cessation.

Before the Court, Advocate General Mazak remarked that "the past reticence of the contracting States to the Geneva Convention to avail of the cessation clause contained in Article 11.1(e)...".

3.1.2 On the transposition of the Qualification Directive

A recent report of the European Commission mentions the important discrepancies in the transposition and implementation of the QD. The following points deserve a special mention:

13 Above n. 11, at 587, n. 4, quoting from UNHCR, 'Statement on the "ceased circumstances" clause of the European Community Qualification Directive' (UNHCR Statement), 2008, 10. This statement was issued by the UNHCR in the context of the preliminary reference to the CJEU that led to the decision in Abdulla.
14 UNHCR Statement, ibid., 11.
17 UNHCR, 'Guidelines on International Protection, Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention', UN doc. HCR/GIP/03/03, 10 Feb. 2003, at 3.
18 Above n. 4, Conclusions, n. 20.
(a) While the provisions of the QD concerning cessation ‘are phrased in mandatory terms... legislation in a number of Member States merely allows for termination of status on the grounds referred to in these provisions instead of requiring it’.

(b) ‘In some Member States, cessation of refugee status is not possible if protection is offered by non-State actors or within only a part of the country of origin’.

(c) ‘In other Member States, cessation of refugee status... is not possible if there are compelling grounds resulting from previous persecutions’.

(d) ‘If the refugee has been granted permanent residence, the termination of status is restricted or prevented in some Member States, despite the fulfilment of the conditions for cessation’.

Under article 3 QD: ‘Member States may introduce more favourable standards for determining who qualifies as a refugee or as a person eligible for international protection, and for determining the content of international protection, in so far as these standards are compatible with this Directive’. The Report is silent on this point, which in a way might seem strange, in view of the fact, noted by the Report, that some Member States have introduced or retained more favourable provisions when implementing the QD. On the other hand, in the absence of any case law of the CJUE on the interpretation of the notion of compatibility contained in article 3 QD, the Commission was not equipped and was anyhow reluctant, at this stage, to propose a sort of shopping-list indicating which more favourable standards would be compatible with the QD. This is a Directive, not a Regulation. It sets minimum standards. More favourable ones relate, directly or indirectly, to the relation between refugee and asylum law as stated in the QD and to the international human law obligations of the Member States. After quoting a 2002 note of the Council’s Legal Service and many authors, Storey writes that ‘not all provisions of the Directive are considered to be mandatory, but key ones are’. Which ones? None of

20 Under art. 11.1 QD ‘A third country national or a stateless person shall cease to be a refugee if...’ (etc). Cf. art. 1C(3) of the Geneva Convention, quoted above n. 6.
21 Art. 11 and 12, read in conjunction with art. 14(1) and (3), for refugee status.
22 Report, above n. 19, 9. The following countries are mentioned at n. 26: Belgium, Ireland and the UK.
23 Ibid. In n. 30, 14 countries are mentioned: Austria, Belgium, Cyprus, the Czech Republic, France, Greece, Ireland, Latvia, the Netherlands, Poland, Romania, Slovakia, Slovenia and Spain.
24 Ibid. This is the case in Germany, the Netherlands and Poland (see n. 31, at 10).
25 Ibid., at 10. The Report mentions Austria, Germany, the Netherlands and Poland (see n. 31, at 10).
27 Ibid. 18.
the questions sent to the CJEU so far mention this thorny issue. This does not, however, prevent the Court from adjudicating on it, which it has not yet done. Will it one day? Meanwhile, domestic courts and authorities will have to apply the interpretation of the QD contained in this decision.

These divergences in the transposition of the QD are accompanied by no less serious divergences in its implementation.

