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THE SUBSIDIARY PROTECTION IN ARMED CONFLICTS

The construction and the application of the Subsidiary Protection type c) in France

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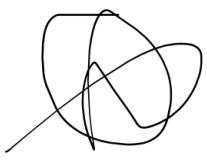

KEYS WORDS

- Asylum law
- Refugee status
- Subsidiary protection
- European asylum system
- Code of Entry and Residence of Foreigners and Asylum Seekers
- Appreciation of the judge

ACRONYMS

- EU : European Union
- SC : State Council
- UNHCR : United Nations High Commissioner for Refugee
- RAEC : Common European Asylum System
- SP : Subsidiary Protection
- OFPRA : French Office for Refugees and Stateless Persons
- CESEDA : Code of Entry and Residence of Foreigners and Asylum Seekers
- CNDA : National Court for Asylum Law
- ECHR : European Court of Human Rights
- CRR : Refugee Appeals Commission
- ETIAS : European Travel Information and Authorization System
- AUEA : European Union Agency for Asylum
- OQTF : Obligation to Leave French Territory
- HCR : High Commissioner for Refugees

ABSTRACT

The granting of international protection in France seems to be framed by numerous legal texts, codified in the CESEDA. From European origin, subsidiary protection type 3 allows asylum seekers, fleeing an area of armed conflict, to benefit from asylum in France.

However, there is no consensus on the qualification and assessment of an armed conflict within the international system. This legal vacuum is reflected in the legal framework, leaving a wide margin of appreciation to judges to rule. The conditions for granting subsidiary protection relating to armed conflicts are therefore the result of a praetorian construction.

Moreover, the multidimensionality of the right to asylum has given rise to numerous conflicts between international courts, particularly European, and national ones, seeking to define their own standards. French case law shows the large extent of the judge's appreciation and how they are trying to emancipate from international law. However, the many decisions and judgments of the French courts do not seem to be fully based on the principle of impartiality, creating on the contrary, a political asylum law.

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INTERNSHIP PRESENTATION

Through this legal research dissertation, I seek first and foremost to respond to the problematical asylum policy on the European and national scale. The interrogations I was interested in are the direct result of my five month internship with Lucille Watson in a law firm specializing in asylum law, from January 2023, to June 2023.

During this period, most of my work consisted of drafting appeals and briefs before the cases were submitted to the French National Asylum Court. Maître Watson would send me the applicants certificate of admission to legal aid and their file from the Office Français de Protection pour les Réfugiés et Apatrides (OFPRA), containing his story and the decision rejecting his asylum application. Based on these documents, I had to clarify the applicant's story, drawing on documentary and legal research to justify the merits of the application to the Cour Nationale du Droit d'Asile (CNDA). In certain cases, such as where there were inconsistencies in the applicant's story, I drafted questionnaires to try to better understand their path into exile.

Alongside this research and writing work, Maître Watson allowed me to attend preparatory interviews she conducted with the applicants, before their audience. What's more, as our offices were located next door to the CNDA, I had the chance to attend around ten hearings and see different lawyers' defense speeches. I also conducted a number of telephone and in-person interviews with asylum seekers, to authenticate their accounts before the Court’s audience. Drafting appeals proved to be a highly varied task, depending on the type of procedure (supplementary submission, reconsideration), the applicant's nationality and the grounds for their application. Finally, I had to deal with various secretarial tasks, such as filing files and welcoming asylum seekers.

Maître Watson is specialized in Somali cases. Of the forty-five appeals I drafted during my internship, eleven concerned Somali’s exiles. This work therefore gave me a precise knowledge of the geopolitical context of this country. The majority of appeals were linked to fears about the Al Shebab armed group. Moreover, Somalia is a country with a multitude of ethnic clans. The hierarchical organization of these groups gives rise to numerous conflicts. As a result, many Somali asylum seekers fear not only terrorist threats, but also persecution linked to their clan affiliation. A wide range of problems can thus be added to the reasons for exile.

I was struck by the example of a Somali applicant from Mogadishu, which illustrates the multiplicity of factors to be taken into account. In Samoli, the latest was threatened by the Al shabaab militias after his father refused to enlist in the troops. In addition, the applicant was persecuted for belonging to the Ashraaf minority clan. Finally, in drafting his appeal, I also had to take into account the fact that he had already benefited from international protection in Italy. Thus, my internship gave me a solid legal grounding in the drafting of appeals and an understanding of the asylum system.

GENERAL INTRODUCTION

A. Opening on the European actuality

The actuality in the European Union these past month has been putting light on the role member states are playing on the migration policy field. On June the 11th, Ursula von der Leyen presented a plan to reinforce cooperation between the European Union and Tunisia. The plan is based on five pillars, which are : the economic development, investment on business and energy, the entry of Tunisia in the Erasmus + programme and the engagement to fight against irregular migration. To push the further the agreement, Giorgia Meloni, Mark Rutte and Ursula von der Leyen have been meeting Kais Saied in Tunisia.

The massive flux of migrants to central Europe has pushed the migratory question in the center of the preoccupation for the EU. Indeed, 26 000 migrants crossed the border for Italy since the beginning of 2023. Through these migrants, 51 215 left from Tunisian coast, which can explain why Italy pushed for the implementation. During the meeting with Kais Saied, the Commission notably proposed to invest 105 billion euros to fight against ferrymans and reinforce maritime control of the tunisian borders. This means that the EU is “giving the burden” of the management of migration to a third country without considering the guarantee of Human rights.

Thus, the proposition encourages us to look at how our country, France, stands in front of the European migration policy of externalization and to what extent it concretely frames asylum law.

B. The birth of the right to asylum

The history of asylum goes back to the deepest roots of Western law. In the face of looting and force, certain places enjoy a kind of immunity, as attested by the very terminology of the word asylum, from the Greek "asulo": inviolable place. It was in the temple of Poseidon that this guardianship originated. Of religious origin, asylum was a way of invoking a higher form of protection, a sacred space.

Asylums in Christian churches have been used since the 4th century (Council of Sardique, 344). Secularized, territorial asylum has become a prerogative of the State, which allows a person to remain on its territory by derogating from the general rules of foreigners' law. In France, according to the Constitution of 6 Messidor, Year I (June 24, 1793), *"the French people shall*

give asylum to foreigners banished by the cause of liberty". The Constitution of the Fourth Republic consolidated this tradition, with paragraph IV of the Preamble stating that *"any man persecuted for his action in favor of liberty has the right of asylum in the territories of the Republic".*

In international law, the right to asylum is a fundamental human right recognized by the 1948 Universal Declaration of Human Rights. With the Geneva Convention of July 7, 1951, and the New York Protocol of January 31, 1967, refugee status became a cornerstone of asylum. Article 18 of the Charter of Fundamental Rights includes, for the first time, a right to asylum guaranteed in the Universal Declaration of Human Rights approved on December 10, 1948. Article 19(2) of the Charter enshrines the principle of non-refoulement, according to which it is prohibited to return a person to a place where he or she has a well-founded fear of being persecuted or faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Article 3 of the European Convention on Human Rights indirectly guarantees these principles: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*[1]. In the Court's view, it is a violation of this article for a Contracting State to expel a person to a country where there is a risk of inhuman or degrading treatment. Such removal is akin to refoulement. The asylum procedure is thus one of the mechanisms available to States to avoid such a violation.

C. International protection statuses in Europe

At the European Union (EU) level, the Common European Asylum System (CEAS) has established a common minimum asylum regime. The EU Charter of Fundamental Rights guarantees the right to asylum (article 18), thus going beyond the right to seek asylum. People who qualify for asylum have the right to be granted this status. Articles 13 (refugee status) and 18 (subsidiary protection status) of the Qualification Directive (2011/95/EU) expressly grant the right to be granted refugee status or subsidiary protection. Although it is important to note that people who have been granted international protection may lose their status if the situation in their country of origin improves significantly.

Lastly, created in 2001 following the Kosovo crisis, refugees can exceptionally benefit from temporary protection. The purpose of this exceptional procedure is to grant immediate

[1] https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet4Rev.1fr.pdf

protection for a period of one year, extendable once, without prejudice to the granting of international protection, in the event of a mass influx of people. However, none of the countries affected by an increase in the number of asylum seekers has introduced temporary protection following this regulation.

D. French application of European Directives

Today in France, the right to asylum is governed by the provisions of Book VII of the Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile (CESEDA), reformed for the last time by the Asylum and Immigration Act of 2021. In France, Article 1 of the law of December 10, 2013 substituted territorial asylum, transposing the "Qualification Directive" of April 29, 2004. Today, a person seeking asylum in France can obtain either refugee status or subsidiary protection, depending on whether they are at risk of persecution or serious harm in their country of origin. France has also set up the European temporary protection mechanism.

E. Focus on the Subsidiary Protection Type 3) (or c)

In this paper, we have chosen to focus more specifically on subsidiary protection type c). In the Article L 512-1 CESEDA point 3), the subsidiary protection fills certain gaps by making it possible to grant asylum to people at risk of being subjected to *"serious harm which is not a) the death penalty or an execution b) torture, inhuman treatment or punishment* ***c) in the case of a civilian, a serious and individual threat to his or her life or person, regardless of their personal situation and resulting from a situation of internal or international armed conflict"***[2]. The article also provides for subsidiary protection to be granted to *"any person who does not meet the conditions for recognition as a refugee, and for whom there are serious and proven grounds for believing that there would be a real risk of suffering one of the following serious harm in his or her country (...)".* OFPRA and CNDA must therefore assess whether the asylum seeker meets the definition of a refugee set out in article L 511-1, and if not, whether he or she is eligible for protection under article L 512-2.

However, if this status is subsidiary to the Geneva Convention, SP3 is also subsidiary to SP1 and SP2, although these must be applied as a matter of priority. The use of these different foundations is very uneven. OFRPA and CNDA make very little use of the *"risk of death penalty or execution"*, whereas the risk of *"torture, inhuman and degrading treatment or*

[2]Article L 512-1 CESEDA point 3)

punishment", and to a lesser extent that resulting from armed conflict, are applied much more frequently. According to State Council case law dated December 28, 2017 , the CNDA must investigate ex officio the possible existence of a situation of armed conflict characterizing indiscriminate violence when examining the merits of the application for subsidiary protection. However, if this ground is neither invoked nor substantiated, it may implicitly set it aside in its decision.

Risks of suffering serious harm consisting of a *"death sentence or execution"* or acts of *"torture, inhuman or degrading treatment or punishment"* are thus normally systematically rejected, before the application of the SP3 is considered. However, the boundary between SP1, SP2 and SP3 is porous, all the more so as the criteria laid down by the ECJ are not respected by French case law. More than the notion of conflict by itself, the major difference between the first two articles and the third lies in the nature of serious harm, and we shall see that this same notion is subject to a variety of legal interpretations.

F. Methodology

The choice of the topic led us to write a judicial type of dissertation based on scientific and legal literature, as well as the jurisprudence of various institutions involved in the asylum field (CNDA, ECJ, CCRR, law firms, etc.). Moreover, the legal vagueness surrounding the concept of subsidiary protection type c), seems to call into question the theories of the coherence of the normative system developed by authors such as *Bobbio*[3]*, Dworkin*[4]*, MacCormick, Villa*[5] *and Schiavello*[6].

According to these studies, not only is coherence between norms preferable in itself for various reasons, in particular legal certainty, but it is also an attribute of any legal system, the study of which is particularly relevant when, as in subsidiary protection within the EU, a system has to be designed on the basis of different sets of norms. For these reasons, we thought interesting to question to what extent asylum law is an international coherent legislative model and what are the mechanisms settled behind.

[3] Teoria dell' Ordinamento Giuridico, Torino, éd. G. Giappichelli, 1960, Essais de théorie du droit, Bruxelles, Paris, Bruylant, LGDJ, 1998

[4] Law's Empire, London, Fontana Press, 1986

[5] « Coherence in Legal Justification », in A. Peczenik, L. Lindahl, B. Van Roermund (eds), Theory of Legal Science, Dordrecht, Boston, Lancaster, Reidel Publishing,1984

[6] « Normative Coherence and Epistemological Presuppositions of Justification », in P. Nerhot (ed.), Law, Interpretation and Reality, Dordrecht, London, Boston, Kluwer

According to the model of coherence applied to the international law of armed conflict by Raphaël van Steenberg's, the concept of armed conflict specific to international humanitarian law should be "translated" in accordance with the law that receives it. In this case refugee law should be a safeguard so as not to undermine its founding principle and to enable better protection of refugees. However the author assumes that the vagueness of international refugee's law is more inclined to restrict the granting of protection. In order to understand to what extent this is true, we narrow our focus on a specific disposition of French law and wonder ***to what extent article L-512 of the CESEDA, concerning subsidiary protection, is a guarantee for refugees leaving a war zone for France ?***

In order to do so, we based our study on the theoretical framework of Mireille Delmas Marty and her "Ordering pluralism". In her study, she refers to two techniques applied by authorities to create a coherent legal system which are : "***the cross-internormativity"*** and the ***"cross interpretation".*** On the one hand, the cross-internormativity is understood in the sense of express or apparent reference from one normative body to another and vice versa. On the other hand, cross-interpretation, understood in the sense of interpretation of a norm or concept of one normative body in the light of a norm or concept of another normative body and vice versa.

