

## PART II(A) : FRANCE



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### The French reading of subsidiary protection

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## I. Presentation

### 1.1 Institutions

In 1954<sup>1</sup>, France ratified the Geneva Convention on the Status of Refugees which provides for the international protection of persons meeting the definition of the term “refugee” as defined in article 1 of the Convention.

We shall now take the institutions in charge of asylum as our starting point.

In France, the **Home Office** is in charge of entry and residency of all the aliens even the asylum seekers. All of them should ask the prefecture for a file and a provisional residence permit.

The Law of the 25<sup>th</sup> of July 1952 instituted an administrative establishment, the French Office for the Protection of Refugees and Stateless Persons (**OFPRA**), who is dependant of the Foreign Office and a Commission which was not precisely defined in the text but has been defined, a few years later by the State Council as an administrative jurisdiction<sup>2</sup> : the French Refugee Appeals Board (la **Commission des recours des réfugiés**). It now explicitly appears in article L. 731-1 of the Admission and residency of aliens and Asylum code and a decision of the Constitutional Council of 4<sup>th</sup> of December 2003<sup>3</sup> asserts that the independence of the Refugee Appeals Board vis-à-vis the OFPRA is an essential guarantee for the right to asylum.

Initially made up of a single judgment group, from the beginning of the 80s, the Board had to be divided into sections. The number of sections varies according to the number of appeals. Thus, between 2002 and 2005, there was an increase of around forty to a hundred and forty. The sections are made up of a **President**<sup>4</sup> (member of the State Council, an administrative tribunal body and administrative appellate courts, the Revenue Court or a legal magistrate) who presides over the hearings and ensures the order of the audience and designated assessors. One is by the United Nations High Commission representative in France for refugees among qualified people of French nationality, on notice from the Vice-President of the State Council, the other by the Vice-President of the State Council, chosen among qualified people proposed by one of the Ministries represented at the Office’s Board of Directors.

This presence of UNHCR representatives on the Refugee Appeals Board is a unique feature of the French system. The Refugee Appeals Board is in fact the only jurisdiction in France on which a representative of an international organisation sits and has the right to vote.

Within the Board, there is a judgment group called **Reunited Sections** instituted by the decree of the 3<sup>rd</sup> July 1992 whose function is to settle questions of law that have no precedent and also to ensure the harmony of the case law. An affair may be brought before the Reunited Sections, either upon the initiative of the judgment group, or upon the initiative of the President of the Appeals Board. The Reunited Sections are normally chaired by the Appeals Board President and are include the appeals section referred to, and two other sections designated annually .

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<sup>1</sup> Law No. 54-290 of 17 March 1954.

<sup>2</sup> Decision of the 29<sup>th</sup> of March 1957, *Paya Monzo*

<sup>3</sup> Decision No 2003-485 DC, preamble 40

<sup>4</sup> Mr François Bernard since the 1<sup>st</sup> of April 2005

The President, in addition to his overall responsibility in the smooth running of the Appeals Board, has three quasi-judicial functions. One is specific to him, that is the Presidency of the so-called above mentioned “Reunited Sections”. The two others are similar to those of the Section Presidents: they include, on the one hand, the Presidency of any ordinary judgment group, and, on the other hand, allow the possibility, to reject appeals as obviously inadmissible unlikely to be covered at court proceedings or that present no serious elements likely to bring into question the motives for the decision taken by the General Director of the OFPRA.

A **General Secretary** appointed by the President of the Refugee Appeals Board, helps the President, as well as the three Vice Presidents appointed by the latter among the Presidents of sections, in their administrative functions and their control of the smooth running of the jurisdiction. An assistant secretary is in charge of the Clerk’s Office, another of the administrative and financial management of the Refugees Appeals Board.

The **sections** benefit from the assistance of twelve **departmental heads** who organise the work.

They are assisted by **reporters** who are responsible for the inquiry into files of requests for grant of asylum but who have no voting rights (Art. 24, Decree of 14 August 2004).

There are **others departments**: legal aid, reception of the lawyers and interpreting, geopolitical department, the legal department and a department in charge of inadmissible claims.

About 300 people, who are civil servants or have been recruited by contract, work in this jurisdiction.

## 1.2 Reform of the right to asylum

Since 1954 to 2003, the French authorities were bound by the sole Geneva Convention and organised temporary protections for some groups or gave a right to stay to persons in individual cases. The law of the 11<sup>th</sup> of May 1998, instituted the constitutional asylum: in accordance with the preamble of the Constitution of 1946, which concerns “any person persecuted because of his action in favour of freedom”. The constitutional asylum follows the same rules procedure and offers the same protection as conventional asylum, the only difference is the legal basis. The law also institutes territorial asylum. It is granted by the Home office, to any person who established that his or her life or liberty is threatened. *We shall speak later about these particular protections.*

Anticipating upon the adoption and the transposition of European directives<sup>5</sup>, the French legislator has, through its law of the 10<sup>th</sup> of December 2003, fundamentally modified the legislation applicable to asylum law. During its discussion before the Parliament, the new law has been presented as transposing « by anticipation the measures which, within the framework of these directives have been agreed upon by the Fifteen members of the European Union <sup>6</sup> ». In a communication, the Minister of Foreign Affairs explained that: “this project of reform falls within the European framework. It is inspired by directive proposals now being discussed in the field of asylum”.