In 2009 the Commission published its proposal to revise the QD.28

3.2 On the basis of interpretation

The Court’s mission, when a referral is sent to it, is to interpret such EU instruments as the treaties, Regulations and Directives. In cases relating to refugee and asylum law the Court is bound to take into account, beyond the QD, two other categories of instruments. The first is the 1951 Geneva Convention. The Court recognised it clearly:

It is apparent from Recitals 13, 16 and 17 in the preamble of the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.29

It concluded: ‘The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC’.30

The second category of texts is human rights instruments. This dimension is present in several provisions of the QD.31 It has been fully taken into account both by Advocate General Mazak’s excellent conclusions32 and by the Court’s decision.33

3.3 The Court’s answer to the three questions

3.3.1 The first question

Is Article 11(1)(c) QD to be interpreted as meaning that refugee status ceases to exist if the refugee’s well-founded fear of persecution within the terms of Article

29 At § 52.
30 At § 53.
32 See in particular § 54.
33 At § 71 and 73.
2(c) QD, on the basis of which refugee status was granted, no longer exists and that person has no other reasons to fear persecution within the terms of Article 2(c) QD?

Cessation of refugee status is a falsely simple issue, taking the apparent form of a syllogism: refugee status was initially recognised on the basis of a well-founded fear of persecution relating to the grounds listed in the Convention. The disappearance of the circumstances that led to this fear has suppressed its basis. Therefore cessation is the natural and logical step.

This is not so: first, because a certain amount of time separates this procedure from the initial granting of refugee status. The person is not the same one; the country of nationality is not or does not seem to be the same one. Secondly, because withdrawal of refugee status introduces a substantial change in the situation and legal status of the person concerned. Thirdly, because the QD contains a number of new provisions on the nature and on the actors and content of persecution and of protection that do not figure in the Convention and which must be taken into account in cessation proceedings. Many Member States have dealt with these consequences in the way they have transposed the QD, as shown earlier.

The scope of the referral is clear when one considers the content of the submissions of certain Member States and of the Commission, aptly summed up in the Advocate General's conclusions. The German Government affirmed that the answer to the question should be a straight 'Yes'. Other circumstances, such as general danger in the country of origin, could not be taken into account. The Government recognised that article 11.1(e) could be read as requiring an additional condition for cessation, that is, the possibility of the refugee being able to avail himself of the protection of his country of origin. However, it held that the interpretation of that provision 'in accordance with the Geneva convention' did not permit such a solution. It emphasized the symmetry between the acquisition and the loss of refugee status both under the QD and the Geneva Convention.\(^{34}\)

The UK Government considered that the 'clear intention' of the Community legislator was that the QD would 'reflect' the provisions of the Geneva Convention. Its position was the same as that of Germany. What then about article 11.2 QD, under which 'In considering points (c) and (f) of paragraph 1,\(^{35}\) Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the

\(^{34}\) Conclusions, at § 33.

\(^{35}\) Relating to cessation.
refugee's fear of persecution can no longer be regarded as well-founded? The answer was that 'considerations' under this article 'form a part of the factual assessment of the well-founded fear of persecution'. The UK Government felt it necessary to add, for good measure, that 'the UNHCR Guidelines are not binding on Member States as a matter of international law and have not been incorporated into Community law'.

Whoever pretended that they were?

The Commission's position was a different one. It held that article 11.1(e) QD ought to be interpreted as meaning that a person does not loose his status as a refugee if the well-founded fear of persecution within the terms of article 2(c) QD, on which the status was granted, no longer exists and he has no other reason to fear persecution. The Commission commented on the meaning of article 11.2 on the change of circumstances, which must be both significant and non-temporary. In other words, the fact that the circumstances in connection with which refugee status was granted have ceased to exist is a necessary but not a sufficient condition of cessation. It is equally crucial, as noted by the Advocate General, to examine whether the refugee can effectively re-avail himself of the protection of the country of his nationality. This is indeed fully consistent with the Commission's commentary on its proposal relating to what was then article 13.

In its decision, the Court took into consideration three categories of clauses of the QD relating respectively to the definition of refugee, to that of persecution and to the evaluation of the change of circumstances. The first category concerns the definition of refugee by article 2(c), and its four components:

- a well-founded fear;
- persecution on one of the five grounds mentioned;
- an inability or unwillingness, because of such a fear, to avail oneself of the protection of the country of nationality; and
- being outside that country.

The second category relates to persecution (article 9).