This theory led us to put forward two hypotheses: first, we assume that ***the international law framework and especially the European Union, as a political and legal entity, plays a role in defining and applying the SP3 in France.*** Then, in the same way, our second hypothesis admits *a* ***legal and political power of the French jurisdictions for the granting of the SP3.***

To this end, we will first examine the extent to which international law and the European project have shaped, and continue to shape, the application of the SP3 in France. We will then see that the European law related to this status leaves judges a wide margin of appreciation. This will lead us to examine the clarifications made by both international and French courts in defining the SP3. Finally, the study of the Afghan case will illustrate the role of the French judge in granting SP3 and the political dimension of his action.

PART I. SUBSIDIARY PROTECTION: A STATUS OF INTERNATIONAL ORIGIN

CHAPTER 1 : SP3 ; AN INTERNATIONAL PROTECTION PUSHED BY THE EUROPEAN UNION

A. Subsidiary protection, the fruit of European standardization of asylum law

In ratifying the Treaty of Amsterdam, the member states of the European Union committed themselves to developing a common asylum and immigration policy. At the Tampere European Council on October 15 and 16 1999, the European Commission was asked to present a set of asylum procedures. The key points of the legislative program are, on the one hand, to harmonize the interpretation of the definition of "refugee" within the meaning of the Geneva Convention and, on the other, to harmonize subsidiary forms of protection. To this end, the Council proposed a Protection Directive in 2001 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection.

In this proposal, the Commission proposes to respond to three challenges: to ensure full compliance with the commitments made at the Tempere European Council to guarantee optimum protection for refugees on the basis of the Geneva Convention; to promote consensus between Member States on the categories of people who are entitled to international protection in an area without internal borders; and finally to develop a protection regime offering equivalent social rights to displaced persons, so as not to create *"second-class"*[7] refugees.

EU law has been developed in two stages. A first generation of texts, resulting from the communitization of asylum policies by the Treaty of Amsterdam, laid down a set of minimum rules to be applied by Member States. This legislation covered the whole spectrum of asylum issues, including reception conditions, the procedure for examining asylum applications, and the application of criteria for qualifying asylum applications under both the Geneva Convention and subsidiary protection. At the same time, the Union consolidated the achievements of the Schengen area legislation by adopting a regulation on determining the State responsible for examining asylum applications, better known as the "Dublin II" regulation. This first generation of texts was not very restrictive, and was mainly a downward harmonization of national protection systems.

7 Quelle protection subsidiaire dans l'Union européenne ?Daphné Bouteillet-Paquet, Hommes & Migrations Année 2002 1238 pp. 75-87

Such was the case with subsidiary protection, which represented an innovation. Its aim was to enable people whose situation did not fall within the scope of the Geneva Convention to benefit from protection on the grounds that they would be at risk of serious harm, such as the death penalty, acts of torture, inhuman or degrading treatment, or serious and individual threats to their lives as a result of indiscriminate violence in the event of internal or international armed conflict. In this respect, this protection fills a certain gap left by the Geneva Convention, the purpose of which is to protect only those persons specifically targeted on the basis of intrinsic characteristics relating to their "race", religion, nationality, membership of a social group or political opinions, even if the notion of "social group" is highly extensible.

The end of the 20th century saw the development of conflicts in which civilians, by virtue of their status as non-combatants, were exposed to risks to their lives or safety. Excluded from the scope of the Geneva Convention, they were unable to benefit from any other protection except a form of territorial asylum, the content of which was ill-defined, and the granting was left to the discretion of state authorities. Although various alternative forms of protection existed in the Member States at the time, the Qualification Directive had the merit of harmonizing the criteria for granting such protection.

A second generation of texts will therefore be drawn up with a view to establishing a common European asylum system in 2015. The aim of this second phase was to establish a higher level of uniform protection and to guarantee solidarity within the EU. It led to the recasting of all the directives and regulations making up the "asylum package". Most recently, after the failure of the "Asylum Package" negotiations initiated in 2016, the European Commission presented a draft reform of European migration policy, known as the "Pact on Migration and Asylum", on September 23, 2020.

B. Transposition with political consequences

However - and this is one of the issues that has guided our research - depending on the method applied by each state, there are divergences in the recognition of refugee and subsidiary protection status. The adoption of the Qualification Directive in 2004, prompted by the EU's new powers in the field of asylum and immigration together with the political will to establish a common European asylum system, introduced the notion of subsidiary protection at regional level. By imposing an obligation on member states to formalize a subsidiary status of international protection, to which rights are attached, this instrument marks a definite step

forward. By defining the scope of subsidiary protection, the directive should have had the effect of offering asylum seekers the same chances of access to protection in the European Union. However, this is still not the case, not least because many countries have been slow to transpose the directive.

The case of Syrian asylum seekers serves to illustrate these discrepancies. According to the latest statistics, in 2015, 43% of Syrians protected in Europe were granted subsidiary protection and 51% refugee status. But the distribution between the rates of recognition of refugee status and those of subsidiary protection within each of the different EU countries varies widely. For example, only 15% of protected Syrian refugees were granted subsidiary protection in Germany, compared with 87% in Sweden[8]. These differences have very real consequences for individuals, as the two statuses do not entitle them to the same protection regime.

Indeed, some member states apply subsidiary protection status only to victims of torture, inhuman and degrading treatment, others include victims of generalized violence and/or natural disasters, and still others grant this status to people with close family ties or who find it materially impossible to return to their country of origin or habitual residence. Continuing discrepancies in the recognition of refugee and subsidiary protection status show that there is still no common understanding of the eligibility criteria for protection.

What's more, subsidiary protection status guarantees a much lower set of rights than refugee status, such as a residence permit valid for just one year (article 24). Statistics published by the United Nations High Commissioner for Refugees also point to a structural decline in the number of statuses issued on the basis of the Geneva Convention. In fact, according to Eurostat figures, in 2021 member states issued 724,000 asylum decisions, of which around 271,000 were positive. The overall number of protection decisions is down 4% in 2020. The overall protection rate is 51.9%, also down two points in 2020[9].

The complexity of implementing subsidiary protection therefore also seems to be the result of a lack of political will on the part of the Member States. Indeed, the scope of the status of beneficiaries of subsidiary protection, the fruit of a political compromise unfavorable to a

8 BITOULAS Alexander, « *Asylum Applicants and first instance decisions on asylum applications : 2014* », Data in focus 3/2015, Eurostat – Populations and social conditions, réf du 1er octobre 2015, disponible sur www.ec.europa/eurostat

9 BITOULAS Alexander, « *Asylum Applicants and first instance decisions on asylum applications : 2014* », Data in focus 3/2015, Eurostat – Populations and social conditions, réf du 1er octobre 2015, disponible sur www.ec.europa/eurostat

generous recognition of rights, remains very largely within the competence of the States, to whom the directive leaves considerable discretion.

C. An application dependent on the willingness of member states

Pending changes at European level, the subsidiary protection system remains strongly determined by national practices. Indeed, the Directive, by setting only minimum standards, still leaves room for differentiated application by each State. It is for this reason that we felt it relevant to mention the France Terre d'Asile study[10], which studied the rights granted by *Germany, Belgium, Hungary, France and Sweden* on refugees and subsidiary protection beneficiaries.

The researchers analyzed six areas of application, and we will summarize their conclusions by focusing on the French case. With regard to the right to residence, unlike Hungary and Sweden, France offers only a one-year renewable residence permit to beneficiaries of subsidiary protection. As for the right to family reunification, this is guaranteed by most Member States through the principle of family unity, as in France. Access to employment is open to refugees and beneficiaries of subsidiary protection in France, while it is limited in Germany and Belgium. Moreover, France now offers the minimum integration income to beneficiaries of subsidiary protection under the same conditions as for refugees, in contrast to the Belgian regulation on subsistence income. Finally, the study concludes that access to nationality varies from country to country: after at least seven years in Germany, five years in Sweden and France, three years in Belgium and Hungary. Finally, none of the member states grants the right to vote to refugees or beneficiaries of subsidiary protection at national level.

These examples underline the fact that, despite its commitment to integration, the European Union is not yet a totally homogenous area, with procedures, status and rights equivalent for all foreigners. The importance of the national dimension in the application of European directives on subsidiary protection therefore seems to be guided by political will.

D. The choice of the CESEDA analysis

It is this national political dimension of the application of European asylum directives that has guided our choice to analyze subsidiary protection through the prism of the CESEDA.

10 https://www.france-terre-asile.org/images/stories/publications/pdf/Cs18__vweb-finale.pdf

As mentioned above, from this Code, France has adopted specific legal provisions governing the entry and processing of asylum-seekers, which must remain compatible with European law. In this thesis, we focus on the specific article L 512-1 3) of the CESEDA, about civilians fleeing armed conflicts, which is significant to illustrate the gap of translation from the European Qualification Directive of 2011.

At European Union level, specific rules have been drawn up in this area, by means of several instruments which ensure compliance by member states. European law is made up of European Union law and Council of Europe law, which govern the entry and processing of asylum seekers. These rules must respect the 1951 Convention, as recognized in article 78 of the Treaty on the Functioning of the European Union. What's more, alongside European Union law and Council of Europe law, although not specifically concerned with asylum, now play an important role in regulating these issues.

Although the 2021 version of the CESEDA has, for the first time, incorporated references to European regulations: the Schengen Borders Code, the Community Code on Visas and the Regulation on the European Information and Travel Authorization System (ETIAS), asylum regulations are still mainly the work of individual French governments. In the past, the status of foreigners in France was governed by the Disposition of November 2, 1945 issued by the Provisional Government of the French Republic. Amended several times, this text was replaced by the CESEDA. It came into force in 2005, and has already been the subject of numerous reforms, the latest of which was announced for 2022 and is still being drafted.

In addition to European conventions, these national modifications must also comply with international refugee law. This concerns the rules of the 1951 Refugee Convention, as well as the Opinions, Notes and Recommendations of the United Nation High Commissioner for Refugee (UNHCR), the body responsible for ensuring compliance with the Convention. Therefore, it is this multi-dimensionality that makes subsidiary protection so special, and its national application so complex.

CHAPTER 2: CONTROVERSIAL INTERNORMATIVITY WITH INTERNATIONAL LAW

A. The theory of the coherence system of international law on armed conflict

Raphaël van Steenberghe's article *"Coherence and the international law of armed conflict as a legal system"* explains that in contemporary practice relating to armed conflict, practice understood in the broad sense and including texts and case law, there is a definite tendency to ensure what might precisely be described as formal coherence between the different branches of international law applicable to such conflicts. This practice clearly reflects the concern of the players involved, if not to resolve, at least to avoid possible conflicts between these branches.

Several stages are necessary for the construction of this common law and some of them echo the two stages described in the theories of normative coherence, namely, the search for formal coherence, which must be extended by a search for the material coherence of the system under consideration. The first consists of a movement of coordination between different normative spaces, which is achieved through horizontal exchanges between these normative groupings. Delmas-Marty, who theorized the ***ordering legal pluralism***, refers to two techniques in this respect: cross-internormativity, understood in the sense of the express or apparent reference from one normative set to another and vice versa, and cross-interpretation, understood in the sense of the interpretation of a norm or concept of one normative set in the light of a norm or concept of another normative set and vice versa.

As we already briefly mentioned above, there are many cases of cross-internormativity between international humanitarian law and other branches applicable in armed conflicts. In the refugee law, for example, Article 45(4) of the Geneva Convention IV of 1949, prohibits the transfer of protected persons to a country where they may fear persecution on the basis of refugee law. It's also the case, in the opposite direction, with the reference to armed conflict, a concept specific to international humanitarian law, in the definition of the scope of application of subsidiary protection to refugee status provided at European level.

The second coordination technique is cross-interpretation. Such interpretations are not only the result of the application of the lex specialis mechanism, which is mainly used to interpret human rights in the light of international humanitarian law, in particular by the International Court of Justice and certain national courts. Other mechanisms are also used, such as systemic

interpretation, which is implicitly applied by national administrative authorities to refugee law in the light of international humanitarian law.

According to the author, restricting oneself to the application of mechanisms for resolving or avoiding conflicts of norms between the different branches of international law applicable to armed conflicts, without this application being guided, is likely to reduce the protection of individuals. This is illustrated by the possible interpretation of certain concepts of the right of asylum in the light of international humanitarian law. As we will see, this is particularly true of the notion of armed conflict mentioned in subsidiary protection and that of refugees in European law. Such an interpretation, on the basis of conflicting norms such as systemic interpretation, a mechanism implicitly applied by certain national administrative authorities, is likely to reduce the scope of application of this subsidiary protection.

B. The main principles of the Qualification Directive based on the Geneva Convention

The constraints of international law have therefore shaped the procedures for applying subsidiary protection in France, but it remains a totally independent system. As mentioned above, in order to apply subsidiary protection, conventional grounds must be ruled out. OFPRA and the CNDA must therefore assess whether the asylum seeker meets the definition of a refugee set out in article L 511-1 and, if this is not the case, check whether they are eligible for protection under article L 512-2. However, OFPRA and the Court may misunderstand the existence of a risk of serious harm on the grounds listed in article 1A2 of the Geneva Convention, on fears and persecution and on the possibility of linking an application to one of these grounds.