<sup>5</sup> According to article 38 of the qualification directive of the 20<sup>th</sup> of October 2004, it has to be transposed into law by the member states before the 20<sup>th</sup> of October 2006. But France has transposed most of its provisions in advance.

<sup>6</sup> Report presented before the Senate by Mr. Jean René Lecerf

### *The aims of the reform*

- Give priority to processing outstanding cases (the number of outstanding cases had significantly increased during the last years)
- Organise individual meetings with asylum applicants, rationalize, analyse and improve the reception structures.
- Reduce the average time needed to process the applications.

The mechanism provided by the law of the 10th of December 2003 respects the principle put forward by the directive, as confirmed by the Hague program defined by the European Council in November 2004 and repeated in the procedure directive<sup>7</sup> which aims to institute a « common asylum procedure », as well as a uniform status for people having been granted refugee status or subsidiary protection.

At present in France, when **the claimant claims « asylum », it includes both protections** and each asylum application is subject to a single procedure.

The OFPRA and the Refugee Appeals Board should decide:

*firstly* on the right of the applicant to be entitled to the Convention status, and  
*secondly*, if the Convention status is not granted, on the right of the applicant to be entitled to the subsidiary protection.

### *The text*

**Article L712-1** ( Admission and residency of aliens and Asylum Code) :

*The Office (for refugees and stateless persons) grants subsidiary protection to asylum seekers who do not meet the requirements laid down by the refugee definition, but who have proved that they could be exposed to one of the following serious threats:*

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

### **1.3 General rules of Procedure**

•**Deadline for the appeal:** asylum seekers have one month from the date they are notified of the decision to file an appeal. *A draft decree provides for a reduction of the delay to only fifteen days.*

•**A substantiated written application:** in its absence, the appeal is inadmissible. An appeal must set out the grounds of the appeal and be written in French.

•**A suspensive effect:** the appeal before the Board suspends the effects of the decision of reject of the General Director of the OFPRA

•**Hearing** : petitioners can present oral submissions before the Appeals Board and be represented by a lawyer. It's not compulsory, but the Appeals Board has a duty to inform the applicant of the possibility that is offered the seeker to be summoned to a public session in order to present his or her verbal observations and to summon to this hearing the applicant who requested it.

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<sup>7</sup> Adopted on the 1<sup>st</sup> of December, 2005

- The asylum seekers may be granted *legal aid* on three conditions: their legal entry into France, the limit of their resources and the appeal should obviously not be inadmissible.

- Way of ruling*: the Refugee Appeals Board's appeal process is adversarial.

- Review is not on legal aspects, but also on the credibility of the statements.

During its deliberations, the Appeals Board *bases its decision* to award refugee status and subsidiary protection *on all the information it has in its possession* at the time of its ruling, including information which the OFPRA did not have when it first ruled on the application.

- The decision by which the Appeals Board recognises refugee status is a *final judgement* but the decree of the 14th August 2004 *affords the General Director of the Office the possibility of referring appeals* to the Refugee Appeals Board when its *decisions* have been *taken on the basis of fraud*.

- The *decisions* of the Refugee appeals Board *can be overturned by the State Council*, for errors of law or procedure.

#### 1.4 Origin of the subsidiary protection

**The new law provides a subsidiary protection to the protection granted by the Geneva Convention**, which is mainly inspired by the previous territorial asylum, « asile territorial »<sup>8</sup>. This “asile territorial” was granted to the alien if he/she could prove that his/her life was threatened in his/her country or that he/she could be exposed to abuses in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The new law is also inspired by the provisions of the directives, which provides that *subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention*. (cons.24).

There are nonetheless some **differences between the former territorial asylum and the new subsidiary protection**:

- Firstly, the authority concerned*: the territorial asylum was granted by the Home Office, which is not usually in charge of the questions related to asylum but only in charge of the admission and residency of aliens. One could find here the reason of the failure of this kind of protection (only 11,6 % in 1998 persons have been protected by this way; 4,6 % en 1999, 3 % in 2000, 1% en 2001 and less than it in 2002 !).

- Secondly, the scope of the territorial asylum : it used to concern persons whose life was threatened or that could be exposed to abuses in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.*

Furthermore, the civil war wasn't recognised as a ground of protection.

