

**CESSATION AND ASSESSMENT OF
NEW CIRCUMSTANCES : A COMMENT
ON *ABDULLA*, CJEU, 2 MARCH, 2010**

Roger ERRERA¹

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For the first time in the history of refugee and asylum law a supranational court adjudicates on issues relating directly to refugee and asylum law. The decisions of the Court of Justice of the European Union (hereafter: 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 EU². Several referrals are now pending before the Court³. *Elgafaji, Abdulla*⁴ and *Bolbol* have

¹ Conseiller d' Etat honoraire, France. Former Visiting Professor, Central European University, Budapest.

² See *European Parliament v Council*, Case C-133/06, 6 May 2008, on the respective powers of the European Parliament and of the Council on the procedure of adoption of the common list of safe countries of origin; *Migrationssverket v Petrosian*, Case C-19/08, January 29, 2009, on the implementation of the Dublin Regulation; *Melki Elgafaji, Noor Elgafagi v Staatsecretaris van Justitie*, Case C-465/07, Grand Chamber, 17 February, 2009;(2009) IJRL 297-307, on Article 15-c of the Qualification Directive. I have commented this decision at the European Chapter's workshop held in Berlin in October 2009 :” The ECJ and subsidiary protection: Reflections on Elgafaji, and after”, www.rogererrera.fr; *Bolbol v Bevandorlesi es Allampogarsagi*, Case C-31/09, 17 June 2010, on the exclusion clause of Art. 12-1 of the qualification Directive.

³ The Luxembourg administrative Court referred a case relating to the interpretation of Article 39 of the procedure Directive concerning the right to an effective remedy : *Diouf*, Case C-39/10, 5 February, 2010, OJEU, April 14,2010. The UNHCR issued a statement on this issue on May 21, 2010; The German Federal Administrative Court referred a case relating to the exclusion clauses of the qualification Directive (Art. 12,§ 2):Joint Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*. Advocate General P.Mengozzi delivered his conclusions on June 1, 2010. Two other pending cases relate to Art.12 (2) and 14(3) of the qualification Directive on exclusion: Cases C- 57/09, *Cemalettin Palat* and C-101/09, *Ayhar Cifci*.

⁴ *Aydin Salahadin Abdulla, Kamil Hasan,Ahmed Adem, Hamrin Mosa Rashi and Dier Jamal v Bundesrepublik Deutschland*, Joined Cases C-175/08,C-176/08,C-178/08 and C-179/08, 2 March 2010.

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 which 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 character of the questions sent to the Luxembourg Court; the content of the latter's decision and of the conclusions of Advocate General Mazak.

This paper shall examine the referral in *Abdulla* before commenting the Court's decision.

I THE REFERRAL

The case before the German administrative courts related to the cessation clauses of the qualification Directive (hereafter: QD). It concerned Iraqi nationals who had entered Germany before 1999 and 2002 and had been recognized as refugees in 2001 and 2002. In 2004-5 the Federal Administration initiated 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 a durable one and in the absence of fear of persecution. The Federal administrative court decided to send three questions to the Court. The second and the third ones are divided into three and two sub-questions.

The questions were the following ones:

“ 1. Is Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004⁵ to be interpreted as meaning that - apart from the second clause of Article 1(C)(5) of the Convention of 28 July

⁵ « 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”.

1951 relating to the status of Refugees⁶ (Geneva Convention on Refugees) - refugee status ceases to exist if the refugee's well 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 2004/83⁷ 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 2004/83⁸, which leads to the granting of subsidiary protection under Article 18 of that Directive⁹, 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 2004/83¹⁰? “

⁶ « 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 connexion which he has been recognised 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”.

⁷ « 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.”

⁸ « Qualification for subsidiary protection.- 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 ».

⁹ « 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 ».

¹⁰ « 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

II

THE COURT'S DECISION

II.1. Preliminary remarks

They relate to the use of Art. 1.C.5 of the Geneva Convention and to the transposition of the QD.

II.1.1. On the use of Article 1C.5 of the Geneva Convention

Many commentators mention the infrequent use of the cessation clause contained in Art.1.C.5. by States Parties¹¹. This is no more the case. According to Maria O'Sullivan "Germany commenced application of Article 1. C. 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 circumstances¹²". 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' clause¹³". The use of this clause is also attested by the case law of the French CRR/CNDA¹⁴ and by the UK Border Agency Instruction¹⁵. A 2003 UNHCR study gives examples of general declarations of official cessation¹⁶.

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 ».