Indeed, it seems appropriate to quote from the study on the guidelines developed by the UNHCR on refugee status. This guide explains that *"refugee status determination is a two-stage process. The first is to establish all the relevant facts of the case and the second is to apply the definitions of the 1951 Convention and 1967 Protocol to the facts thus established"*. For subsidiary protection, the UNHCR's quantitative and qualitative criteria relating to the Geneva Convention overlap with the criteria for granting PS3 set out in the Qualification Directive.

Let's take the example of risk assessment in the event of return; guiding principle number 12 talks about risk assessment in the event of return to a war zone, and the pitfalls to be avoided in order to arrive at an accurate assessment. With regard to the degree of risk in the event of return, the UNHCR recommends not to submit to *"a calculation of probability, based, for example, on the number of people killed, injured or displaced, but instead requires a quantitative and qualitative analysis of the information assessed in the light of the applicant's circumstances"*. Similarly, the degree of seriousness of the persecution or treatment feared must reach a certain threshold in order to fall within the scope of refugee status or the SP3.

With regard to Article 9 of the Qualification Directive, an act of persecution "*must be sufficiently serious in nature and repeated to constitute a serious violation of fundamental human rights"*. Here, the UNHCR is calling into question the idea of relying solely on the number of people killed, injured or displaced, just as the European Agency for Asylum (AUEA) does in its legal analysis of the conditions for international protection. These people must be considered as part of the population that fears persecution simply because they are civilians. The Qualification Directive is therefore designed to comply with the guiding principles of international law.

However, according to Raphaël van Steenberghe's study on the international law of armed conflict, an overly idealistic international law of armed conflict, due to the influence exerted by these branches, is likely to reduce, or even destroy, the protection of individuals that it is supposed to offer.

C. Confusion in the desire to assert the independence of European law

A relevant analogy can be drawn with regard to the method of assessing the violence to which civilians may be subjected. Refugee status is granted to people fleeing a situation of armed conflict through article 1-A-2 n°12, mentioned above.

What's more, the Court of Justice of the European Union has been keen to emphasize the independence of European law. In 2014, following a preliminary question on the interpretation of the concept of "armed conflict". In the Diakité judgment, the CJEU held that the application of Article 15-c of the Qualification Directive cannot be made conditional on meeting the conditions for the application of protection under international humanitarian law. The Court pointed out that *"international humanitarian law and the subsidiary protection regime*

provided for the Directive pursue different aims and establish clearly separate protection mechanisms".

However, in the same decision, the Court of Justice of the European Union gave a definition of armed conflict that was just as general as that of the Convention: *"a situation in which the regular forces of a State confront one or more armed groups or in which two or more armed groups confront each other"*[11]. In fact, the only difference with subsidiary protection is that the threshold of seriousness of the acts in question cannot be raised in this type of context. In most cases where conventional protection is chosen over refugee status, it is when it cannot be established that the fears are linked to the applicant's membership of a national, ethnic, religious or social group.

Thus, as J. Fernandez & C. Viel remind us, this autonomy is only a façade: *"it is not easy to erase more than seventy years of appreciation of what constitutes an armed conflict in international humanitarian law"*[12]. Indeed, in studying the conclusions of the State Council's public rapporteur on the Baskarathas case, they found that he relied almost exclusively on sources of international humanitarian law. Finally, a study of the CNDA's legal department's output on subsidiary protection showed that all the memos relating to subsidiary protection referred to classic definitions of humanitarian law.

This is the problem with the Diakité judgment: while accepting that the concept of armed conflict set out in the Qualification Directive could be inspired by international humanitarian law, the Court nevertheless concluded that it differed from it in that it had to be compatible with the principle of non-refoulement, which is specific to refugee law. In other words, the concept of armed conflict specific to international humanitarian law had to be applied in accordance with the standards of refugee law. Through the lack of coordination between different normative spaces, the aim of French jurisdictions is not to undermine its founding principle and, at the same time, to provide better protection for refugees.

D. Conflict over individualisation criteria

In addition to defining general concepts, judges base their decision to grant the SP3 on the individual characteristics of the claimant. In many cases, however, these may be confused

11 C.J.U.E., 30 janvier 2014, Aboubacar Diakité c. Commissaire général aux réfugiés et aux apatrides, C-285/12

12 J. Fernandez, C. Viel, « La protection incertaine des étrangers en provenance d'une zone de guerre », AJDA, 2016

with a conventional ground for protection. This is because they have their source in the same place as the grounds for conventional protection, which for the most part are ethnicity or religious affiliation. It was in its Kona judgment that the State Council criticised for the first time the confusion made by the CNDA in granting a SP3 on the grounds of the presence of elements of individualisation, which on the contrary were the basis for conventional protection.

In this case, the applicant was a woman whose application for protection under the Convention had been rejected, but who had been granted subsidiary protection because she belonged to the Assyrian-Chaldean community, which had been targeted by the parties to the conflict in Iraq. The State Council considered that the applicant's ethnicity was such as to make her particularly prone to violence from the parties to the conflict. It should have been concluded by the Court that a well-founded fear of persecution on the basis of race fell within the scope of conventional protection.

Moreover, confusion between the concepts of international law and SP3, as defined by the European Union, are not the only obstacles to its application. Indeed, SP2 and SP3 concerning the risk of suffering serious harm consisting of a "*death sentence or execution*" or *"acts of torture, inhuman or degrading treatment or punishment"* are normally systematically rejected before the application of 3° of article L 512-1 is considered. However, given that the concept of serious harm to the life or person of civilians, which is necessary for the application of SP3, remains undefined, the scope of application of the various subsidiary protections remains unclear.

This has led to confusion for the Court, which has had to substitute legal bases, as in the CNDA's decision of 10 January 2020. The subsidiary protection granted by OFPRA to a Libyan couple on the basis of article L. 712-1 c) of the CESEDA due to the risk of serious harm resulting from a situation of indiscriminate violence, was replaced by b) of the same article relating to the risk of torture or inhuman or degrading treatment.

In order to substitute a legal basis, the Court relied on the documents in the case file and the applicant's statements to find that, despite the situation of indiscriminate violence prevailing in his region of origin, the applicant had been subjected to torture during his abduction for ransom. Referring to the case law of the ECJ, the Court also relied on the existence of death threats made against his wife by her husband's kidnappers to find that these had been intended to instil

in the applicant a feeling of fear and anxiety such that it had to be analysed as degrading treatment within the meaning of Article L. 712-1 b) of the CESEDA.

As we have seen, the application of subsidiary protection is characterised by confusion between the legal bases and the concepts to which judges must refer. This is why the right of asylum can be seen as a "praetorian" law, built up over time through the cross interpretation of European and national judges.

PART II: THE GENERALITY OF THE DIRECTIVE LEAVING A MARGIN OF APPRECIATION TO THE COURTS

CHAPTER 1: CLARIFICATIONS PROVIDED BY INTERNATIONAL COURTS

A. In France, the binding incorporation of European asylum law

Prior to the reform of the right of asylum of 29 July 2015, the French authorities had only transposed the provisions restricting the right of asylum into domestic law, without incorporating the provisions protecting rights. It was only under pressure from the State Council that the government resolved to fill the gaps in French and European law on a case-by-case basis, and to do so in regulatory form or, more exceptionally, in legislative form. In some cases, the legislator or the regulatory authority have brought domestic asylum law into line with European law. On 10 December 2003, anticipating the work of the Union, the legislator first incorporated "subsidiary protection" or the concept of "safe country of origin", even before the "Qualification" or "Procedure" directives, in which these concepts were included, had been adopted.

However, the incorporation of European law into national law has above all been the result of judicial constraint. By working to apply its directives at national level, the Court of Justice of the European Union is one of the main players in the development of the right of asylum. Two factors explain the development of litigation concerning the directives before the administrative courts. The first is the reversal in the case law of the State Council in its ruling of 30 October 2009 in the case of Ms Perreux. It ruled that arguments based on the infringement of a European directive could now be accepted in support of an appeal against an individual administrative act. As a result, associations for the defence of foreign nationals were able to argue that domestic law was incompatible with EU law. As a result, the right to protection under the Qualification Directive became an enforceable right directly linked to the right to asylum.

At a domestic level, the right to asylum has been particularly constrained by the European Court of Human Rights, which is responsible for two major reforms: the reform of asylum at the border and the reform of the suspensive appeal to the CNDA when people are placed under an accelerated procedure. Following these reforms, France was condemned on several occasions for the non-conformity of its asylum policy. This was the case in 2005, in the Gebremedhin affair. At the time, French law made no provision for a suspensive appeal against

the rejection of an asylum application made in a waiting zone. The Minister of the Interior turned people back without giving them access to a judge. The Court's condemnation led the legislator to reform the law by providing for an urgent suspensive appeal to an administrative court. Still nowadays, the Court of Justice of the European Union is increasingly forcing France to comply with the directives.

B. The CJEU has established a hierarchy of rights

The complexity of multi-level governance in asylum matters has also prompted the Court to define the hierarchy of norms in order to grant subsidiary protection. In the far Elgafaji judgment on 17 February 2009, the Court affirmed the priority of refugee status and subsidiary protection 1 and 2 over recognition of fear of punishment and ill-treatment. More specifically, the Elgafaji judgment interprets article 15(c) of the Qualification Directive, noting that: *"On the other hand, article 15(c) of the Directive is a provision the content of which is distinct from that of article 3 of the ECHR and which must therefore be interpreted independently, while respecting fundamental rights as guaranteed by the ECHR".*

In 2012, the Court provided further clarification on the primacy of national legislation concerning subsidiary protection, in cases where refugee status has been refused. In its judgment : JTM v Minister for Justice and Equality, Ireland and the Attorney General on the 25th of June 2012„ the Court recognised *"that a national procedural rule which makes the examination of an application for subsidiary protection subject to the prior rejection of an application for refugee status is permissible provided that (...) secondly, that national procedural rule does not result in the examination of the application for subsidiary protection taking place at the end of an unreasonable period of time, which it is for the referring court to ascertain".* After specifying the conditions under which subsidiary protection may be granted in relation to refugee status, the Court attempted to define the criteria. Through these rulings, the CJEU has reaffirmed the priority of international law over European law, while at the same time guiding national courts in the application of the SP3.

C. The Court clarifies substantive concepts…

However, as regards the substance of the issue, neither the Qualification Directive nor the CESEDA clearly define the criteria used to determine the granting of international protection. In its 17 February 2009 Elgafaji judgment, the CJEU attempted to establish the autonomy of the criteria for applying article 15-c of the Qualification Directive.

Firstly, it was in this same judgment that the ECJ gave meaning to the definition of subsidiary protection which, given the contradiction it contained, was virtually inapplicable. The particular case of a civilian fleeing a situation of indiscriminate violence of exceptional intensity is an oxymoron, in the sense that *"serious and individual threats"* cannot, without contradiction, arise from "*violence extending to people regardless of their personal situation".*

The onus was on all asylum seekers to prove an individual risk, even though the source of the threat was not directed specifically against them. Finally, to neutralise this contradiction, the Court interpreted Article 15 as not requiring the applicant to prove that he or she was specifically targeted, and that the individual nature of the threat had to be assessed in the light of the intensity of the violence to which the person concerned was exposed.

In other words, recourse to the SP3 would only be relevant when the consequences of the conflict make it impossible to differentiate between civilians. But French case law, for example, applies this article to situations where indiscriminate violence does not reach such a level, which means that it is once again necessary to seek to individualise the risks of serious harm to the life or person of the applicant, whereas the ECJ only deals with questions of the burden of proof.

D. …But the definitions remain too imprecise

In addition, as mentioned above, the application of the SP3 is conditional on the existence of an internal or international armed conflict generating violence against persons *"regardless of their personal situation",* on the applicant's status as a civilian and, finally, on a risk of serious harm to life or person.

In the Diakité judgment, in relation to points (a) and (b), after defining the concept of "internal armed conflict" the European Court stated that these cover *"a risk of harm of a particular kind"* whereas subsidiary protection of type (c) covers a "*more general risk of harm*". But it has only

been able to establish autonomy where the level of indiscriminate violence is so high that "*there are substantial grounds for believing that a civilian returned to the country concerned, or as the case may be, to the region concerned, would run a real risk of suffering serious threats to his life or person".*

Thus, the C.J.U.E. has not given the national authorities any guidelines or specific criteria to help them assess the level of violence in concrete situations. As a result, the assessment of the degree of indiscriminate violence remains the central criterion for identifying whether an SP1, SP2 or SP3 is involved.

This leads us to conclude that, despite the ECJ's efforts to clarify matters encouraging legal coordination, the ambiguity of the concepts has served as a reminder of the role of national courts in the European asylum system. As Sophie Noel explains, "*The European area thus created will be, to a large extent, the product of the various individual contributions from the different protection systems existing at European level"*[13].