- Thirdly, the claimants concerned* : the former territorial asylum was instituted to protect above all Algerian citizens, who were threatened during the civil war but who couldn't benefit from the refugee status because of the French's interpretation of the article 1A2 of the Geneva

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<sup>8</sup> law of the 11th of May 1998

Convention. : through this reading, when the persecutors were groups who didn't support the authorities, the notion of the government authorities inability or powerlessness to provide for the protection of its citizens, was not taken into account.

- Fourthly*, there was *no connection between the Geneva Convention and territorial asylum*. Every claimant could successively ask for each kind of protection.

- Fifthly*, the new law targets the article 3 by interpreting it but doesn't define *the burden of the proof*, which seems to be different for each kind of protection. *I shall return to that point later*.

- Sixthly*, the former system *hadn't provided for exclusion clauses*; a relevant example is the new case of exclusion if the presence on the French territory constitutes a threat to public order.

- Finally*, another kind of protection, the constitutional asylum – the outcome of it is the refugee status -, which was introduced by the law of the 11<sup>th</sup> May 1998, didn't succeed either in protecting such claimants. In a few cases, the Appeals Board has considered that the petitioner had to be regarded "*as persecuted because of his action for freedom*"<sup>9</sup>.

## 1.5 Special rules of procedure concerning the subsidiary protection and texts

- The transposition*

In 2003, the French government considered that the qualification directive would be transposed by anticipation, by the new law.

In fact, he decided to organise the vote of a new law as soon as an agreement between the members of the European Union was concluded, in order not to be forced to continue to negotiations. Some authors consider that the provisions in the Directive could be used by the Member States as a way of lowering their existing standards or at least to maintain theirs.

Moreover, some of the clauses of the directive have not been transposed. For example, article 10 d : the common definition of a particular social group (we shall speak about it later) or article 14 : "*Member States may revoke, end or refuse to renew the status (..) (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present; (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State*". In accordance with the French system, the sole residence permit may be not renewed in this case.

As we shall see in more details later, the transposition concerning the definition of the subsidiary protection is not perfect.

- The principle of the preliminary decision:*

In France, every appeal before an administrative jurisdiction has to be preceded by an administrative decision or act. The new law entered into force the 1st of January 2004. At this date, the Ofpra had not taken any decision about the subsidiary protection

- *Consequences:*

When the administrative decision was taken before the 31<sup>st</sup> of December 2003, the Refugee Appeals Board couldn't examine the pending recourses regarding subsidiary protection but only regarding to refugee status. The section should declare that the demand of subsidiary

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<sup>9</sup> For example, CRR, 22<sup>nd</sup> of December 1998, *Haddadou*

protection was inadmissible or ask the administration to take a decision concerning subsidiary protection. Consequently, the Board took its first decisions about the criteria of the subsidiary protection more than six months after the law entered into force.

In addition, the Board had to specify in which conditions, it could examine the appeal filed by the beneficiary of the subsidiary protection who claimed refugee status. It settled that it was bound by the submissions of the applicant and couldn't withdraw the subsidiary protection in case of rejects<sup>10</sup>.

## **1.6 Statistics**

Let's have a look at the statistics:

In 2004, almost 5000 Geneva Convention status were granted by the Refugee Appeals Board, on 39160 decisions.

And in 2005, 9599 refugee status were granted, on 62262 decisions of the Refugee Appeals Board.

In the first six months of 2006, 185 people were granted subsidiary protection (in most cases under paragraph (b) of the Qualification Directive).

Let's compare them to the figures of the subsidiary protection:

In 2004, only 83 subsidiary protections were granted by the Office for refugees and stateless persons and the Refugee Appeals Board.

In 2005, 457 subsidiary protections were granted (108 by the Office and 349 by the Refugee Appeals Board).

It seems that the new law failed to institute a real new system of protection and to give the means to develop the new subsidiary protection. But comparing to the constitutional asylum, the first results of the subsidiary protection are promising. Every year since 1998, less than ten constitutional asylums are granted by the Refugee Appeals Board.

## **2. Case law**

### **2.1 Death penalty**

- Up until now, neither the OFPRA, nor the Commission have granted the subsidiary protection to a claimant at risk of death penalty.
- It is important to note that the law takes into account death penalty but not execution ( art 15 a of the qualification directive ).

The OFPRA and the Commission have considered that they have not had the opportunity to take a decision on an extra judicial death threat, even if some applicants put forward the risk of being killed ( for example, fear of an honour crime). Concerning the execution, I would like to mention briefly that neither the difference between execution and death penalty, nor the difference of the wording between the directive and the French law, have been underlined by its authors.

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<sup>10</sup> Reunited Sections, 17<sup>th</sup> of December, 2004, *Ms Louahche*



Let's take the example of an Iranian applicant who alleges that his mistress – a married woman - was exposed to a stoning, and his own serious harm. He fled alone but it would be interesting to know how the asylum judge would have appreciated the serious harm of the woman<sup>11</sup>: Would it have considered that she was threatened with death penalty or inhuman and degrading treatment? We shall see later that the fear of a so-called honour crime is already considered as a fear of inhuman and degrading treatment. In my view, the consistency of this analysis is not certain.