¹¹ Cf. Guy S ;Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd Ed.,2007, at 142; UNHCR, *Discussion Note on the Application of the "ceased circumstances" cessation clause in the 1951 Convention* ,Doc. EC/SCP/1992/CRP.1, at § 3 and 11, quoted by Jean Fitzpatrick and Rafael Bonoan, "Cessation of refugee protection", in *Refugee protection in International Law. UNHCR Global Consultation on International Protection*, E.Feller, V.Türk and F.Nicholson, Eds., 2003, at 491 and 501; Maria O'Sullivan, "Withdrawing Protection Under Article 1 C(5) of the Geneva Convention: Lessons from Australia", (2008) IJRL. 586, at 587.

¹² Loc . cit. supra n. 11, at 587, n.4, quoting from UNHCR, *Statement on the "ceased circumstances" clause of the European Community Qualification Directive*,2008,at 10.

¹³ UNHCR,*Statement...op. cit.*, quoted supra n.12, at 11.

¹⁴ D.Alland and C.Teitgen-Colly, *Traité du droit de l'asile*, 2002, at 612 ss ;Commission de recours des réfugiés, *Le droit des réfugiés en France*, with a study by F.Tiberghien and a preface by M.Combarous, 2000, at 294-296 ;F.Tiberghien, *La protection des réfugiés en France*, 2nd Ed.,1988, at 451 ss.

¹⁵ Home Office, UK Border Agency,*Cancellation, cessation and revocation of refugee status*,18 December 2008, Version 3.0.

¹⁶ UNHCR, *Guidelines on International Protection. Cessation of Refugee Status in the context of Article 1 C(5) and (6) of the 1951 Convention*,HCR/GIP/03/03, 10 February 2003, at 3.

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 1.C.5 thereof supports the cautious approach of the application of Article 11 (1) e...”¹⁷.

II.1.2. On the transposition of the qualification Directive

A recent report of the European Commission mentions the important discrepancies in its transposition and implementation¹⁸. The following points deserve a special mention:

a) While the provisions of the QD concerning cessation “ are phrased in mandatory terms¹⁹...legislation in a number of Member States merely allows for termination of status on the grounds referred to in these provisions²⁰ instead of requiring it²¹

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”²².

c) “ In other Member States, cessation of refugee status ... is not possible if there are compelling grounds resulting from previous persecutions”²³.

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”²⁴.

Under Art. 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 is strange.

In 2009 the Commission published its proposal to revise the QD²⁵.

¹⁷ Conclusions, n.20.

¹⁸ European Commission, *Report from the Commission to the European Parliament and to the Council on the application of Directive 2004/83/EC of 29 April 2004...*, COM (2010) 314 final, June 16, 2010.

¹⁹ Under Art. 11.1 QD « A third country national or a stateless person shall cease to be a refugee if...”(etc). Cf. Art.1 .C .5. of he Geneva Convention quoted supra n. 6. (RE).

²⁰ Art . 11 and 12, read in conjunction with Art. 14(1) and (3), for refugee status.

²¹ *Report*, at 9. The following countries are mentioned at n. 26: Belgium, Ireland and the UK.

²² *Id*, *ibid*. In n. 30 14 countries are mentioned: Austria, Belgium ,Cyprus, the Czech Republic, France, Greece, Ireland, Latvia, the Netherlands, Poland, Romania, Slovenia and Spain.

²³ *Id*, *Ibid*. This is the case in Germany, the Netherlands and Poland (see n.31, at 10).

²⁴ *Id*, at 10.The Report mentions Austria, Germany, the Netherlands and Poland (See n.31, at 10).

²⁵ COM (2009) 554/4.

II.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 one 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”²⁶.

It drew the consequences:

“ The provisions of 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”²⁷.

The second category of texts is human rights instruments. This dimension is present in several provisions of the QD²⁸. It has been fully taken into account both by Advocate General Mazak excellent conclusions²⁹ and by the Court's decision³⁰.

II.3. The Court's answer to the three questions

II.3.1. *The first question*

“ Is Art. 11. 1 (e) 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 Art.2.(c) QD, on the basis

²⁶ At § 52.

²⁷ At § 53.

²⁸ See,inter alia, recitals 10,11 and 12, and Art. 9 1 (a) and (b). - On refugee law and human rights see R.Errera, “Human Rights and Refugee Law: The Three Pillars”, in IARLJ, *The Asylum Process and the Rule of Law*, 2006,at 173.

²⁹ See in particular § 54.

³⁰ At § 71 and 73.

of which refugee status was granted, no longer exists and that person has no other reasons to fear persecution within the terms of Art.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 certain elements. That fear has disappeared because the circumstances which accompanied it have disappeared. Therefore cessation is the natural and logical step.

This is not so : firstly 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 which must be taken into account in cessation proceedings. Many Member States have drawn the 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 Art. 11.1 (e) could be read as requiring an additional condition for cessation, i e the possibility of the refugee 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 Convention³¹.