It is in this context that the objective defender of the law highlights a major element of a specific mechanism for guaranteeing human rights: the possibility for each system to provide broader protection than those offered by the referent international system. This leads us to look at the transposition of the European Directive on SP3 into the CESEDA and the role of national courts.

13 CJCE, Ord., 27 novembre 2009, Sophie Noel, C-333/09 (point 22)

CHAPTER 2 : CLARIFICATIONS PROVIDED BY THE FRENCH COURT CONCERNING THE DIRECTIVE

A. The cross interpretation analysis

As we have just seen, the vagueness of the European directives on subsidiary protection has prompted the Court of the European Union to clarify both the form and the substance. However, a wide margin of discretion is still left to the Member States. In her book, Mireille Delmas Marty analyze the “cross interpretation” of the judges based on different legal norms.

In order to analyze it through the French SP3, we have chosen to get through the case law of the CNDA on these concepts in the order in which they appear in the Article L-512-3 of the CESEDA : *"In the case of a civilian, **a serious and individual threat to his or her life** or person by reason of **violence** which may extend to persons **regardless of their personal situation** and which is the result of a **situation of internal or international armed conflict"**.*

B. The sine qua non requirement of lack of protection by the State of origin

Firstly, in order for an asylum application to succeed, it is necessary to establish a "lack of protection" from the applicant's country of origin. However, the constituent elements of this protection are not precisely defined in European law. Article 7, paragraph 2 of the Qualification Directive, reproduced in article L-513-3, merely states that "*protection against persecution or serious harm must be effective and not temporary. Such protection is generally granted where the actors take reasonable steps to prevent persecution or serious harm, inter alia where they have an effective system for detecting, prosecuting and punishing acts constituting persecution or serious harm, and where the applicant has access to such protection".* The Refugee Appeals Commission, 29 July 2005, therefore had to specify that a State that does not control part of its territory cannot offer protection.

To make up for this lack of precision, the European Court, in its famous Baskarathas judgment of 3 July 2009, went further, specifying that the assessment of indiscriminate violence must be based on the applicant's region of origin, or more precisely, the region where he or she had the centre of his or her interests. This was reiterated by the Council in the Ajanthan judgment of 7 May 2012, on facts similar to those in Baskarathas. Following the OFPRA's request it annulled the CNDA judgment, not on the grounds that the area was not subject to indiscriminate violence, but by stating that *"without assessing the level of generalised violence resulting from*

the internal armed conflict affecting the place of residence of the person concerned, the court vitiated its decision with an error of law"[14].

This decision reiterates the CNDA's obligation to verify the level of violence in the applicant's area of origin in each case, even if it is well-known that the situation in the said area has not changed since the last decision characterising it as subject to indiscriminate violence. Later, following an asylum application by an Afghan applicant, in its Stanikzai judgment, 16 October 2017, the European Court certified that it was necessary to assess the region he must cross to reach it. The Court therefore, first, set out the conditions necessary to consider the assessment of the SP3 criteria enshrined in the CESEDA.

C. The CNDA's precisions on the CESEDA concepts of

1) civil

To counterbalance the generality of the texts, French judges went back on the definition of the actors in the conflict. Initially, the notion of civilian is broadly defined in international law as opposed to combatants, which is why the CNDA intends to restrict the notion. In a decision of 16 March 2021, the Court ruled that the status of a civilian cannot be presumed because of doubts about the applicant's background.

In a numerous decisions[15], the CNDA stated that "*the concept of civilian must be understood broadly, including any person who is no longer actively participating in hostilities, provided that this absence of participation is the result of deliberate disengagement ... that in each individual case a precise assessment must be made of all of the information provided by the applicant and with regard to all of his or her activities, since civilian status must be assessed on the date on which the Court rules".*

Pushed to reconsider each applicant profile, French judges seek to be precise this broad definition of civil according to the SP3. The State Council, for instance, on 29 July 2020, M.L, required a formal break in his commitment to the state armed forces. Judges at the Court, therefore, exclude deserters, but this concept is less suited to non-state armed groups, since the commitment is not necessarily formalised. According to Thibaut Fleury Graff and Alexis Marie, the aim is to assess the applicant's moral distance. In CNDA, 28 January 2021, the Court

14 CE, 12 septembre 2011, M. Ajanthan A., n° 352512

15 CNDA 9 January 2015 n°12025756, 15 December 2017 n°15008911, 3 April 2018 n°16035581 and 22 February 2021 n°20045300.

qualified an applicant as a civilian, without taking into account the absence of participation in combat, but rejecting his membership of the Taliban. In armed conflicts, unlike in humanitarian law, it is not direct participation in hostilities that leads to the loss of civilian status, but membership of the group taking part.

With regard to the actors involved in protection, the Directive requires that the applicant must be outside the country of his or her nationality or, if there is not any, of its habitual residence. This presupposes the identification of that country, which under French case law cannot be a State. However, these criteria are extremely vague and leave room for wide interpretation by the courts dealing with these issues. In the decision CNDA, 20 mars 2016, the CNDA rejected the applicant's request for asylum on the grounds that he could be protected by a non-State entity, even though it had stated that it was insufficient for non-State entities *"to possess stable institutional structures enabling them to exercise exclusive and continuous civil and armed control over a delimited territory within which the State no longer exercises the obligations or prerogatives of its sovereignty"* in order to be actors of persecution. The CNDA has interpreted the texts in a debatable and contradictory way, refusing to link the applicants to these entities, which do not constitute States. However, it accepts to consider them as actors of persecution.

2) serious and individual threat due to violence

The second concept of serious threat to life or person is not defined in any of the decisions. As a result, several Member States planned to amend Article 15-c of the Qualification Directive, as they feared that it would give too broad a scope to the risks to "security", "physical integrity" or "freedom from arbitrary detention", which were rejected. In France, the vagueness of the concept of persecution seems to benefit applicants for the time being, according to case law encompassing the risks of sexual violence committed by armed groups and the risks of violence, arrest, arbitrary detention and enforced disappearance.

After establishing the threats faced by the applicant, the State Council, on March 5th 2014 OFPRA Mlle K, declared that the asylum authorities must ensure that the fears or risks are current, that they exist on the day the authority makes its decision. But here again, the generality of the European Directive is a source of ambiguity in the national legal translation. The actuality of fears as a condition for granting protection is not regulated in the same way as actuality as a cessation of eligibility. Articles 11 and 16 of the Qualification Directive and L-511-8 and 512-3 of the CESEDA allow a change of status only in the event of a "significant

and lasting change" in circumstances, although this is not a condition of eligibility in any text. However, there is a certain eagerness on the part of judges to recognise a "change in circumstances" where the situation remains volatile.

This was the case in Albania when the Court refused protection to an Albanian political activist on the grounds that the elections that brought his party to power had been held two months before the date on which the decision was read. The qualification of Albania in terms of the security situation has also been the subject of debate within the jurisprudence of the State Council. On 26 March 2012, a request was submitted by Action syndicale libre OFPRA to annul the decision of OFPRA's Administrative Council recognising Albania as a "safe country". Indeed, a country of origin is considered safe when, in a general and lasting manner, there is no persecution within the meaning of the Geneva Convention or no serious harm within the meaning of the definition of subsidiary protection.

Consequently, the State Council, considering the terms of 2° of article L. 722-1 of the CESEDA, describing the conditions for qualifying a country as safe, applied in the light of the provisions of directive 2005/85/EC, about the minimum standards on procedures in Member States for granting and withdrawing refugee status, decided to invalidate the decision to maintain Albania on this list. However, two years after this ruling, the State Council reversed its 2012 judgment and found that Albania *"has democratic institutions and appoints its leaders on the basis of free and pluralist elections, is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and whose application for membership of the European Union was accepted by the European Union in June 2014".*

Here, the judges seem to have based their judgment rather on the French political context than that of Albania. The EC's decision comes at a time when the wave of Albanian migration to France has accelerated since 2013, and seems to warn of a deterioration in the human rights situation in the country. However, at the same time in the State Council judgment of 23 October 2014, the Belgian Council of State removed Albania from the list of safe countries of origin.

3) situation of armed conflict

Last but not least and as we already mentioned, the presence of armed conflict in the applicant's region of origin, whether international or not, is clearly a prerequisite for the

application of the SP3. However, as J. Fernandez and C. Viel point out, *"the difficulty in international protection law lies in the fact that the Qualification Directive refers to internal and international armed conflicts but does not offer any definition"*[16].

Like the European courts, the French courts have sought to establish the autonomy of the concept of armed conflict, the classification of which would not be subject to the requirements of international humanitarian law. As a result, the State Council and the CNDA have endeavoured to provide a method for assessing levels of violence. On 19 November 2020, M.N and M.M, the CNDA produced a vademecum applicable to all contexts, listing the quantitative and qualitative criteria for identifying indiscriminate violence and its intensity. French case law has shown itself to be clearer than the ECJ when indiscriminate violence is not qualified.

In addition, following the definition given by the ECJ on 17 February 2009 Elgafaji, the European Court, 3 July 2009 Baskarathas, returned to the individuality of the fears as covering "*attacks directed against civilians without regard to their identity, when the degree of indiscriminate violence characterising the armed conflict in progress (...) reaches such a high level that there are serious and proven grounds for believing that a civilian sent back to the country concerned (...) would, solely by virtue of his or her presence there, run a real risk of being subjected to serious threats (...)"*. Motivated by an appeal by OFPRA, concerning the situation of violence in Sri Lanka, the State Council confirmed that it is therefore necessary to individualise the applicant's fears in relation to his situation within the armed conflict, for indiscriminate use against all civilians.

The State Council was also asked to comment on the method used by the CNDA to assess generalised violence. Contrary to the case law developed by the ECJ, it opted for a qualitative analysis of violence. The threshold for violence is not defined in the Directive, which leaves a wide margin of discretion to the asylum authorities. This is reflected in the "grey area" of delicate assessment to which the Court's contradictions bear witness.

The CNDA decision of 16 December 2008 is indicative of this ambivalence. In this case, the Court rejected an application on the grounds that the acts suffered were not serious enough, on the grounds of a homosexual applicant who had been expelled from her parents' home, excluded from university and sexually assaulted. However, in 2014, judgment Ms W, the

[16] J. Fernandez et C. Viel, « La protection incertaine des étrangers en provenance d'une zone de guerre », AJDA, 2016, p. 1961

CNDA recognised the existence of the social group of homosexuals in the Democratic Republic of Congo, even though it noted that *"there is no systematic violence against homosexual communities"* in the country. This ruling represents a turnaround in case law concerning the recognition of the social group of homosexuals.

Thus, despite the efforts of the courts to clarify the concepts relating to the SP3, the margin of appreciation left to French judges remains significant. While the importance of objectivity in the assessment of the application is neglected by the Geneva Convention, in order to compensate for the relativity of decisions, the Qualification Directive attempts to rationalise and objectify the fact-finding stage.

D. The subjectivity of the judicial authorities in the face of "intimate conviction"

The Directive proposes elements for assessing and indicating these fears and risks, on the one hand, and imposes an obligation of cooperation between the claimant and the assessor, on the other. The European Agency for Asylums practical guide is indicative of the effort to fill the legal vacuum. It provides a four-step test posing the various questions that serve as guidance on how to grasp credibility. Most of these provisions are taken from article L 531-5 of the CESEDA, which relates to OFPRA but whose solutions are transposable to the CNDA.

Firstly, the judge is confronted with the subjectivity of the applicant's statements on which he must base his judgment. International law makes recognition of refugee status conditional on a "reasonable" fear of "persecution", and EU law makes the granting of subsidiary protection conditional on a "real" risk of suffering "serious harm". However, fear is defined as a "feeling", an "apprehension", subjective in nature. The UNHCR in its practice guide (paragraph 38) states that it is a state of mind that depends on the applicant's personality and the situation.

Moreover, EU law only refers to a risk that must be "real", just as the fear must be "reasonable", as one of the conditions for Subsidiary Protection. This is an objective element that makes it possible to place the applicant's statements about his or her fears in their geopolitical, cultural, social and family context. In addition, the right to asylum leaves a particularly important place for the subjectivity known to the legislator, particularly in relation to the importance of the applicant's personal situation.

Consequently, the case law of the European Court of Human Rights has provided a framework for judges' assessment methods. In a resounding ruling, the ECJ, 21 January 2011, MSS, Belgium and Greece, stated that judges are obliged to *"take into consideration the specific vulnerability of the applicant, inherent in the status of asylum seeker, as a result of his or her migratory route and the traumatic experiences he or she may have undergone prior to it".* Furthermore, article 20, paragraph 3, of the Qualification Directive specifically requires account to be taken of the specific situation of *"persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence".*

In addition to the applicant's statements and personal situation, the assessment of the reasonable and real nature of the fear and risk of persecution and serious harm must be based on the evidence and information presented by the applicant. But evidence is difficult to obtain because it is rarely produced to the asylum authorities and it is difficult to establish the authenticity of evidence from the country of origin. First of all, the "reasonable" or "real" nature of the facts is, by its very nature, beyond direct proof. What's more, having not traveled with these documents or having lost them during their exile, applicants rarely have the opportunity to present documents.