Allow me to conclude this point by highlighting the fact that some claimants, fearing a death penalty, come within the ambit of exclusion clauses of the Geneva Convention, which have been transposed to the subsidiary protection. In which cases ? We shall come back to this question later.

## **2.2 Torture or inhuman or degrading treatment**

First of all, we must bear in mind that the French Refugee Appeals Board should refer to the experience and interpretation of others jurisdictions of the article 3 of the European of human rights convention:

Let's me give the example of the case law of the *European human rights Court*.

In the case, *Selmouni v. France*, 28<sup>th</sup> of July, 1999, the applicant complained that he had been subjected to various forms of ill-treatment. These had included being repeatedly punched, kicked, and hit with objects; he also complained that he had been raped. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. The Court considers *that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim(...)*.

In the case of *Aksoy v. Turkey*, 18<sup>th</sup> of December, 1996 the police had identified the applicant as a member of the PKK. He was arrested and taken to custody. On the second day of his detention, he was stripped naked, his hands were tied behind his back and he was strung up by his arms in the form of torture known as "Palestinian hanging. The Court considers that article 3 makes no provision for exceptions and no derogation, even in the event of a public emergency.

In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court should have regard to the distinction drawn by Article 3 between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering. In the view of the Court this treatment of "Palestinian hanging" could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. The Court considers that this treatment was of such a serious and cruel nature that it could only be described as torture.

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<sup>11</sup> the case is going to come before the tribunal in a few months.



In addition, let's have a look at *the French case-law regarding deportation*. According to the law, (article L513-2 of the Admission and residency of aliens and Asylum code) : *an alien shouldn't be escorted back to a country where he or she has established that his or her life or liberty is threatened or where he or she is exposed to torture or inhuman or degrading treatment, in accordance with the Article 3.*

Regarding the administrative decisions about the country of return, the administrative judge checks the gravity of the threats which might result for example from a political activity<sup>12</sup>, a cultural tradition<sup>13</sup>, or a particular sexual orientation<sup>14</sup>.

Compared to *the refugee status*, a constant police pressure, bullying or vexatious measures repeated to the point the person who is a victim thereof can no longer live normally, can constitute a persecution when they stem from one of the grounds listed in Article 1, A, 2 of the 1951 Refugee Convention. According to consistent case law, persecution or fear of persecution must furthermore be personal in nature<sup>15</sup>.

Concerning the definition of what amounts to a serious threat giving access to that protection, one should pay attention,

*firstly*, to the fact that there is no substantial difference between fear of persecution and torture or inhuman and degrading treatment. In many cases, the risk of persecution is a risk of torture or inhuman and degrading treatment. Its gravity might be even sometimes lower. In this respect, the point to note is that for an equal risk, in other terms for the same degree of risk, the claimant may benefit from a lower protection.

Furthermore, the judge hasn't made the distinction yet between torture and degrading or inhuman treatment, in the light of the ECHR Court's jurisprudence and hasn't recognized yet a subsidiary protection based on the fear of torture. Apparently, the Board seems to be reluctant to implement it. In fact, there's a large difference between the check of the right to asylum and the check of the legality of an administrative decision concerning the sole residence permit.

*Secondly*, one should pay attention to the fact that the scope of the new subsidiary protection is defined in relation to the scope of the Geneva Convention and that the subsidiary protection should be only complementary to the Geneva Convention, regardless of the amount of the risk.

To illustrate this point, let us consider the cases of **women submitted to violence**.

- It would be useful to consider the situation of *women fearing a genital mutilation* for themselves or their daughters. Before the entry into force of the new law, the Refugee Appeals Board decided to recognize such women as being refugees in accordance with the Geneva Convention, because they could be considered as members of a social group<sup>16</sup>. It is significant that the French definition of the particular social group doesn't result from the law, but from the case law of the State Council. Claimants may be considered as members of such a group when its members would be likely to be exposed to persecutions because of the

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<sup>12</sup> Council of State, 23<sup>rd</sup> of February 2001, *Nouri*

<sup>13</sup> Administrative tribunal of Lyon, 12<sup>nd</sup> of June 1996, *Condé*

<sup>14</sup> Council of State, 30<sup>th</sup> of May 2001, *Robles Alava*

<sup>15</sup> Council of State, 21 May 1997, *Sahin*

<sup>16</sup> CRR, Reunited Sections, 7<sup>th</sup> of December, 2001, *Mr and Ms Sissoko*

common characteristics that define them in the eyes of the society and also because of the authorities' inability or powerlessness to provide for their protection. In the French meaning, the social group is also defined by the risks to which its members are likely to be exposed and, in spite of the definition of the new qualification directive - article 10d<sup>17</sup> - , this definition is still valid.