The third component includes articles 11.1(e) and 11.2. As to the former, the Court affirmed that it 'establishes, by its very wording, a causal connection between the change of circumstances and the impossibility for the person concerned to continue to avail himself of the protection of his

36 Conclusions, at § 36.
37 Emphasis added.
38 Conclusions, at § 37.
40 Decision, at § 56-64.
country of nationality . . . . The "protection" in question is the same as that which has up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive". 41

This in turn leads to an evaluation of the change of circumstances. It must have 'remedied the reasons which led to refugee status'. 42 There are two consequences: the first one relates to protection, the second one relates to the nature and scope of the change of circumstances.

(i) Protection

The first consequence is that article 11.2 must be interpreted by reference to article 7.2 on the definition of protection: the competent authorities ' . . . must verify, having regard to the refugee's individual position, that the actor or actors of protection . . . have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and the nationals concerned will have access to such protection if he ceases to have refugee status'. 43

What does that mean exactly? The Court's answer can be summed up as follows:

- The verification must relate to the conditions of operation of the institutions, authorities and security forces and of the groups or bodies which may, by their action or inaction, be responsible for acts or persecution against the recipient of refugee status if he returns to his country.
- As to the assessment of facts and of circumstances by these authorities, it includes the laws and regulations, the manner in which they are applied and the extent to which basic human rights are guaranteed. 44

These are the principles and the guidelines to be used now by domestic courts whenever they have to assess the adequacy of protection in a given country. Refugee law has always been, ultimately, a human rights issue. If this ever needed confirmation, the Court has provided it.

(ii) Change of circumstances

The change of circumstances must be, according to article 11.2 QD, 'of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded'. This will be the case, the Court held,

41 Ibid., at § 66-7.
42 Ibid., at § 69.
43 Ibid., at § 70.
44 Ibid., at § 71. The decision mentions art. 4.3 QD.
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when the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive.

This is in full accordance with three sets of sources, of which both Advocate General Mazak and the Court were aware: The UNHCR positions and recommendations; academic writings on asylum and refugee law; and general State practice.

(a) UNHCR positions and declarations

These are expressed in the Handbook, Guidelines and declarations of the Executive Committee. The Handbook mentions the fundamental and non-temporary character of the change of circumstances and adds that the cessation clauses ‘should . . . be interpreted restrictively’. On article 1C(5) the text says:

‘Circumstances’ refer to fundamental changes in the country, which can be assumed to remove the fear of persecution. A mere - possibly transitory - change in the facts surrounding the individual refugee’s fear, which does not entail such major change of circumstances, is not sufficient to make this clause applicable. A refugee’s status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.

Subsequent declarations of the UNHCR have elaborated on these points.

Emphasis added.

Decision, at § 73.

See, e.g., Conclusions, n. 7, where the Handbook and the 2003 Guidelines on cessation are mentioned.

UNHCR, Handbook, at § 112.

Ibid., at § 116.

Ibid., at § 135.

See, the Conclusions adopted by the Executive Committee on International Protection of Refugees, no. 65 (XLII) General, at 9, on the ‘profound and enduring nature’ of the change of circumstances; Conclusion no. 69 (XLIII, 1992), UN doc. A/AC-96/804, Cessation of status, at b); ‘the fundamental character of the changes in the country of nationality or of origin, including the general human rights situation . . . the fundamental, stable and durable character of the change’; UNHCR, ‘Note on Cessation Clauses’, UN doc. EC/47/SC/CRP.30, 30 May 1997, at §§ 20-3; UNHCR, ‘Guidelines on the Application of the Cessation Clauses’, UN doc. UNHCR/IOM/17/99; UNHCR, Guidelines on Cessation, above n. 17. See also, UNHCR, ‘Annotated Comments on the Qualification Directive’. In addition the UNHCR has issued in Aug 2008 a statement on the ‘ceased circumstances’ clause of the QD in the context of the referral of the German Federal Administrative Court, above n. 12.
(b) Academic writings
The legal literature on asylum and refugee expresses a similar orientation.  

(c) State practice
The general state practice has been aptly summed up by the UNHCR.  

By its thorough exploration of the notion of change of circumstances and what it really means in terms of protection and of persecution, and by its use of the category of human rights, the Court has duly emphasized the extent of the duties of the domestic authorities, administrative and judicial, in this domain. The writing is on the wall.