If the subjectivity of the asylum judge flourishes because of the standard of personal conviction, the latter is also the first pillar around which the work of the asylum judge is built. Intimate conviction is not just an "inner feeling". It is a method that offers a modus operandi for grasping credibility by mobilising different meanings of the truth. Even so, the terrain remains conducive to the manifestation of prejudices and stereotypes that guide the processing of asylum applications.

European and national courts have therefore tried to restrict the discretion of asylum judges. However, the various stages in the assessment of the applicant's background leave room for the cross interpretation of the judges and ultimately influence the decision. In addition, using the example of the qualification of third countries, we noted that the applicant's country of origin alone can influence the judge's decision. Partly for this reason, and because August 2023 signed the two years of the storming of Kabul by the Taliban, we have chosen to narrow the angle of analysis through the case of Afghanistan.

PART III: THE ROLE OF THE JUDGE IN GRANTING SP3, WITH A FOCUS ON AFGHANISTAN

CHAPTER 1 : REASSESSMENT OF THE SP3 CRITERIA BY THE GRAND CHAMBER OF THE COURT

A. The reversal of the 2020's Kabul jurisprudence

Until November 2020, the CNDA applied the "Kabul jurisprudence": it almost systematically granted the SP3 to Afghans. The Court considered that an Afghan whose asylum application had been rejected and who was asked to leave France had to stop in Kabul before returning to his home province. This meant that they were exposed to the threat of "indiscriminate violence". But in two decisions : *19 November 2020 M. N. n° 19009476 R and CNDA (GF) and 19 November 2020 M. M. no. 18054661 R*, the Court reversed its case law. To do this, the CNDA met as a Grand Chamber to set out its methodology for assessing levels of violence in conflict zones.

To understand how the ECJ considered that Kabul no longer represented a zone of indiscriminate violence, it is necessary to go back to the Grand Chamber's citation of the ECJ judgment of 25 février 2020, ruling that the expulsion of an Afghan national through Kabul did not breach article 3 of the ECJ, on the grounds that it did not "*in itself expose him to treatment prohibited by the European Convention for the Protection of Human Rights and Fundamental Freedoms".*

Yet, in its Elgafaji judgment, the ECJ interpreted the substance of article 15(c) of the Qualification Directive, noting that : *"Article 15(c) of the Directive is a provision the content of which is distinct from that of article 3 of the ECHR and which must therefore be interpreted independently while respecting fundamental rights as guaranteed by the ECHR"*[17]. The CNDA thus, opportunely relies on a decision that does not recognise the fact that an Afghan national would be exposed to the risk of inhuman or degrading treatment because of his presence in Kabul.

However, exposure to the risk of inhuman or degrading treatment has virtually nothing to do with being exposed to the violence of an armed conflict in an indiscriminate manner. This was

[17] CJUE, 17 février 2009, Elgafaji v Staatssecretaris van Justitie, C-465/07, point 28

made very clear in the Elgafaji judgment: *"Moreover, these threats are inherent in a general situation of "internal or international armed conflict".* This contradiction leads us to figure out why and through which mechanisms, the Court completely changed its criteria concerning afghans applicants.

As a reminder, article L. 512-1 of the CESEDA sets out several criteria that need to be characterised in order for the SP3 to be applied. The first, which can be considered fundamental, is t**he assessment of the level of violence in the applicant's area of origin** (A). The second criterion concerns **the location of the violenc**e, the delimitation of the area that is to be considered as the applicant's "area of origin" and in which the level of violence is to be assessed (B). Finally, we will examine the question of assessing **the elements of individualisation of fears**. Based on the work of Martin Jouvin, our empirical study part will be based on these criteria.

B. 1) Assessing the level of violence

The Ajanthan judgement of 7 May 2012 accepts that the CNDA is obliged to assess the level of violence in each case. However, assessing levels of violence is precisely a matter for the judge's sovereign appreciation and is therefore much more subjective than legal, which prevents decisions from being challenged on this basis before the State Council.

We note that the CNDA itself relies on reports dating back several years. Indeed, the Kabul case law is based on reports dating back to 2019 for the oldest, most of which are from 2020 but relate to 2019. This raises the question of the relevance of a source of information relating to a situation that, at the time of deliberation, was more than a year and a half old. In addition, it should be noted that no figures are given for the period starting from 1 January 2020 to 19 November 2020, which means that we do not know how violence is evolving in certain "highly strategic" provinces[18].

In addition, the Refwar project, which aimed to analyse the sources used by the CNDA to establish levels of violence, reported 61 references to reports from international institutions (representing more than half of the sources used), with EASO and UNAMA in the lead. In fact, of the 10 decisions taken after the Grand Inquiry, three were based on the 2019 EASO report,

[18] Martin Jouvin, 2022, *"la protection internationale des afghans en France"*, Université Paris Saclay : file:///C:/Users/colin/OneDrive/Bureau/Documents/Stage%20M2/Papiers%20et%20M%C3%A9moire-LAPTOP-FOTU66QF/Sujet%202/La%20protection%20internationale%20des%20afghans%20en%20France.pdf

six on the 2020 EASO report, seven on the February 2020 UNAMA report, one on the July 2020 UNAMA report, two on the 2019 UNAMA report, two on the United Nations Office for the Coordination of Humanitarian Affairs and one on a USAI report[19].

Unfortunately, these reports (EASO, UNOCHA, ACLED and UMANA) are mainly quantitative. They mention the number of civilian casualties, the number of security incidents and, this time, are subject to a comparative evolution over the years 2018 and 2019, which show decreases and increases in violence linked to the "highly strategic" nature of the province, the only qualitative element that will be taken into account by the Court.

The CEREDOC files, which were initially intended for information purposes, to help judges make their decisions and assist rapporteurs in drafting their decisions, have become increasingly important in assessing levels of violence during deliberations. During the investigation, the public rapporteurs are tasked with seeking information on the security situation in the applicant's area of origin in order to present the judges with the possibility, or otherwise, of granting subsidiary protection. However, the decisions sometimes mention quantitative elements showing trends towards a worsening of the security situation, contrary to the CEREDOC lines, which the judging bodies refuse to see.

Thus, in its decision of 12 March 2021 recognising a "simple" level of indiscriminate violence for the province of Kapisal, which corresponds to CEREDOC's assessment, the CNDA ruled that, as usual, it was basing itself on quantified assessments of the number of civilian victims, whose number is known to be used by CEREDOC to calculate the thresholds for levels of violence, the number of security incidents, whose sole source is ACLED, and finally the number of internally displaced persons or returnees in the province. There is only one mention of the resumption of ground and aerial fighting in the province, which argues in favour of classifying it as indiscriminate violence of exceptional intensity. However, the Court followed the CEREDOC guidelines and did not recognise the threshold of violence of exceptional intensity.

It is therefore the judge who ultimately decides on the elements on which he will base his assessment of levels of violence. However, his assessment is limited by the tools he uses, by

[19] Martin Jouvin, 2022, *"la protection internationale des afghans en France"*, Université Paris Saclay : file:///C:/Users/colin/OneDrive/Bureau/Documents/Stage%20M2/Papiers%20et%20M%C3%A9moire-LAPTOP-FOTU66QF/Sujet%202/La%20protection%20internationale%20des%20afghans%20en%20France.pdf

those who shape them, and by the intrinsic biases they contain. Thus, depending on the importance the judge attaches to this issue, which can vary greatly depending on the personalities of the judges and the time they wish to devote to this analysis, they will examine more or fewer elements on their own initiative. In this way, we have seen that the judges of the Grand Panel have been able to reappropriate the assessment of levels of violence through the cross-interpretation.

C. 2) Defining the area of origin

In order to assess the level of violence in the applicant's area of origin, it is necessary to locate its area of origin. This precision of the territorial level of assessment is clearly set out in the ECJ's ElGafaji ruling, which decides that the assessment of the risk that a civilian is exposed to a real risk of being threatened must be made in the light of *"the country concerned or, where appropriate, the region concerned"*. The refusal in the case of Afghanistan to choose the level of precision of the district, leads us to question the choice of a location extended to the province.

Although the district has rarely been accepted as the seat of violence, it nevertheless appears to be the best element of analysis in many informative and military documents. For example, the EASO report on the situation in Afghanistan for the year 2020 refers to the resumption and loss of places of power by reference to the districts : "*The Taliban also took the control over Arghandab district, Zabul province, while the ANDSF recaptured Guzargahi Nur district in Baghlan province […], the Taliban recaptured Yamgan district, Badakhshan province, while in April the ANDSF overtook the districts of Khamyab and Qarqin in Jowzjan province"*.

The international coalition's military documents seem to adopt a similar analysis. In a report submitted to the US Congress by the US Inspector General for Afghanistan Reconstruction (SIGAR) in 2019, in order to calculate the influence of the different parties to the conflict, the percentage of districts under their control is used: *"At the end of October 2018, the Afghan government controlled only 53.6 percent of districts, the Taliban at least 12 percent, and more than 30 percent of districts were considered disputed"*[20]. It has to be said that in the typology of the Afghan conflict, the districts are the first geographical areas to be at the center of

[20] SIGAR, Quarterly Report to the United States Congress, 30 janvier 2019, p. 69, 71, disponible sous le lien suivant : https://www.sigar.mil/pdf/quarterlyreports/2019-01-30qr.pdf

sovereignty issues between the Taliban and its affiliates, and the Afghan government and its allies. In the reality of the Afghan politico-military situation, control of a few districts is enough to "rule" the province, by virtue of their geographical position or the resources they contain.

It would appear that the CNDA's refusal to use the district level and opt for the broader, but less relevant, level of precision of the province, is justified for several reasons, the consequence of which is to maximise protection. The choice of the provinces as the delimitation zone for assessing violence is primarily due to the difficulty that information centers have in drawing up accurate and detailed reports on the security situation in Afghanistan.

First of all, it should be remembered that in examining an asylum application, the burden of proof is joint, as the State Council ruled in a judgment of 10 April 2015. It should also be remembered that there are 34 provinces in Afghanistan, made up of 398 districts, making it difficult for the Court and the applicant to prove the existence of such a high level of violence in each district of origin. It would therefore have been unreasonable to place the burden of establishing the security situation in each district on the applicant or on the OFPRA or CNDA documentation centers.

Furthermore, the extremely volatile nature of the Afghan conflict is recalled in every CNDA decision concerning Afghanistan and also in the Grand Panel's decision of 19 November 2020. In the Afghan conflict, both insurgents and the government carry out numerous lightning attacks in order to quickly retake a coveted district. Failure to take account of the local characteristics of a province can lead to a poor assessment of the risk to the applicant if he or she returns to his or her place of origin.

This will be all the more the case in the decisions that will follow the Grand Panel's decision of 19 November 2020, which tends to clearly delimit the provinces subject to indiscriminate violence of exceptional intensity from the others. In fact, in the provinces deemed to be subject only to "simple" indiscriminate violence, it is not uncommon to see one or more districts in the hands of the Taliban, who therefore exercise complete control over the population, making these localities subject to frequent fighting with government forces. In this case, the province of Kapisa is currently considered to be subject to "simple" indiscriminate violence, and is therefore not eligible for the application of the SP3. However, the CNDA noted in November

2019 that "*three districts of this province, Alasay, Tagab and Nejrab, are in the hands of the Taliban"*[21].

Thus, if an applicant comes from one of the three above-mentioned districts, he or she would be refused the application of the SP3 even though the district from which he or she comes is, or may become, clearly the subject of intense conflict between insurgent groups and government actors, in circumstances similar to those that could lead provinces to be considered as being subject to indiscriminate violence of exceptional intensity. In addition, the fact that certain provinces subject to "simple" indiscriminate violence border on provinces subject to indiscriminate violence of exceptional intensity, should raise questions about the situation of districts located on this border.

While the judge's sovereignty is limited by the EU's recommendations in the Qualification Directive, which are reiterated by the Court's case law in the assessment of levels of violence, as we shall see, this is not the case for the elements of individualisation, due to their particularly vague and ill-defined nature, which leaves the asylum judge with a very wide scope for maneuver.

D. 3) Individualisation of fears

In the French case, we have seen that the prior assessment of levels of violence by the CNDA's satellite institutions partially bound the judge. The latest, therefore, had to find a new way of regaining his or her sovereignty. The elements of individualisation appear to be an instrument of sovereignty for CNDA judges in relation to the Grand Panel. The most recurrent of these relate to the applicants' young age, family isolation, westernisation and psychological vulnerability.

During the Kabul case law period, the practice of judges looking for individualisation factors fell sharply. However, the holding of the Grand Panel highlighted the importance of these elements, which may have been forgotten during this period. The CNDA decision, Grand Panel, 19 November 2020, point 19 mentions these factors after concluding the demonstration of the absence of a level of indiscriminate violence of exceptional intensity: *"Under these conditions, it is necessary to take into account the existence, where applicable, of a serious indication of a real risk of suffering serious harm, and it is up to the applicant to provide all*

[21] CNDA, 7 novembre 2019, n° 18034058, point 6.

the information relating to his or her personal situation that leads to the belief that he or she runs such a risk"[22].