Whereas, we have to remember that in France, before the decision of the Refugee Appeals Board, the administrative tribunals had already decided to define a female genital mutilation as an inhuman and degrading treatment<sup>18</sup>.

From my point of view, the basic problem in this context and after the adoption of the new law, was to decide if, henceforth, the Refugee Appeals Board should grant the sole subsidiary protection – which gives less guarantees than the refugee status – for these women, instead of the refugee status.

Finally, the judge made a distinction : he decided to confirm his first analysis and to reserve the subsidiary protection for the cases in which all the requirements provided by the case-law, were not fulfilled, for example when the authorities were fighting against FGM<sup>19</sup>.

- I might add that, when they are threatened with a *so-called honour crime because they have refused a forced marriage*, women are likely to be granted to refugee status or subsidiary protection, in accordance with the same framework. On the one hand, a relevant example is the case of women coming from Eastern Turkey, threatened by an honour crime if they refuse a forced marriage, without any protection from the authorities. These women are likely to be granted refugee status. On the other hand, a claimant coming from Cameroon is likely to be granted subsidiary protection when there is no infringement in her behaviour of the social rules.<sup>20 21</sup>

To put it bluntly, it's difficult in these cases to make a distinction between the criteria of each protection. One may have doubts about the implementation of such decisions.

- Generally speaking, the situation of women, suffering from *domestic violence* at the hands of their partners or husbands is a matter of subsidiary protection<sup>22</sup>. Such kind of violence has already been regarded as an inhuman and degrading treatment, by the administrative judge. In spite of this statement, we must bear in mind that, before the new law, such women have also already been considered as refugees, because of their membership to a *particular social group* of a kind - hiding behind another name - or because their involvement in women's rights has

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<sup>17</sup> The definition of a particular social group is provided for by article 10, d of the qualification directive which states that:

*“a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation”.*

<sup>18</sup> Administrative Tribunal of Lyon, 12nd of June 1996, 96-00127, *Condé*

<sup>19</sup> CRR, 16<sup>th</sup> of June 2005, *Miss Sylla* for a claimant coming from Sahel

<sup>20</sup> CRR, Reunited Sections, 15th of March 2005, *Miss Tas*

<sup>21</sup> CRR, Reunited Sections, 29th of July 2005, *Miss Tabe*

<sup>22</sup> CRR, 28th of September 2005, *Ms Apleni Aguocha* (South Africa) ; CRR, 21<sup>st</sup> of March 2005, 493515, *Ms Gueye Reckoundji* (Democratic Republic of the Congo).

been analysed as an action for freedom. In this case, they've been recognized as refugees on the basis of the constitutional asylum<sup>23</sup>.

### **Crimes witnesses, victims of offenders and of the mafia and other cases**

Let me give you some examples:

The Ofpra has granted subsidiary protection to crime witnesses, subjected to harassment by criminals ( for example in Russia, in Ukraine or in Albania).

Just consider, by way of illustration, the example of a young Algerian citizen who refused to perjure after a car's crash, in which the son of a police officer (in fact, a "gendarme") was involved. The harassment his parents were submitted to, was analysed as an inhuman and degrading treatment by the Ofpra. We shall see how the asylum judge has raised the question<sup>24</sup>.

The French Refugee Appeals Board has granted subsidiary protection:

- to a Nigerian ill-treated by offenders, who wanted him to join their group,<sup>25</sup>
- to an Ukrainian who was swindled out of his money by Tartar offenders,<sup>26</sup>
- to Albanese claimants, mugged by a gang, or victims of a vendetta and of the « Kânun law». It's worth stressing that the *Kânun law* organizes a system of revenge, by which the family of deceased tries to recover her honour , by killing a member of the murderer's family. As the saying goes, those fears were not based on one of the grounds provided by the article 1A2 of the Geneva Convention and these claimants did not meet the requirements to obtain refugee status.<sup>27</sup>
- To Chinese teenagers, victims of a prostitution network<sup>28</sup>, helped in France by social services; one of them has given evidence to the police, as a witness. It's important to note that in this particular case, the law provides a special residence permit. It remains to be seen whether the judge of asylum is responsible for this question<sup>29</sup>.
- To claimants who decided to expose criminal acts<sup>30</sup>;
- Furthermore, the claimants who allege to have been sentenced for a non-political crime or a criminal offence, in the respect of the procedure, can't be regarded as fearing an inhuman or degrading treatment, on condition that the sentence isn't discriminatory and fits the offence.

## **2.3 Situations of armed conflicts**

### *Definitions*

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<sup>23</sup> CRR, 25<sup>th</sup> of September 2003, *Ms Zouaouia Benaouda* for a Algerian teacher, threatened by Islamists or CRR, 27<sup>th</sup> of February 2003, *Ms Khanam Nipu Khan* for a women involved in several women rights associations in Bangladesh.