3.3.2 The second question
If question 1 is to be answered in the negative does the cessation of refugee status under Article 11(1)(e) of Directive 2004/83 also require that, in the country of the refugee’s nationality,

(a) an actor of protection within the meaning of Article 7(1) of Directive 2004/83 be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops?
(b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of Directive 2004/83, which leads to the granting of subsidiary protection under Article 18 of that Directive, and/or
(c) the security situation be stable and the general living conditions ensure a minimum standard of living?

(f) The answer to question 2(a)
The Court included its answer to question 2(a) into the answer to question 1.  

It mentioned ‘the actor or actors of protection referred to in Article 7(1) of the Directive’.  

It held that ‘the actors of protection referred to in Article 7(1)(b) of the Directive may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory’.  

52 Goodwin-Gill and McAdam, above n. 12, 139-49; J. C. Hathaway, The Rights of Refugees under International Law (Cambridge University Press, 2000), from 919; Fitzpatrick and Bonoan, above n. 12, from 493, French translation: La protection des réfugiés en droit international, (Larcier, 2008).
53 UNHCR, 2008 Statement, quoted at n. 48, from 12.
54 At § 77.
55 At § 76, second indent.
56 Ibid., third indent.
However, a number of additional observations are in order at this point.

One of the innovations of the QD is to include among the actors of protection, in article 7.1(b), ‘parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State’. It is obvious that the cessation of refugee status requires the presence of an agent of protection. Advocate General Mazak aptly deduced from article 7.1(b) that ‘a body other than the State may be an actor of protection (either on its own or . . . in conjunction with the State) provided that the requisite level of control over the State is exercised and the objective standard of protection imposed by Article 7(2) . . . is fulfilled'.

The inclusion of ‘international organisations’ among actors of protection raises four issues:

1. The Geneva Convention excludes from its scope, under article 1D, ‘persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance’. Under the second paragraph of this article:

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

One such organisation is the UNWRA. Article 12.1 QD reproduces article 1D of the Geneva Convention.

2. The Directive says nothing on the nature and type of activities of these international organisations. The UNHCR and the ICRC come naturally to the mind. The Commission’s initial proposal was much more specific. It referred to ‘international organisations and stable quasi-State authorities who control a clearly defined territory of significant size and stability and who are able...’

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57 Conclusions, at §58. The words in parentheses figure in n. 33 of the conclusions.
58 On the interpretation of this art., see, the recent decision of the CJEU, Bollbol, above n. 2. On the French case law, see, the Conseil d’Etat’s decision Office français de protection des réfugiés et apatrides c. M. Arjou, 23 July 2010: A., a Palestinian, was registered with the UNRWA in Jordan. He decided to leave that country in 2003 and went to France, where he applied for refugee status. The Cour Nationale du droit d’asile granted him refugee status on the grounds that, since he resided outside the zone of activity of UNWRA, he could not any more be regarded as continuing to receive the protection or assistance of that body, that he was not a Jordanian national and did not enjoy the rights and obligations attached to this nationality. The decision was quashed: the Cour Nationale du droit d’asile should have checked whether A. had a well-founded fear of persecution on one of the grounds stated by the Geneva Convention or whether he could be granted subsidiary protection under French law. Not doing so was an error in law and the case was remanded to the CNDA. In 2006 the Conseil d’Etat had taken a similar position in relation to the application of the 1954 Convention on stateless persons: Office français de protection des réfugiés et apatrides, 22 Nov 2006, 479; Actualité juridique. Droit administratif. 2007.91, cond. Verot. On the English case law, see, H. Lambert, ‘The European Union Qualification Directive, its impact on the jurisprudence of the UK and International Law’ (2006) 55 ICLQ 161-92, 171.
59 Emphasis added.
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and willing to give effect to rights and protect an individual from harm in a manner similar to an internationally recognized State.\footnote{Commission's proposal, art. 9.3.}