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 the German one. What then about Art. 11-2 QD, under which

³¹ Conclusions, at § 33.

“ In considering points (c) and (f) of paragraph 1³², Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the 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”³³.

The Commission’s position was a different one. It held that Art. 11.1 (e) QD ought to be interpreted as meaning that a person does *not*³⁴ lose his status as a refugee if the well-founded fear of persecution within the terms of Art. 2 (c) QD, on which the status was granted, no longer exist and he also has no other reason to fear persecution. The Commission commented the meaning of Art. 11.2 on the change of circumstances, which must be both significant and non-temporary. In other terms, 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 to examine whether the refugee can effectively re-avail himself of the protection of the country of his nationality³⁵. This is indeed fully consistent with the Commission’s commentary of its proposal relating to what was then Art.13³⁶.

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

- a well-founded fear
- of being persecuted on one of the five grounds mentioned
- the inability or unwillingness, because of such a fear, to avail oneself of the protection of the country of nationality
- to be outside that country³⁷.

³² Relating to cessation.

³³ Conclusions, at § 36.

³⁴ Emphasis added .

³⁵ Concl., at § 37

³⁶ Commission, *Proposal for a Council Directive*, COM (2001) 510 final, 12 September 2001, Explanatory Memorandum, Art. 13 (e), at 23-4.

³⁷ Decision, at § 56-64.

The second one relates to persecution (Art.9).

The third category includes Art.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 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”³⁸.

This in turn leads to an evaluation of the change of circumstances. It must have “ remedied the reasons which led to refugee status”³⁹. There are two consequences : the first one relates to protection, the second one to the nature and scope of the change of circumstances.

Protection

The first consequence is that Art.11.2 must be interpreted by reference to Art. 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”⁴⁰.

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 guaranteed⁴¹.

³⁸ Id, at § 66-67.

³⁹ Id, at § 69.

⁴⁰ Id, at § 70.

⁴¹ Id, at § 71. The decision mentions Art. 4.(3) QD.

Change of circumstances

It must be, according to Art.11.2 QD, “of such a significant and 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, “when the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been *permanently eradicated*”⁴². 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”⁴³.

This is in full accordance with three sets of sources of which both Advocate General Mazak⁴⁴ were aware: The UNHCR positions and recommendations; academic writings on asylum and refugee law and general State practice.

UNHCR positions and declarations

They are expressed in the Handbook, Guidelines and declarations of the Executive Council. The Handbook mentions the fundamental and non-temporary character of the change of circumstances⁴⁵ and adds that the cessation clauses “ should...be interpreted restrictively”⁴⁶. On Art. 1.C 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”⁴⁷.

Subsequent declarations of the UNHCR have elaborated on these points⁴⁸.

⁴² Emphasis added.

⁴³ Decision, at § 73.

⁴⁴ See, e.g., conclusions, n.7, where the Handbook and the 2003 Guidelines on cessation are mentioned

⁴⁵ UNHCR, *Handbook*, at § 112.

⁴⁶ *Id.*, at § 116.

⁴⁷ *Id.*, at § 135.

⁴⁸ See the conclusions adopted by the Executive Committee on International Protection of Refugees, n° 65 (XLII) General, at 9, on the « profound and enduring nature » of the change of circumstances ; N°09 (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”; *Note on the cessation clauses*, UN doc EC/47/SC/CRP.30, 30 May 1997, at § 20-23;UNHCR, *Guidelines on the application of the cessation clauses*, UN doc UNHCR/IOM/17/99;*Guidelines*

Academic writings

The legal literature on asylum and refugee expresses a similar orientation⁴⁹.

State practice

The general State practice has been aptly summed up by the UNHCR⁵⁰.

By its thorough exploration of the notion of change of circumstances and what it really means in terms of protection and of persecution and 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.

II.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 ?

(a) (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

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

The answer to question 2 a)

on international Protection . Cessation of refugee status in the context of Article 1 C (5) and (6) of the 1951 Convention, HCR/GIP/03/03, 10 February 2003. See also UNHCR, Annotated Comments on the QD. In addition the UNHCR has issued in August 2008 a statement on the “ ceased circumstances’ clause of the QD in the context of the referral of the German Federal Administrative Court.

⁴⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd Ed, 2007, at 139-149; James C. Hathaway, *The Rights of Refugees under International Law*, 2000, at 919 ss; Joan Fitzpatrick and Rafael Bonoan, “ Cessation of refugee protection”, in *R efugee Protection in International Law. UNHCR Global Consultation on International Protection*, E.Feller, V.Türk and F.Nicholson, Eds, 2003, at 493ss; French translation: *La protection des réfugiés en droit international*, Brussels, 2008.

⁵⁰ UNHCR, 2008 Statement, loc. cit., mentioned supra n.48, at 12 ss..