<sup>24</sup> *Ms Louahche* op.cit.

<sup>25</sup> 22<sup>nd</sup> of December 2004, *Mr Umokoro*

<sup>26</sup> 3<sup>rd</sup> of February 2005, *Mr Fateyenko et Ms Okopski Fattyenkova*

<sup>27</sup> 4<sup>th</sup> of February 2005, *Mr Ndreca* and 3<sup>rd</sup> of March 2005, *Mr Vukaj*

<sup>28</sup> 18<sup>th</sup> of March 2005, *Miss Liu*

<sup>29</sup> 8<sup>th</sup> of February 2005, *Miss Zheng*

<sup>30</sup> CRR, 8<sup>th</sup> of February 2005, *Miss Z.* ; CRR, 2<sup>st</sup> of April 2005, *Mr Kahn*

A “**civilian**”: someone who does not participate directly to the conflict. Those persons may be direct targets of attacks, taken as hostages, forcibly recruited, made to do forced labour, or even deported<sup>31</sup>.

“**Internal or international armed conflict**”: this definition results from the Protocols additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I and II).

**Protocol I article I (4)** : The situations referred to in the preceding paragraph include *armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination*, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

**Protocol II article I (1)** : This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of the 12<sup>th</sup> of August 1949 without modifying its existing conditions of application, *shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

*2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*

Before the new law, when it appeared that the fears reported were the result of a general situation of insecurity, even on a conventional ground, case law had failed to apply the 1951 Refugee Convention<sup>32</sup>.

Concerning the threat against one’s life because of the prevailing violence<sup>33</sup>, resulting from a situation of an internal or international armed conflict, the new law could seem to be even more evasive in its writing than the directive because it requires the existence of a threat recognised as **serious** and **individual** but also **direct**. On that matter, the refugee judge has already given its opinion on the prevailing situation in Iraq and in Haiti.

The Refugee Appeals Board considers that such situations should be recognised not by the ordinary sections but by the Reunited ones. It’s reasonable to assume that this kind of assessment is a political one. In these cases, it turns out that the assessment of the United Nations or the European union is conclusive.

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<sup>31</sup> Examples given by Marguerite Contat Hickel in her study : *Protection of internally displaced persons affected by armed conflict: concept and challenges*

<sup>32</sup> For example, CRR, Reunited sections, 9 of October 1998, *Mr Maxamed* for a Somali national whose fears arose from the general situation prevailing in Somalia, divided into areas ruled by different clans and factions, and could not be imputed to the action of an organised power exercising *de facto* authority in the country Or the example of a citizen of Sierra Leone, suspected to be a supporter of the united revolutionary front

<sup>33</sup> “Undiscriminate”, according to the directive, CRR, Reunited Sections, 3 of July 1998, *Mr D*. According to the judge, the fears weren’t based on one of the grounds of Geneva convention .

## Case law

**Case of militaries** : in only one case, the French Refugee Appeals Board examined the case of a member of a group of Patriots ( self-defence) in Algeria, threatened during the civil war. The Board decided not to consider him as a civil in the legal sense<sup>34</sup>, because those groups were set up with the agreement of the authorities, *if at the beginning, they only had defensive activities, they also participated to insurrectionary operations*<sup>35</sup>, *wearing uniforms and using the equipment of the security forces.*

## Ivory Coast

In the case of a servant who used to work for the family of the former president Konan Bedie and who claimed that she was considered as a slave, the Refugee Appeals Board decided that she wasn't exposed in case of return to inhuman or degrading treatments or to another direct or individual threat by reason of indiscriminate violence in situations of international or internal armed conflict<sup>36</sup>. More precisely, this motive is not really explained, in the decision.

## Haiti

As I was saying, the Protocol to the Geneva Conventions of the 12<sup>th</sup> of August 1949, and Relating to the Protection of victims of non-international armed conflicts, *shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*

2466 claimants coming from Haiti applied in 2005 before the French Appeals Board ( an increase of 25%). 8,21% were given a protection.

The French refugee Appeals Board had granted in a few cases subsidiary protection for the risk of degrading or inhuman treatment, for example in the cases of small shopkeepers swindled out of their money, by armed groups. It hasn't yet officially recognized a situation of instability and sporadic violence, which has not the intensity and gravity of a situation of armed conflict, in the meaning of the 1949 convention relating to the protection of victims of non-international armed conflicts.

However, the Board has also granted the refugee status for opponents<sup>37</sup> to the former president Aristide and, in these decisions, had taken into account the situation of general insecurity. This kind of decision blurs the distinction between the scope of Geneva Convention and the scope of subsidiary protection.