3. In the UK and in France the case law has affirmed that protection may be provided by entities other than the state. International organisations include private ones, such as NGOs, or public ones with a UN mandate, either general (UNHCR) or local (UNMIK or KFOR in Kosovo). The existence of armed conflicts that are both internal and international, and the corresponding mention of UN sponsored or other international peace-keeping missions or forces, explains the inclusion of these new clauses.\footnote{See, for the UK, \textit{Dfii v. Home Secretary} (2000) INLR 372.NB; (2000) Imm AR 652 (Kosovo. Positive answer); for France (negative answer: absence of protection): CIRR, Samanga, 30 Nov. 2006 (UN forces in Ituria, Democratic Republic of Congo); \textit{Saint-Plant}, 25 June, 2005, 54; \textit{Haleau}, 6 July 2005, 47; \textit{Vil}, 30 Oct. 2006, 45 (MINUSTAH in Haiti); \textit{Qreini}, 23 Sept. 2004, 31 (KFOR, Kosovo).}

4. The wording of question 2(a) and that of article 7.1(b) QD raises five questions:

(a) The German Court asked whether the protection can be assured \textit{only} with the help of multinational troops. Article 7.1 QD mentions ‘international organisations’. It neither mentions nor excludes troops, multinational or other. Several situations may occur in relation to the presence of foreign forces in a given country: invasion by a foreign state, leading to intervention of multinational troops acting under a UN mandate (Kuwait, 1991); internal armed conflict, a functioning state of sorts, and multinational troops under a UN mandate (Afghanistan); no functioning state, an internal armed conflict and multinational troops under a UN mandate (Ivory Coast in 2011). The position of Advocate General Mazak was the following one:

... in order to comply with the terms of Article 7... a State may only rely on the assistance of multinational troops provided such troops operate under the mandate of the international community, for example under the auspices of the United Nations.\footnote{Conclusions, at § 58, last sentence.}

The Court’s answer is as follows: ‘The actors of protection referred to in Article (1)(b) ... may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of multinational forces in that territory’.\footnote{At § 75.} With respect, the precise question asked by the German Court has not been answered. Why?

(b) The question sent to the Court and the Court’s decision mention only multinational troops. Would the answer be the same if these troops came from one country only?
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(c) The Advocate General's mention of 'the international community' is not helpful. The meaning of this expression is not, to say the least, clear. Besides, it would deprive a state of asking an allied state for its help.

(d) One basic fact remains: whatever their utility and their real merits, including civilian missions, multinational troops are not always equipped, to say the least, to provide the kind of protection demanded by article 7.2 QD, as shown by the tragic examples of Rwanda and Srebrenica.

(e) The inclusion of international organisations among the actors of protection by the QD continues to raise many questions. It is regrettable that the Court's decision does not elaborate on this point.

(ii) The answers to questions 2(b) and (c)
Given the answer given to questions 1 and 2(a), the Court affirmed that there was no need to answer questions 2(b) and (c). The decision is therefore silent on them, with one exception, relating to subsidiary protection. The Court stated the obvious: The Directive mentions two distinct systems of international protection, that is refugee status and subsidiary protection, the latter created by it. Consequently 'the cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection status'.

Question 2(c), on the stability of the situation and the minimum standard of living ensured by the general living conditions, was left unanswered. This is also regrettable. The answer to questions 1 and 2(a) did not command such silence. The cryptic dictum of the Court is not convincing.

As to the stability of the security situation in the refugee's country of nationality, Advocate General Mazak rightly held that it should be assessed as an integral part of the availability of protection from persecution mandated by articles 7.2 and 11.1(e) QD. What prevented the Court from saying so?

As to the general living conditions and the availability of a minimum standard of living in their country of nationality, the Advocate General said two things. One: It is not an independent relevant criterion when assessing cessation. Two: It must, however, be taken into consideration as

64 Is it more than a legal and political fiction; which may have its uses, as all legal fictions? The 1969 Vienna Convention on the law of treaties mentions, in its art. 53 relating to jus cogens, 'the international community of States'. In its judgment of 29 Oct. 1997, the Appeals Chamber of the International Criminal Tribunal for the ex-Yugoslavia interpreted the obligations of cooperation and of judicial assistance of the States with the Tribunal as 'obligations towards the international community as whole' (IT-95-14-AR 108 bis, Blakic, § 26, quoted by N. Qoc Dinh, E. Daillier and A. Pellet, Droit international public (LGJ), 9th edn., 2009)), 444.