However, since the change in case law, the CNDA no longer seems to require an element of individualisation, but rather a personal fear, such as that found in conventional protection. The purpose of individualisation is to demonstrate the risk that the person would run *"if they were to return to their country of origin"*, a risk that has not yet been run but will probably be, for example, because they belong to a "community" that is particularly targeted by those involved in the conflict.

The treatment of claimants with a westernised profile and Hazaras, whose judges were unable to demonstrate how this status would individualise fears about them, CNDA, 5 janvier 2019, is significant. The risks to them are attested to by official institutional reports, so there is no reason for the claimant to demonstrate this. However, this has meant that elements of individualisation rejected by the Grand Panel have been accepted in subsequent decisions. This demonstrates the flexibility of the individuality of fears and reminds us of the difference between the legal texts, the institution and the staff that make it up.

In her study, "*The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence"*, Hélène Lambert details the national case law of the United Kingdom, Germany, the Czech Republic and the Netherlands. She concludes that at both European and French level, the analysis of violence relating to the SP3 appears flexible, subjective and ultimately very ill-defined due to the absence of a clear line at European Union level. Most countries have adopted a similar approach, combining qualitative and quantitative elements.

In the end, the only difference lies in the in concreto assessment of this violence, which remains eminently subjective. This subjectivity will lead to a desire on the part of countries to rationalise their analysis, in particular by using figures and interpreting legal concepts. We shall therefore see that French judges are subjective when it comes to assessing levels of violence.

22 CNDA, Grande Formation, 19 novembre 2020, n° 19009476, point 19

CHAPTER 2: LEGAL TECHNICS TO ESTABLISH A CERTAIN POLITICAL WILL

A. The individualisation of fears

The regained sovereignty of the asylum judge following the Grand Chamber's reversal on the issue of the Kabul transit point has given rise to a host of sometimes very divergent decisions on the question of the application of the SP3 with regard to the elements of individualisation. For example, on a report from december 2020, EASO with a greater concern for precision than CEREDOC, distinguishes the situation in Balkh province from that in the capital of this province, Mazar-e Sharif, by indicating that the situation in this city is stable and that the level of violence there is low. This clarification has only been made for Mazar-e Sharif on this map.

This is explained by the desire to call into question the jurisprudence of the Kabul airport crossing point. The town of Mazar-e Sharif is supposed to have an international airport to which Afghan nationals could be returned. This failure to recognise high-intensity indiscriminate violence in Mazar-e Sharif seems appropriate in the light of the situation in the three other cities with international access - Kabul, Herat and Kandahar - which EASO classifies as medium-intensity indiscriminate violence.

However, the CNDA did not take up this information, because if it had concluded that there was an international crossing point via Mazar-e Sharif, the reiteration of these levels of violence would have made it possible to avoid questioning the applicant's passage via Kabul. Kabul was the most likely to be reclassified as indiscriminate violence of exceptional intensity. This is the subtlety of the "point of passage theory", which is used by asylum judges to re-appropriate the Grand Chamber's guidelines on the delicate issue of assessing violence. It sometimes happens that decisions based on the same elements and the same sources conclude, a month apart, that there are different levels of violence.

The aforementioned example of the Kapisa province is a case in point. The first of the complex decisions that the judges had to take, dated 19 February 2021, recognised a level of indiscriminate violence of exceptional intensity in the province of Kapisa. However, a second, subsequent decision, dated 12 March 2021, recognised a "simple" level of indiscriminate violence only one month later. According to Martin Jouvin's study on the protection of Afghans in France, this clearly reflects the arbitrariness of the courts on this issue.

Added to the simplicity of certain elements of individualisation is the weakness of the requirement to justify individualisation in relation to the characterisation that the Grand Chamber seemed to demand. This can legitimately lead us to believe that the asylum judge is deliberately acting in this way. In effect, we are witnessing an interesting reversal of the burden of proof for individualisation, or even the disappearance of this burden. As explains by Martin Jouvin, the judging panel decides to explain itself why an element present in the applicant exposes him or her to greater risk, or it simply decides to disregard this explanation in favour of the applicant. This can be seen in the wording of decisions such as Kapisa, where no mention is made of either the arguments that the claimant would have put forward in support of this individualisation, or sometimes even of the risks that this element would objectively engender.

Through the elements of individualisation and the point of passage theory, we observe that the judges have decided to seize the power of assessment. Despite a minority sympathetic to the applicants' cause, the CNDA finally concluded that there had been a reduction in the levels of violence in Afghanistan that had not been recognised a few weeks earlier. It was in the involvement of politicians, particularly at European level, that the reduction in levels of violence was to be sought. This allows us, once again, to confirm the expression from François Héran speaking about “a state law controlling migration”.

We have therefore only been able to observe the limited legal influence of this Grand Chamber on subsequent decisions. However, what cannot be described as an influence could be described as an impetus, which seems to have been given as a concession to some of the CNDA judges who wanted to re-establish the institution of international protection, which they felt had been disrupted by the Kabul case law.

B. Judges in favor of a wider scope of the SP3 ? the recent case law

The Court's recent case law bears witness to this desire to broaden the scope of SP3. Indeed, while some courts analysed the Taliban's seizure of power as marking the end of armed conflict, this analysis has not withstood developments in the geopolitical situation. Based on the latest report from the European Union Asylum Agency (EUAA) in January 2023, the CNDA considers that the provinces of Badakhshan, Baghlan, Balkh, Kabul, Kapisa, Kunar, Kunduz, Nangarhar, Panchir, Parwan and Takhar, as well as the province of Kandahar, are affected by a situation of indiscriminate violence. It also considers that the violence affecting

the province of Panjshir, a stronghold of resistance against Taliban forces, is higher, but not exceptional.

Furthermore, in this decision of 14 February 2023, the Court does not explicitly mention different points of entry into Afghanistan, unlike the decision of the Grand Chamber. It must therefore be concluded that Kabul is once again considered to be the only point of entry into Afghanistan. The judge should therefore, at the very least, assess the possible threats that could affect an Afghan national as a result of his or her arrival in this region, which is, as a reminder, qualified as a zone of armed conflict generating indiscriminate violence.

Despite the desire to extend the SP3, analysed above, the latest CNDA case law report, dated 2021, shows that judges are increasingly tending to refuse certain elements of individualisation. While the Taliban takeover of Kabul resulted in the suspension of the application of subsidiary protection under article L. 512-1, 3° of the CESEDA and a concomitant increase in the number of cases where conventional protection was granted, the Court nevertheless noted that a stay in a Western country was not sufficient in itself to result in persecution by the new regime.

On the other hand, it ruled that, given the continuing high levels of violence, insecurity and arbitrariness in the country, the applicant's particularly vulnerable state was likely to expose him to inhuman or degrading treatment. As a result, subsidiary protection was granted to an Afghan applicant in view of the serious health problems he had demonstrated. The Court also had to update its analysis of the general risks to the Hazara community in Afghanistan, considering that the Taliban's takeover of the entire country has rekindled the serious and high risk of persecution of this population.

The diversity of case law over the same period shows us the importance of the judge's cross-interpretation in assessing levels of violence and above all the individual fears of the applicant. As a result, it is difficult to identify a consistent trend in the granting of SP3 status, since the criteria for granting it are constantly changing depending on the geopolitical situation and their wishes. To demonstrate our point, we will see through the Somali case, which I mostly encountered during my internship, is just as political and diverse as Afghanistan.

C. Somali case law

First of all, it is through European case law that we can observe the political dimension of subsidiary protection, since it varies greatly over time and from one jurisdiction to another.

In a judgment of the ECJ, Sufi and Elmi, dated 28 June 2011, the European Court of Human Rights ruled that it was impossible to return Somali nationals to their country of origin in view of the exceptional situation of generalised violence, their mere presence causing fear for their lives.

However, despite the situation prevailing in Somalia at the time and the clarification of the case law in the judgment of 5 September 2013, K.A.B. v Sweden, ECJ, the Court announced that such an expulsion would not be contrary to Article 3 of the European Charter of Human Rights. Relying on the same justifications as the Kabul decision discussed above, the Court found that Al-Shabbab had withdrawn from Mogadishu and, according to reliable international sources, the general level of violence in the city had decreased. As a result, it considered that there was no longer any fighting or bombing on the front line and that the daily lives of ordinary citizens had to, to some extent, return to normal.

In France, the government has withdrawn "automatic asylum" from Somali since 2016. This means that, on the same model as Afghanistan, all Somali nationals are no longer granted subsidiary protection as soon as they enter France. It should be noted that in previous decisions, on 17 July 2007, the Refugee Appeals Commission had already classified Mogadishu as a city of low-intensity violence. This is further evidence of the lack of harmonisation within the French courts.

Following this, in a classified decision dated 17 February 2021, the Court accepted a "new assessment" of the level of indiscriminate violence generated by the Somali armed conflict in Mogadishu. However, this decision does not appear to represent anything new, since the situation in Mogadishu has not been reclassified. Instead, it seems to be inspired by the Kabul jurisprudence, which aims to restrict asylum to Afghan applicants. Furthermore, this decision does not seem to be based on precise sources concerning the situation of the armed conflict in Somalia (see appendix 1). However, like Kabul, Mogadishu is the only point of entry to the country, so denying the situation of indiscriminate violence of exceptional intensity makes it possible to refuse subsidiary protection on individual grounds to the applicant and therefore to leave the judge to make a subjective assessment.

In the case of Somalia, too, the judges do not seem to be adopting a harmonious line. The example of the Galgaduud region bears witness to this. In line with the Kabul case law, and the legal framework provided by the Grand Chamber decisions, the Court refused the application

for international protection of a Somali national from this region. However, this decision, CNDA C+, March 2021, appears to be restrictive and poorly reasoned. The situation in Galgaduud at the time was linked to a conflict between the pro-government militia Ahlu Sunna Wal Jamaa and the government over control of Ceel Buur and Mataban. While official reports, such as ACLED, detail the security context in the region in 2019-2020 (see appendix 2), this conflict does not appear at any point in the CNDA's justification for rejecting the application. This leads us to conclude that decisions made by judges are partially well-informed, and that it can serve political objectives.

D. A concrete example of a political judgment

During my internship, I was directly confronted with cases in which legal dogmatism in one way or another influenced the final decision. One case in particular struck me as a good illustration of the subjectivity and, more specifically, the ethnocentrism of French judges. Coming from Cameroon, *Mr N.N.C.L* (as we will call him to keep his anonymity), was a Bamiléké living in Douala who asked for asylum in France. Following the OFPRA refusal, I was asked to draft his appeal to the CNDA, and to attend his audience.

In this case, *Mr N.N.C.L*. should return to his country of origin, he stated that he would be subjected to persecution or serious harm. The applicant fears reprisals following his father's refusal to succeed to the throne of a traditional chieftaincy, without being able to avail himself of effective protection from the authorities. In 2012, his father, who had traveled to the village to attend a funeral, learned that he had been chosen to succeed to the throne of a traditional chiefdom, something to which he objected. From that moment, his father's health deteriorated and the whole family was subjected to mystical attacks. As a result, his father died in 2014.

Since his death, his mother and *Mr NN.N.C.L* have faced major financial problems. Having opposed his father's planned succession, they were held responsible for his death by his father's family. In 2016, he explained that his health had deteriorated as a result of the mystical attacks, and he had to undergo surgery. Faced with the extent of the incantations against them, they had to leave the family home to go and live with their mother's family. After a perilous journey into exile, the claimant left Cameroon on 10th December 2018 and reached France on 20th March 2022, having traveled through Niger, Algeria, Morocco and Spain.

On 11th May I had the opportunity to attend the applicant's audience at the National Court of Asylum and to analyse the judges' questions. I noted the vagueness of the questions about mystical practices, which showed a lack of knowledge of Bamiléké culture in France. During the closing arguments, the lawyer did not fail to raise this point. In fact, he emphasised his regret at the angle chosen by OFPRA, which underestimated the importance of chieftaincies in Cameroon, given that the role of state power in the country is very weak. In addition, *Mr. N.N.C.L* belongs to the "Eglise du Réveil", a powerful institution in Cameroon that opposes the central government. The lawyer emphasised that by refusing the conventional ground, OFPRA had given the wrong reasons for its decision, since the applicant was also persecuted because of his religious affiliation.

Although the pleading highlighted the westernized bias of the judgment of the French administration vis-à-vis the judges of the Court, the latter rejected the appeal on June the first, 2023. In their decision, the judges did not recognize the authenticity of statements regarding mystical threats :

> *"The causal link which would exist between the spell supposedly cast against his father and the disease from which he suffered, namely diabetes which led to gangrene, according to the information mentioned on the death certificate drawn up in Douala on April 15 2014,* ***cannot be established with certainty.*** *The same observation applies to the illness from which he himself suffered in 2016, two years after the start of the conflict he would have encountered with members of his family and which would result from the support given to his father in his choice. to refuse the succession. The alleged targeting of him, together with his mother, following his father's death, consisting of* ***mystical attacks and threats, has been reported in summary terms.*** *Asked about his fears in the event of a return to Cameroon, he limited himself to mentioning fears of being the victim of spells,* ***without delivering more substantial developments on this subject."***

So, behind the ambiguities concealed in the European law and the case law of the asylum courts, the judge remains the only master of the application of the SP3, with greater room for maneuver than in other areas of the law.