## Iraq

The Reunited Sections have considered that [the context prevailing in Iraq was characterized by an indiscriminate violence in situation of internal armed conflict](#). They decided that this situation could be illustrated by terrorist attacks, serial killings and kidnappings, rapes and muggings and was a result of the conflict between the Iraqi security forces, the Coalition forces and some armed groups, under responsible command, that exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. In this context, an accountant, member of the presidential cabinet and of the Baath's party,

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<sup>34</sup> this is written in a tacit way in the decision

<sup>35</sup> according to Amnesty International

<sup>36</sup> CRR, Reunited Sections, 25th June 2004, *Miss Koffi Amani*

<sup>37</sup> in 2005

can be considered as member of a group exposed to serious harms in case of return<sup>38</sup>. The context and the authorities' inability to protect him prevail over the conventional grounds (political reasons). The same argument was followed for a Christian woman who was alleged to live without her family and to be wealthy<sup>39</sup>.

## Other cases

On one occasion, the Refugee Appeals Board took into account the situation of indiscriminate violence in the Darfur area<sup>40</sup> of Sudan, because of the current deterioration of security in Darfur including attacks by the *Janjaweed*. It's an acknowledged fact that the Janjaweed and the Sudanese armed forces were responsible for a campaign of ethnic cleaning and forced displacement by bombing and burning villages, killing civilians and raping women.

## 2.4 Family unity rule

In a few cases, the Refugee Appeals Board directly used the principles as laid down by the directive, by recognising that the family unity rule « [principe de l'unité de famille](#) » applies to spouses and minors of the person who is granted subsidiary protection. The Refugee Appeals Board thus ensures that « asylum as provided by the Alien's code and by the Council's directive of the European Union on the 29th of April 2004, assures to all the beneficiaries – those who have obtained refugee status or subsidiary protection – the guarantees which spring from the general principles of law applied to refugees ». <sup>41</sup> The case law, in order to be coherent, and has it had done for the refugee's family<sup>42</sup> through the interpretation of the Geneva Convention's provisions, also insures to the beneficiary of subsidiary protection an equivalent protection.

Concerning the residence permit, if subsidiary protection is granted, the refugee and his or her spouse will have the right to a renewable temporary residence permit (if the marriage took place before subsidiary protection was granted and the husband and wife have lived together continuously). When they reach the age of eighteen (or sixteen if they wish to work), children who were minors, will then have the same rights.

## 3. Legal points and perspectives

### 3.1 Limits (cases of exclusion, suspension and withdrawal)

#### [Exclusion](#)

Article L712-2:

*The subsidiary protection shall not be granted to any person with respect to whom there are serious reasons to consider that.*

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<sup>38</sup> CRR, Reunited Sections, 17<sup>th</sup> of February 2006, *Mr Alazawi*

<sup>39</sup> CRR, Reunited Sections, 17<sup>th</sup> of February 2006, *Miss Kona*

<sup>40</sup> CRR, 22<sup>nd</sup> of November 2005, *Mr Azzine Ahmed*

<sup>41</sup> CRR, SR, 27th May 2005, *Mme A.*

<sup>42</sup> CE, Ass., 2<sup>nd</sup> December 1994, *Mme A*

*(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*

*(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

*(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.*

*(d) His activity on the territory constitutes a serious threat for public order, public security or State's safety.*

Regarding to the cases of exclusion, what goes for the Geneva Convention applies equally for the subsidiary protection. It may concern the degree of personal involvement of the petitioner in the commission of such action, the gravity of these acts, or the notion of “serious reasons”.

In its decisions, the Refugee Appeals Board excludes the petitioner not successively but at one go, from the benefit of the two protections. To illustrate this point, we can mention the case of individuals in charge of executing actions inconsistent with the goals and principles of the United Nations : an Iraqi, member of an armed group placed under the authority of the former president Saddam Hussein<sup>43</sup>, responsible for the arrest of opponents, or in Turkey, the case of a member of “Ozel Tim”, a militia responsible for violent acts against Kurdish activists<sup>44</sup>.

On the other hand, the exclusion case for threat to public order, which concerns the sole subsidiary protection, has not been yet examined by the French office for refugees and stateless persons and by the Refugee Appeals Board.

It's important to note that usually, the ordinary administrative judge rules on whether or not an alien is a threat to public order and has the right to have a residence permit.

However, in a few cases, in addition to its function as a jurisdiction, the Refugee Appeals Board examines petitions by individuals with refugee status who are the subject to one of the measures provided by Articles 31, 32 and 33 of the 1951 Refugee Convention and gives its opinions on whether to maintain or revoke such measures (*i.e.* escorting the refugees back to the border, deportation, house arrest, etc.). Only in such a case, the Appeals Board acts as an advisory administrative body and may assess the risk for public order<sup>45</sup>. In this context, it will be able to make the most of its experience.