The answer to question 2 a)

The Court included it into its answer to question 1⁵¹. It mentioned “ the actor or actors of protection referred to in Article 7 (1) of the Directive”⁵². 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”⁵³.

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 Art. 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 deducted from Art. 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”⁵⁴.

The inclusion of “international organisations” among actors of protection raises four issues:

- The Geneva Convention excludes from its scope, under Art. 1.D “ 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”.

⁵¹ At § 77.

⁵² At § 76, second indent.

⁵³ Id, third indent.

⁵⁴ Conclusions, at §58. The words between parenthesis figure in n. 33 of the conclusions.

One of such organisations is the UNWRA. Article 12(1) QD reproduces Art. 1.D of the Geneva Convention⁵⁵.

- 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*⁵⁶ who are able and willing to give effect to rights and protect and protect an individual from harm ion a manner similar to an internationally recognized State”⁵⁷.
- The domestic law has affirmed that protection may be provided by entities other than 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 or armed conflicts which 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 clauses⁵⁸.
- The wording of question 2 a) and that Art.7 (1) b) QD raises several questions:
 - a) The German Court asked whether the protection can be assured *only* with the help of multinational troops. Art. 7 (1) QD mentions “ international organisations”. It neither mentions nor excludes troops, multinational or other. The position of Advocate General Mazak was the following one:

⁵⁵ On the interpretation of this Article see the recent decision of the CJEU, *Bolbol*, mentioned supra n.2. On the French case law see the Conseil d'Etat's decision, *Office français de protection des réfugiés et apatrides c M. Assfour*, July 23, 2010: A., a Palestinian, was registered with the UNRWA in Jordan. He decided to leave that country in 2003 et came 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, 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. On the English case law see H.Lambert, “ The European Union Qualification Directive, its impact on the jurisprudence of the UK and International Law”, 55 ICLQ 2006. 161, at 171.

⁵⁶ Emphasis added.

⁵⁷ Commission's proposal, Art. 9.3.

⁵⁸ See for the UK *Dyli v Home Secretary* (2000) INLR 372.NB;(2000) Imm AR 652 (Kosovo.Positive answer);for France (negative answer: absence of protection): CRR, *Samanga*, November 30, 2006 (UN forces in Ituria, democratic Republic of Congo); *Saint-Phart*, June 25, 2005, p.54; *Valens*, July 6, 2005, p.67;*Vil*, October 30,2006 (MINUSTAH in Haiti); *Qerimi*, September 23,2004, p. 51 (KFOR, Kosovo).

“ ...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”⁵⁹.

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”.⁶⁰ 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?
- c) The Advocate General conclusion’s raise an additional question: What is the meaning of the expression “ the international community” ? It is not, to say the least, a clear one⁶¹. 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 Art. 7 (2) QD , as shown by the tragic examples of what took place in Rwanda and in Srebrenica.
- d) The inclusion of international organisations among the actors of protection by the QD continues to raise many interrogations. One may regret that the Court’s decision does not elaborate on this point.

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) and the decision is therefore silent on them, with one exception, relating to subsidiary protection. The Court stated the obvious: The Directive

⁵⁹ Conclusions, at § 58, last sentence

⁶⁰ At § 75.

⁶¹ Is it more than a legal and political fiction ? 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 October 29,1997, 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 ,Blaskic,§ 26, quoted by Nguyen Qoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, 7th Ed.,2002, at 401-402.

mentions two distinct systems of international protection, that is refugee status and subsidiary protection, 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”⁶².

II

Question II.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 to be regretted. The answer to questions I and 2.a) did not command such a 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 7-2 and 11.1.e) QD⁶³. 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 criteria when assessing cessation. Two: It must, however, be taken in consideration as 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 considerations⁶⁴.

I.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, re new, different circumstances founding persecution to be

⁶² At § 78.

⁶³ At § 62.

⁶⁴ At § 63

- (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 ? ”

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 during the examination of the initial application for the granting of refugee status⁶⁵. After recalling the pertinent applicable provisions of the QD (Art. 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”⁶⁶.

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”⁶⁷;

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”⁶⁸.

The relaxation of the burden of proof under Art. 4 (4) QD

According to it “ 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

⁶⁵ At § 83.

⁶⁶ At § 87.

⁶⁷ At § 89.

⁶⁸ Conclusions, at § 70. See also § 71-72.

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"⁶⁹. 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 persecution⁷⁰.

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*⁷¹ with the reasons for persecution being examined at that stage"⁷²." 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 them;
- 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"⁷³.

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

⁶⁹ Id, at § 75.

⁷⁰ See § 74.

⁷¹ Emphasis added.

⁷² At § 96

⁷³ At § 97