GENERAL CONCLUSION

This report has shown that the French application of the SP3 is not limited to the procedures set out in the CESEDA. Firstly, its construction and application are the fruit of the European desire for a deeper integration. However the harmonization has to be put into perspective with regard to the case law of the various Member States. In addition, although the various courts want to assert their independence, the drafting and application of the CESEDA remains constrained by international texts.

However, we then observed that the subsidiary protection directives and implementing codes were too general as far as armed conflicts and personal threats were concerned. The various national and European courts of justice have therefore had to clarify their meaning over time. Indeed, in the case of asylum seekers asking for SP3, there are few elements of assessment that depend on the law. Legal texts make it possible to outline the contours of the procedure, but seem to struggle to be exhaustive when it comes to granting protection. As a result, the SP3 is a system built up by the courts and is still under construction.

Based on the model of "Ordering pluralism" from Mireille Delmas Marty, we can conclude that the system of subsidiary protection is constrained by the law to apply the "Cross-internormativity" mechanism. However, the material and normative coherence desired by the European Union is not fully accepted and implemented at the national scale, notability in France. Indeed, the latest interpret the criteria in the light of a political and cultural set of norms, rather than legal one. Thus, the granting of SP3 seems to mostly depend on the mechanism of "Cross-interpretation" by French judges.

Our study led us to conclude that foundations of protection are set out in too simple terms, concealing a complex assessment reality, which allows judges to express their point of view through their judgment. The analysis of specific cases, like Afghanistan and Somalia, suggests that the French application of the SP3 is, to some extent, rather the result of the appreciation of French jurisdictions. Rooted in a broad national and European political context, the jurisdiction tends to translate the directive based on a restrictive set of norms.

The restrictive conception of asylum protection in France is largely illustrated by the current political actions of the French government. On February the first 2023, the reform "Immigration and Integration" bill was presented to the Council of Ministers. The project intends to strengthen integration, fight against illegal immigration, facilitate deportations and reduce asylum application examination times. To increase its efficiency, the State expects to simplify litigation for foreigners.

Although the bill presents more flexible aspects, such as the introduction of the "short-term job" residence permit, many associations have called on the government to take into account their numerous proposals for the implementation of a migration policy based on hospitality, respect for fundamental rights and human dignity. Among others, the reform would restrict the granting of asylum by the automation of the obligation to leave French territory (OQTF), even before the end of the procedure. Then, the generalization of the single judge considered, would deprive the CNDA of the judge appointed by the United Nations High Commissioner for Refugees (UNHCR) with expertise on the countries of origin of the applicants. The defender of rights, himself, also issued an opinion denouncing the violation of the fundamental rights of foreigners.

The various proposals and numerous criticisms of this reform reinforce the conclusion of our analysis. In other words, the legal techniques of "cross-internormativity" used to frame subsidiary protection in France is, to a large extent, guided by the unwillingness of the authorities to protect migrants who flee conflicted zones.

END

BIBLIOGRAPHY

BOOK AND MANUALS

- Fleury Graff Thibaut et Marie Alexis (2019) Droit de l'asile, Paris, PUF,
- Manuel de droit européen en matière d'asile, de frontière et d'immigration : https://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_fr.pdf

JOURNAL ARTICLES

- Amnesty International, décembre 2022, *"France : les droits des personnes exilées menacés par un énième projet de loi"*
- Aurélien Camus, « *Office du juge de l'asile et crédibilité du récit* », La Revue des droits de l'homme, 2020. URL : http://journals.openedition.org/revdh/10078 ; DOI : https://doi.org/10.4000/revdh.10078
- Charlotte Boitiaux, 2021, "*France : doit-on craindre un rejet des demandes d'asile afghanes ?",* InfoMigrants : https://www.coordination-urgence-migrants.org/medias/files/20210719-infomigrants-france-doit-on-craindre-un-rejet-des-demandes-d-asile-afghanes-copie.pdf
- Christophe Andreo, Samantha Dallaman et Antoine Janbo, septembre 2008 "*la protection subsidiaire en Europe : une mosaïque de droits"*, Observatoire de l'intégration des réfugiés statutaires : https://www.france-terre-asile.org/images/stories/publications/pdf/Cs18__vweb-finale.pdf
- Christophe Pouly, 2016, "*L'Européanisation du droit d'asile : 2003-2016"*, Migration et société, https://www.cairn.info/revue-migrations-societe-2016-3-page-107.htm
- Daphné Bouteillet-Paquet, 2002, "*Quelle protection subsidiaire dans l'Union européenne ?",* Homme et migrations : https://www.persee.fr/doc/homig_1142-852x_2002_num_1238_1_3865
- Daniel Borrillo, 2020, "*La preuve dans le demandes d'asile en raison de l'orientation sexuelle",* Défenseur des droits; CNRS.https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19753
- 2022, "*Un niveau de protection en baisse dans l'UE en 2021",* Forum Réfugié : https://www.forumrefugies.org/s-informer/publications/articles-d-actualites/en-europe/1085-un-niveau-de-protection-en-baisse-dans-l-ue-en-2021
- Helene Lambert, juin 2013, *"The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence"*, International Journal of Refugee Law, Pages 207–234, https://doi.org/10.1093/ijrl/eet014
- Gisti, "*Introduction : Le guide de l'entrée et du séjour des étrangers en France"* (pp. 7-16), Paris: La Découverte. https://www.cairn.info/le-guide-de-l-entree-et-du-sejour-des-etrangers-en--9782348043543-page-7.htm
- Marion Tissier-Raffin, 2015, *« Crise européenne de l'asile : l'Europe n'est pas à la hauteur de ses ambitions »*, La Revue des droits de l'homme : https://journals.openedition.org/revdh/1519
- Mireille Delmas Marty *"Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World"*, Oxford, Hart Publishing, 2009
- Raphaël van Steenberghe, février 2016, "*La cohérence et le droit international des conflits armés comme système juridique"* , Social Science Research Network : file:///C:/Users/colin/Downloads/SSRN-id2726713.pdf
- Valentine Nierinck-Fauvelle, June 2023, *"Migrations : l'Union européenne propose une aide de plus d'un milliard d'euros à la Tunisie"*, Toute L'Europe :
- https://www.touteleurope.eu/l-ue-dans-le-monde/migrations-l-union-europeenne-propose-une-aide-de-plus-d-un-milliard-d-euros-a-la-tunisie/

THESIS

- Julie Richard, 2017, "*L'intime conviction du juge en matière criminelle"*. Droit. Université de Montpellier, https://theses.hal.science/tel-01610334/document
- Madou Kamara, 2022, abstract *"Le droit français relatif à l'entrée et au traitement des demandeurs d'asile au regard du droit européen et de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés"*, theses.fr : https://hal.science/tel-04079817/
- Martin Jouvin, 2022, *"la protection internationale des afghans en France"*, Université Paris Saclay : file:///C:/Users/colin/OneDrive/Bureau/Documents/Stage%20M2/Papiers%20et%20M%C3%A9moire-LAPTOP-FOTU66QF/Sujet%202/La%20protection%20internationale%20des%20afghans%20en%20France.pdf

REPORTS AND OFFICIAL DOCUMENTS

- EASO, Country Guidance Afghanistan, 2020
- EASO, Country Guidance Afghanistan, 2023
- UNHCR, 2011, "Guide et principes directeurs sur les procédures et critères à appliquer pour déterminer le statut de réfugiés" : https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4fc5ce2c2
- SIGAR, 30 janvier 2019, "*Quarterly Report to the United States Congress"*, p. 69, 71 : https://www.sigar.mil/pdf/quarterlyreports/2019-01-30qr.pdf

WEBSITES

- Asylum Law Database
- Centre de Recherche et Documentation CEREDOC
- Cour Européenne des Droits de l'Homme CEDH
- European Agency for Asylum
- Eurostat
- Légifrance
- United Nation Refugee Agency

JURISPRUDENCES

- C.J.U.E., 30 janvier 2014, Aboubacar *Diakité* c. Commissaire général aux réfugiés et aux apatrides, C-285/12
- CNDA, 10 January 2020, M.M, Mme.S, N°18024308
- CE, 15 mai 2009, *M^lle Kona*, nº 292564
- 30 October 2009 in the case of Ms Perreux
- Judgment of the Court (Grand Chamber) of 17 February 2009. *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*
- JTM v Minister for Justice and Equality ; Court, High Court ; Judge, Mr. Justice Kevin Cross ; Judgment Date, 01 March 2012
- Judgement of Mr. Justice cooke delivered the 25th dav of June 2012
- The Refugee Appeals Commission, 29 July 2005
- judgment of 3 July 2009, No 320295, OFPRA c M. Baskarathas
- Conseil d'Etat, *7 mai 2012*, n° 323668, OFPRA c./ *Ajanthan*.
- Stanikzai judgment, 16 October 2017

- Décision OFPRA du 16 mars 2021 reconnaissant un niveau de violence aveugle d'intensité exceptionnelle dans la province de Kapissa.
- CE 29 July 2020, M.L, N° 428283
- CNDA, *28* juill. *2021*, n° 19056362
- CNDA, 20 mars 2016, N° 15033525
- State Council, on March 5th 2014 OFPRA Mlle K
- 26 March 2012, Action syndicale libre vs OFPRA, N° 349174
- 23 October 2014, the Belgian Council of State removed Albania, N° *228.902*
- 19 November 2020 M. N. n° 19009476 R
- CNDA (GF) and 19 November 2020 M. M. no. 18054661 R,
- CNDA 16 décembre 2020 M. Y. n° 20015807 C+
- *CNDA 19 décembre 2014* Mme *W*. n° 14017576 C
- ECHR, 21 January 2011, MSS, Belgium and Greece, N°30696/09
- CEDH, 25 février 2020, A.S.N. et autres c/ Pays-Bas, n°68377/17 et 530/18. Lien ?
- CNDA, 12 mars 2021, n° 20031808
- CE, 10 April 2015, N° 372864
- CNDA, 5 janvier 2019, n°18030242.
- CNDA, 19 février 2021, n° 19030039
- CNDA, 12 mars 2021, n° 20031808
- CNDA 14 February 2023
- ECJ, SUfi and Elmi v United Kingdom, 28 June 2011,
- ECHR decision in K.A.B. v Sweden, Application No. 17299/12, 5 September 2013
- CRR, 17 juillet 2007, Mme R.ép. A., p. 58.
- CNDA 17 February 2021, N° 19032777

CODES AND TEXTS

- Code de l'Entrée et Séjour des Étrangers et du Droit d'Asile (CESEDA) (L-511, L-512, L-513, L-531, L-712, L-722)
- Geneva Convention from 1951 (Articles 3 - 18 - 45)
- Fundamental Treaty of European Union (FTEU)
- Treaty on the Functioning of the European Union (Article 18)
- Directive 2001/55/CE
- Directive 2005/85/CE
- Directive 2011/95/UE (Articles 5, 7, 9, 11, 15, 16, 20)

APPENDIX

APPENDIX N°1

Les rapports les plus récents du Secrétaire général des Nations Unies sur la situation en Somalie dressent un tableau chaotique de la ville de Mogadiscio. Les attaques perpétrées par les miliciens Al-Shabaab sont très fréquentes, et les civils se retrouvent souvent être la première cible des miliciens ou du moins subissent de façon disproportionnée des abus, tandis que l'aide humanitaire a atteint des niveaux alarmants en 2021, comparés à l'augmentation des violences et de la précarité de la situation sécuritaire de la capitale :

> *$13. Les conditions de sécurité sont demeurées instables,* ***236 atteintes à la sécurité*** *ayant été enregistrées en moyenne par mois depuis le début de l'année 2022.* ***Les Chabab ont à nouveau été responsables de la plupart des faits en question****. Les forces de sécurité somaliennes et l'AMISOM sont restées les principales cibles des assauts, généralement menés au* ***moyen d'engins explosifs improvisés*** *ou dans le cadre* ***d'attaques éclairs.*** *Les* ***Régions les plus touchées par les activités des Chabab ont été Banaadir, le Bas-Chébéli et Bay.***
>
> *14. À Mogadiscio, le 23 mars,* ***un groupe de combattants armés des Chabab****, déguisés en uniformes militaires,* ***s'est infiltré dans la zone de l'aéroport international d'Aden Adde*** *et a attaqué le complexe de SafeLane Global. Les assaillants ont* ***ouvert le feu sur les gardes et les personnes se trouvant à l'intérieur*** *du complexe. L'attaque a fait cinq morts, dont trois employés internationaux de SafeLane et un agent de police somalien. Deux des attaquants ont été tués et les autres ont été neutralisés par les forces de sécurité. Alors que l'assaut était en cours,* ***les Chabab ont tiré six obus de mortier contre la zone de l'aéroport*** *international d'Aden Adde, touchant des zones proches du complexe des Nations Unies. Ces tirs n'ont pas fait de victime.*
>
> *(…) Le 10 février, dans le district de Xamar Weyne, à Mogadiscio,* ***un bus*** *qui transportait des représentants électoraux du Somaliland vers le centre de vote a été* ***pris pour cible d'un engin explosif improvisé*** *porté par une personne. L'explosion n'a pas touché le véhicule visé, mais cinq passants civils ont été tués.*
>
> *16. À Mogadiscio, le 16 février,* ***les Chabab ont utilisé deux véhicules piégés*** *destinés à des attentats-suicides pour mener des attaques complexes coordonnées à la périphérie de la ville. Le groupe a attaqué et temporairement envahi le poste de police de Kaxda Bajeeladnet le domicile d'un fonctionnaire dans la zone de Daarasalaam, faisant quatre morts et 19 blessés.*
>
> *(…) À Mogadiscio, le 14 avril,* ***six obus de mortier ont été lancés en direction de l'aéroport international*** *Aden Adde et ont touché une zone située à proximité du hangar de l'armée de l'air somalienne, où se déroulait la cérémonie de prestation de serment des membres du Parlement nouvellement élus. Un agent de sécurité a été légèrement blessé lors de l'attaque.*
>
> *(…) 21.* ***Des activités d'éléments pro-Daech en Somalie ont continué d'être signalées dans la région de Banaadir****. Deux* ***attaques aux engins explosifs improvisés*** *ont visé la police somalienne et le véhicule d'un représentant du Gouvernement dans les districts de Dharkenley et de Kaaraan, les 12 et 19 mars respectivement, faisant deux blessés parmi les civils et trois parmi les membres des forces de sécurité somaliennes. En outre, une* ***attaque à la grenade*** *a visé un poste de contrôle de la police dans le district de Howlwadaag le 13 mars, sans faire de victime.*