### *Suspension or Withdrawal*

According to the article L712-3, *the OFPRA may refuse to renew subsidiary protection if the reasons that originally justified it no longer apply or the change of circumstances is of such a significant and non-temporary nature that the refugee's serious harm can no longer be regarded as well-founded.*

*At any time, the benefit of the subsidiary protection may come to an end for one the motives of the article L712-2 ( cases of exclusion)*

For the moment, I don't have any case of withdrawal to present. But it's reasonable to assume that it would be a difficult task for the Ofpra to re-examine every year each subsidiary

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<sup>43</sup> CRR, 17 th of October, *Mr Zian*

<sup>44</sup> CRR, 29th of April 2005, *Mr Cicek*

<sup>45</sup> Less than ten cases a year



protection, which was granted or renewed the previous year, except for the case of the end of a civil war.

### 3.2. Geneva Convention and subsidiary protection: logic of the distinction, differences and common points

The main issue under discussion seems to be [the distinction between the scope of the Geneva Convention and the scope of the subsidiary protection](#). Those two protections have some common criteria but not the same guaranties.

➤ On the one hand, *the definition* of fear of persecution and serious harm are quite similar. *The state's protection concept* concerns the two protections: Provisions of the law of the 10<sup>th</sup> of December 2003 provide that *the persecutions taken into account when granting refugee status and serious threats which can give rise to subsidiary protection can come from non state actors in the case where the authorities refuse or are not able to offer a protection.*

The law provides the same *cases of exclusion*.

➤ On the other hand, the refugee status is based on the grounds provided by the Geneva Convention and the origins of subsidiary protection are defined by the law. A refugee has a ten years residence permit and the beneficiary of the subsidiary protection has a one year residence permit.

However, [the difference between the grounds of Geneva Convention and the origin of subsidiary protection is not clear](#).

Let's me give you the example of *situations of armed conflicts*. In these cases, the origin of a war is often a political, ethnical or religious ground. But the subsidiary protection can be examined only when the claimant does not meet the requirements provided by the Geneva Convention. In the example of Iraq, the case law seems to individualize the threat (which should be direct and individual) by using some characteristics that could be qualified as Geneva Convention's grounds. Who is likely to be threaten in Iraq? Women, Christians, supporters of the former regime...all members of groups at risk that could be analyzed in the light of Geneva Convention, but who weren't protected in the former system.

When it comes to the *social group*, the asylum policy which is carrying on, concerning the situation of women, is ambiguous. For a few years but before the implementation of the subsidiary protection, some of them have been considered as belonging to a group whose members would be likely to be exposed to persecutions.

Finally, the subsidiary protection sets a question mark against the so-called "*attributed political opinions*". According to the State Council, when the petitioner's activities, even when they have no political motive, are regarded by the government of his/her country of origin as a manifestation of political opposition, they're likely to result in persecution<sup>46</sup>. Some claimants allege to be considered as opponents, because of their fight against corruption, for example against a corrupt authority. As I was saying, some of them may also be considered as victims of the mafia and now benefit from the subsidiary protection. Let's take the example of the Algerian family threatened because one of them refused to perjure. The origin of the threat

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<sup>46</sup> State Council, 27<sup>th</sup> of April 1998, *Mr. Beltaifa*

was an ordinary car crash. But this family was continuously attacked, and harassed. Several court actions were brought against its members and finally the story was related in the newspapers. The continuity, the nature and the authors of the threats led the judge to consider that they were so treated unfairly because they were considered as opponents of the regime<sup>47</sup>. Does it mean that the scope of Geneva Convention is going to be redefined? We're still in the dark about this question.

Let's take the example of a woman who has fought for women's rights and fears for a life. She could be considered as a refugee on the basis of constitutional asylum (for her action for freedom), on the ground of political opinions, as well as on the ground of membership of a particular social group. But she also could benefit from subsidiary protection because of the risk of death penalty or degrading or inhuman treatment, regardless of their origin.

### **To conclude**

It's a bit early to draw conclusions on the effect of the new asylum rules, especially on the implementation of the subsidiary protection, which is not achieved.

From a practical point of view, the rationalisation of the procedure was aiming at reducing delays<sup>48</sup> - and to stop claimants using a wide range of procedures.

From a legal point of view, the reform isn't about to achieve, because the scopes of the each protection aren't completely separated.

The law gives the priority to the refugee status. The lawyers don't argue in favour of subsidiary protection. According to them, it's a secondary form of protection. The sections are tempted to grant it, when they decide to grant a protection, but haven't come to an agreement on the refugee status.

Should it be given up? I don't think so. The institution of this kind of protection is a progress. Before its institution, there was only a form of protection arbitrarily defined (the territorial asylum) and the control of the ordinary administrative judge was very limited. However, it has to be admitted that its criteria should be more precisely defined. Maybe, in an optimistic view, the subsidiary protection is only a stage towards a single system for the persons in need of a protection, whatever the reasons is. The issue is not the maintain the primacy of Geneva Convention. What is at stake is to give an efficient protection to the persons who need it.

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<sup>47</sup> *Ms Louahche* op.cit.

<sup>48</sup> From one year to less than six months for the procedure