65 At § 78.

66 At § 62.
part of the assessment of whether the change of circumstances there can be significant and non-temporary in nature. He rightly concluded that the availability of a minimum standard of living in the country concerned and its relevance in the context of cessation was a matter to be determined by national courts in the light of the above considerations.67

3.3.3 The third question

In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be

(a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or
(b) assessed having regard to the relaxation of the burden of proof under Article 4.4 of Directive 2004/83?

(f) The standard to be applied

Once the circumstances on which refugee status was initially granted have ceased to exist, how are new and different circumstances founding persecution to be assessed? Such an exercise takes place before the affirmation of cessation. It is analogous to that carried out during the examination of the initial application for the granting of refugee status.68 After recalling the relevant applicable provisions of the QD (articles 4.1, 9.1 and 14.2), the decision rightly affirms that the context is not the same as when the individual initially requested the granting of refugee status:

A person who, after having resided for a number of years as a refugee outside of his country of origin, relies on other circumstances to found a fear of persecution does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left his country of origin.69

The standard, however, does not vary:

At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution.70

67 At § 63.  
68 At § 83.  
69 At § 87.  
70 At § 89.
As Advocate General Mazak aptly noted, the words 'new' and 'different' 'relate to entirely novel circumstances which have no link, even partial, to the previous circumstances'.

(ii) The relaxation of the burden of proof under article 4.4 QD

Article 4.4 provides that 'The fact that an applicant has already been subject to persecution or serious harm or direct threats of such persecution or serious harm, is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'. The Advocate General’s position was a strict and a rather narrow one: ‘the relaxation of the rules of assessment contained in Article 4(4) . . . requires in my view a link, if only partial, between past persecution or direct threats of such persecution and, new, different circumstances founding persecution’. The previous granting of refugee status based on entirely different circumstances does not amount to a serious indication, in accordance with article 4.4, of the applicant’s current well-founded fear of persecution.

The Court’s position is a distinct and more subtle one:

. . . Article 4(4) of the Directive may be applicable when there are earlier acts or threats of persecution which are connected with the reasons for persecution being examined at that stage. That may be the case, in particular, when the refugee relies on a reason for persecution other than that accepted at this stage and when there are earlier acts or threats of persecution other than that accepted at the time when refugee status was granted and:

- prior to his initial application for international protection, he suffered acts or threats of persecution on account of that other reason but did not then rely on then;
- he suffered acts or threats of persecution, for that reason after he left his country of origin and those acts or threats originate in that country.

This is another application of the cautionary rules to be respected in cessation procedures.

71 Conclusions, at § 70. See also, §§ 71-72.
72 Ibid., at § 75.
73 See § 74.
74 Emphasis added.
75 At § 96.
76 At § 97 S.
A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea

SILJA KLEPP*

Abstract

This paper discusses research results from anthropological fieldwork carried out in Malta in 2007. The island, which is situated in the central Mediterranean Sea between Tunisia, Libya and Italy, is a focal point regarding the continuing refugee situation. One of the research aims was to investigate the situation at sea concerning Search and Rescue (SAR) operations for migrants and refugees crossing the Mediterranean by boat. In the year 2006, 556 missing and drowned migrants were registered in the central Mediterranean between Libya, Malta and Italy, this number increased to 642 in 2008.¹ The goal of the research in Malta was therefore to understand why an increasing number of migrants were dying at sea and what role the European security forces play in this context.

After introducing the research perspective of this article, background information concerning migration movements in the Mediterranean Sea between Libya, Italy and Malta in recent years is provided. Due to European regulations, which are considered unfavourable for the island, and its population density, Malta feels under pressure from migrants arriving by boat across the Mediterranean. Different concepts regarding a 'place of safety' to disembark rescued boat migrants are debated. The ambiguities in the responsibilities cause problems for the captains who rescue migrants in distress at sea. These ambiguities may in turn lead to a weakening of the SAR regime. Following discussion of the legal and political quarrels on the place of safety, the SAR operations at sea of the Armed Forces of Malta is analysed. The findings show that it is not merely a case of enforcing legal norms created by international law. The process is much more complex: legal gaps are filled by regional actors, through informal or even illegal practices, asserting their own claims at their convenience. Thus, transnationalization processes of law, such as the international SAR regime, are a fragmented and ambiguous set of regulations, creating space for negotiation and manoeuvre.²

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