*(…) 47. **L'accès humanitaire a continué à rencontrer des problèmes majeurs en raison des conflits actifs et de l'insécurité**, ce qui a compromis la sécurité du personnel humanitaire et sa capacité à aider les personnes dans le besoin. Au moins 24 incidents liés à l'accès ont été enregistrés au cours de la période de référence. Comme pendant les périodes précédentes, la plupart d'entre eux se sont produits dans les États de Galmudug, du Hirchébéli et du Sud-Ouest. Environ 900 000 personnes vivent dans des zones contrôlées par des groupes armés non étatiques, avec de graves difficultés d'accès qui entravent l'action humanitaire.*

(Conseil de sécurité, S/2022/392, Rapport du Secrétaire général sur la situation en Somalie, 13 mai 2022)

*19. Les conditions de sécurité sont demeurées instables ; on a ainsi enregistré en moyenne 265 atteintes à la sécurité par mois en 2021. Comme pendant les périodes précédentes, **la plupart de ces atteintes ont été perpétrées par les Chabab, dont les activités ont augmenté de 17 % par rapport à 2020. De nouveau, la majorité des attaques, commises à l'aide d'engins explosifs improvisés**, ont visé les forces de sécurité somaliennes et l'AMISOM. **Les régions les plus touchées par les activités des Chabab ont été le Bas-Chébéli, Banaadir et le Moyen-Chébéli**.*

*20. Les Chabab ont continué de se livrer à des **attaques ciblées sous la forme d'attentats-suicides à Mogadiscio**. Le 11 novembre, un convoi de l'AMISOM a été visé par un attentat-suicide à la voiture piégée dans le district de Wadajir. Au moins trois passants ont été tués. Le 20 novembre, un véhicule privé dans lequel se trouvaient le directeur de Radio Mogadiscio et le directeur de la Somali National Television a été ciblé par un engin explosif improvisé porté par une personne. Le 25 novembre, un attentat-suicide à la voiture piégée a été lancé contre un convoi transportant des membres du personnel de Safelane (entreprise privée prestataire du Service de la lutte antimines) escorté par l'entreprise de sécurité Duguf, sous contrat avec l'ONU. Au moins 8 civils qui se trouvaient sur les lieux, dont des mineurs, ont été tués et 20 personnes ont été blessées. Deux membres du personnel de Duguf ont été légèrement blessés par du shrapnel.*

*(…) 22. Le 16 janvier, à Mogadiscio, les Chabab ont lancé une **attaque à l'engin explosif improvisé** contre le véhicule du porte-parole du Gouvernement fédéral somalien, Mohamed Ibrahim Moalimuu, qui a été légèrement blessé.*

*(…) 26. Il a été signalé que **des éléments pro-Daech étaient actifs dans la région de Banaadir et avaient perpétré deux attentats à l'engin explosif improvisé à Mogadiscio**. Le 6 novembre, dans le district d'Huriwa, un engin explosif improvisé a été déclenché à un point de contrôle de l'Armée nationale somalienne. Quatre soldats, dont le commandant du point de contrôle, ont été blessés. Le 23 novembre, dans le district de Hodan, une autre attaque à l'engin explosif improvisée a été perpétrée contre un camion de police dans lequel se trouvait le colonel Mohamed Dahir, commandant des forces de police. Ce dernier a survécu mais l'attaque a coûté la vie à deux civils qui se trouvaient sur les lieux.*

*27. Le 24 janvier, le véhicule d'un négociant a été visé par un **attentat à la voiture piégée** sur le marché de Bakara, à Mogadiscio. Le 26 janvier, les commerçants du marché ont fermé leurs échoppes au motif que des personnes se réclamant d'un groupe pro-Daech les auraient extorquées. M. Roble a alors donné l'ordre au Ministre de la sécurité d'intervenir et de déployer des forces de sécurité somaliennes sur le marché.*

(Conseil de sécurité, S/2022/101, Rapport du Secrétaire général sur la situation en Somalie, 8 février 2022)

D'autres rapports internationaux alertent sur la situation à Mogadiscio, en particulier concernant le nouveau seuil de déplacés dans le Benadir, qui reflète l'augmentation drastique des déplacements liés au conflit en Somalie :

(UNCHR, Somalia: Internal Displacements Monitored by Protection & Return Monitoring Network (PRMN), 11 janvier 2022)

Aussi, le rapport de juin 2022 de l'Agence de l'Union européenne pour l'asile fait état de 741 incidents ayant tué 701 personnes dans la région du Benadir pour la période de janvier 2020 à juin 2021 septembre 2021 :

> *ACLED recorded 741 security incidents (an average of 9.5 security incidents per week) in Benadir region between 1 January 2020 and 30 June 2021 ranking the region second in terms of the highest number of security incidents after Lower Shabelle. Out of those incidents, 380 were coded as battles, 193 as explosions/remote violence and 168 as violence against civilians.*
>
> *(…) In the reference period, ACLED recorded a total of 701 fatalities in the region.*
>
> **(EUAA, Country Guidance: Somalia, juin 2022)**

De même, l'actualité confirme le climat de violence qui sévit à Mogadiscio.

Rapport Amnesty Internationale, Somalie 2022

> *« La population civile a continué de faire les frais du conflit persistant entre le gouvernement et ses alliés internationaux d'une part, et le groupe armé Al Shabab d'autre part. Des centaines de civil·e·s ont été tués ou blessés pendant l'année. Aucune justice n'a été rendue et personne n'a eu à rendre de comptes pour les violations du droit international humanitaire et relatif aux droits humains.*
>
> *Les Nations unies ont recensé 428 victimes civiles (167 ont été tuées et 261 blessées) entre février et mai, dont 76 % à la suite d'attaques illégales menées par Al Shabab, les autres cas étant attribués aux forces de sécurité gouvernementales, aux milices claniques et aux forces internationales et régionales.*
>
> *Le 23 mars, six personnes, dont cinq de nationalité étrangère, ont été tuées dans une attaque d'Al Shabab contre le complexe SafeLane Global, dans l'enceinte de l'aéroport international Aden Adde de Mogadiscio, la capitale. Le même jour, ce groupe a commis deux attentats meurtriers dans la ville de Beledweyne, à environ 300 kilomètres au nord de Mogadiscio. Selon l'ONU, ces attaques ont fait au*

moins 156 victimes (48 ont été tuées – dont une députée de premier plan, Amina Mohamed Abdi – et 108 blessées).

Le nouveau président a déclaré en mai qu'il ferait de la sécurité et de la lutte contre Al Shabab une priorité de son gouvernement. Le groupe armé a réagi en multipliant ses attaques aveugles ou ciblées, dont des assassinats.

Le 19 août, Al Shabab a mené une attaque complexe contre l'hôtel Hayat, à Mogadiscio, tuant au moins 30 personnes et en blessant plus de 50 autres. Après avoir réussi à pénétrer dans cet hôtel renommé à grand renfort d'explosifs et de coups de feu, les attaquants ont assiégé l'établissement pendant plus de 30 heures. Le Premier ministre s'est engagé à demander des comptes, affirmant que toute personne ne s'étant pas acquittée de ses responsabilités aurait à répondre de ses actes, mais aucune enquête judiciaire n'avait été ouverte à la fin de l'année. Le 29 octobre, Al Shabab a commis un double attentat à la voiture piégée visant le siège du ministère de l'Éducation et un carrefour animé au sein d'un marché à Mogadiscio. Ce double attentat a tué plus de 100 personnes et en a blessé plus de 300[1]*. »*

(Somalie : la situation des droits humains Amnesty International)

De même, l'actualité confirme le climat de violence qui sévit à Mogadiscio.

Le 22 janvier 2023

« En Somalie, au moins six civils sont morts dimanche 22 janvier dans une attaque des islamistes radicaux shebabs, lorsqu'un kamikaze s'est fait exploser à la capitale Mogadiscio. Dans la fusillade qui a suivi, tous les six assaillants ont également été tués et la police annonce que la situation est revenue à la normale. C'est la dernière attaque d'une longue série qui se sont produites depuis le début de l'année. »

(Somalie: au moins six morts dans une attaque shebab contre le bureau du maire de Mogadiscio (rfi.fr)

Le 21 février 2023

« Dix civils ont été tués mardi 21 février en Somalie dans une attaque revendiquée par les islamistes radicaux chabab dans la capitale, a annoncé le gouvernement. Vers 15 heures, des Chabab ont « attaqué une maison dans le district d'Abdiaziz », au nord de Mogadiscio, selon un communiqué du gouvernement, précisant que trois personnes ont été blessées. Les forces de sécurité somaliennes « ont secouru et extrait de nombreux civils de cette maison et dans les immeubles aux alentours », selon les autorités, qui ont précisé que les quatre assaillants ont été tués. »

« L'attaque a été revendiquée par les Chabab, groupe affilié à Al-Qaida. Un soldat présent sur les lieux, Mohamed Ali, a affirmé à l'Agence France-Presse que les assaillants ont « pris d'assaut le bâtiment après avoir fait exploser la porte principale ». Les Chabab « attaquent les maisons des civils après avoir été défaits sur le champ de bataille », a-t-il poursuivi. »

(En Somalie, dix civils tués par les Chabab à Mogadiscio (lemonde.fr)

Le 4 avril 2023

« Un convoi de la Mission africaine de transition en somalie (Atmis) a été la cible, lundi, d'une

explosion dans la capitale Mogadiscio, 3 civils se trouvant à proximité ont perdu la vie.

Un responsable de la sécurité à Mogadiscio, Osman Ahmed, a indiqué à l'Anadolu que le convoi de avait été touché près du siège du département des enquêtes criminelles de Somalie. »

(Euronews, Somalie : un convoi de l'ATMIS victime d'une explosion à Mogadiscio

Le 8 mai 2023

« Le ministère somalien de l'Information a annoncé, lundi, la mise en échec d'une "attaque terroriste" qui prévoyait de viser un lieu de divertissement dans le district de "Waberi", dans le centre de la capitale, Mogadiscio. »

APPENDIX N°2

"*Au vu de ces éléments et des considérations qui précèdent, et en dépit de la persistance du conflit armé en cours dans les régions du sud de la Somalie et de ses conséquences dans le Galgaduud, cette région ne peut être regardée, à la date de la présente décision, comme étant affectée par une situation de violence aveugle susceptible d'engager l'application des dispositions de l'article L. 712-1 c) du code de l'entrée et du séjour des étrangers et du droit d'asile. 11. Il ressort des sources publiques récentes et fiables que la situation prévalant dans de la région Galgaduud ne correspond pas à celle d'une situation de violence aveugle".*

"Selon les données collectées par ACLED entre le 1er janvier et le 31 décembre 2019, quarante et un incidents de sécurité ont été recensés, comprenant les batailles, les violences contre des civils et les explosions et/ou les violences à distance, qui ont entraîné la mort de trente-trois personnes dont huit civils. On constate une baisse notable des victimes civiles par rapport à l'année 2018 où cent-dix morts était enregistrés dont dix-neuf civils. Toutefois, le nombre d'incidents sécuritaires a augmenté sur le premier semestre 2020, avec quarante et un incidents ayant causé la mort de quarante-neuf personnes, civils comme combattants, d'après les données ACLED publiées par l'Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD). En ce qui concerne les populations déplacées, les données publiées par le Haut-Commissariat pour les réfugiés (HCR) sous l'intitulé « Somalia : Internal displacement »[23]

[i] Illustration reference : *http://www.cnda.fr/Informations-pratiques/Assister-a-une-audience*

[23] http://www.cnda.fr/content/download/180669/1766623/version/1/file/CNDA%203%20mars%202021%20M.%20M.%20n%C2%B02000 7059%20C.pdf