

The Use of COI in Court decisions



COUR NATIONALE
DU DROIT D'ASILE

Outline

1. Evolution of the use of COI before the French National Court of Asylum law (CNDA)
2. An evolving hierarchy of sources over the last 10 years
3. The issue of the current approach of COI by the asylum judge

Evolution of the use of COI before the French National Court of Asylum law

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Evolution of the use of COI before the French National Court of Asylum (1/2)

- **CNDA** = Administrative court specialized in **judging applications against refusals of international protection by the French Office for Refugees and Stateless Persons (OFPRA) and decisions to end protection.**
- **A principle:** the CNDA is an **administrative court**, although it is specialized in a matter whose administrative nature is not always obvious.
- COI (Country of Origin Information) means information on the country of origin of a person seeking international protection: legal framework, social and cultural environment, political context, geography, humanitarian conditions, human rights practices or the security situation...
- This "belonging" to administrative law and/or public law explains why the Court has been slow to integrate and use COI: **the Conseil d'Etat has historically issued decisions marked by their conciseness and brevity, supplemented by the conclusions of a magistrate in open court.** However, a relevant use of COI by the asylum judge necessarily requires **longer and more detailed decisions**, setting out the information selected in the reasoning. Therefore, the use of COI has required a gradual change in the way decisions are rendered, which has taken some time to adapt.

Evolution of the use of COI before the French National Court of Asylum (2/2)

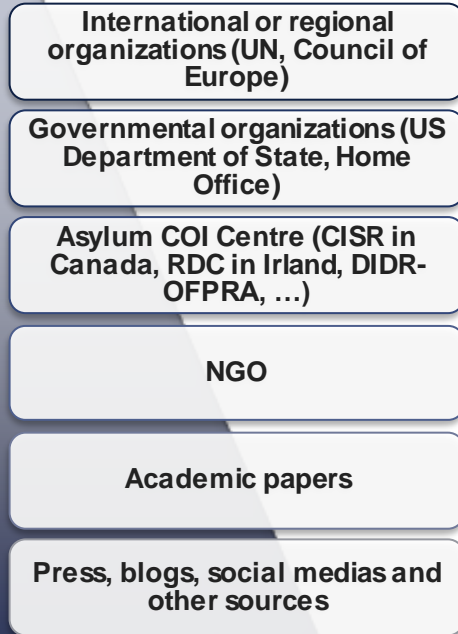
- This is why the widespread use of COI by the CNDA judge dates back to 2009-2010. However, some decisions already showed a very interesting use of COI, in particular the **decision of the Refugee Appeals Commission (CRR) on February 15, 2007: Mrs. Kanziga**, widow of the Rwandan head of state murdered in 1994, was excluded from the benefit of an international protection because of a cluster of elements that lead to the belief that she was guilty of a crime within the meaning of article 1, F, a) of the Geneva Convention and in particular of a crime of genocide and a crime against humanity. This decision, the result of a lengthy investigation into the last genocide of the 20th century, was particularly significant and comprehensive in its use of COI. The idea that the decision must be more justifiable, speaks for itself and not try to be systematically short, was particularly illustrated in the Sri Lankan decisions from July 2010. These decisions demonstrate an integration of COI in the reasoning of the judge and its development in the body of the decision. These decisions **include a certain hierarchy of sources and three or four criteria to qualify these sources, which must be relevant, publicly available and current, precision being always desirable. Ex: CNDA, 30 juillet 2010, n°09000352**
- « [...] ainsi qu'il résulte de l'instruction, *et notamment des informations publiques, pertinentes et précises résultant des rapports des ONG International Crisis Group du 11 janvier 2010 intitulé « Sri Lanka a bitter peace », Human Rights Watch du mois de février 2010 intitulé « Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka » et Irish Refugee documentation center du 22 janvier 2010 intitulé « Information of failed asylum seeker returned to Sri Lanka »...*

An evolving hierarchy of sources over the last 10 years

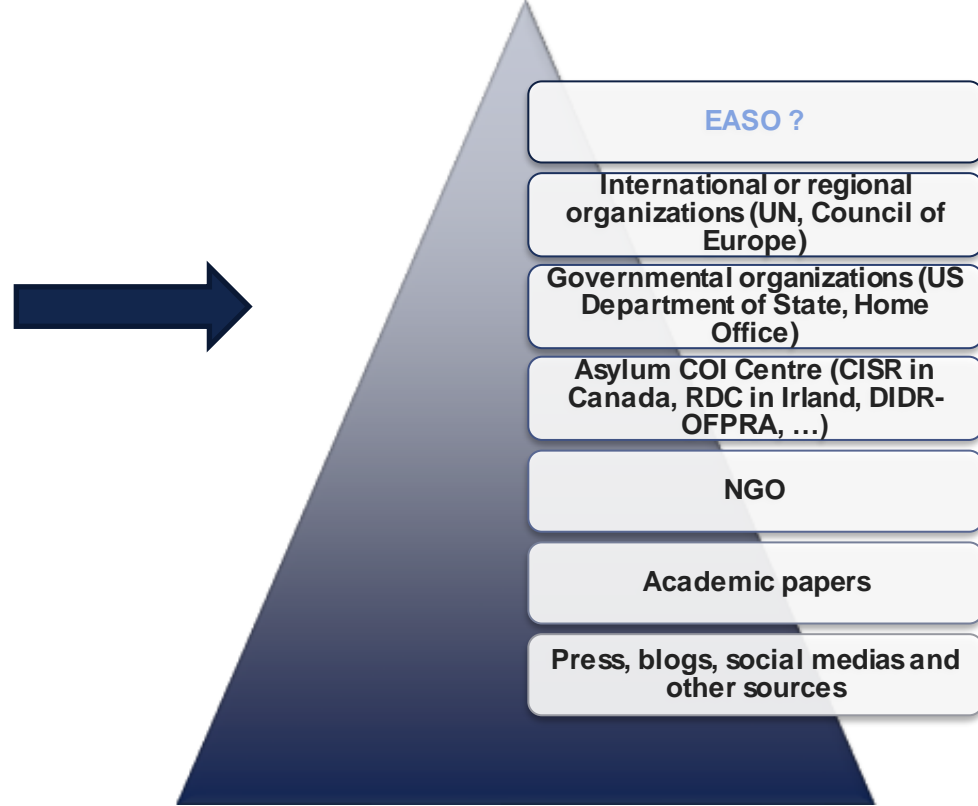
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2. An evolving hierarchy of sources over the last 10 years (1/4)

Hierarchy of major COI norms prior to 2011:



Hierarchy of major COI norms since 2012:



2. An evolving hierarchy of sources over the last 10 years (2/4)

- The International Association of Asylum and Immigration Judges (IARMJ), named IARLJ until December 2017, produced in February 2006 a guide entitled "**Judicial criteria for assessing country of origin information (COI)**" which was of great use to CNDA judges. It was even at the origin of the initial hierarchy of COI sources.
- The Court has taken this hierarchy into account from July 2010. However, it is worth noting the "rise in power" of the European Asylum Support Office (EASO) over the last ten years. The creation of this structure was prompted by Regulation n°439/2010 of the European Parliament and the Council of 19 May 2010. However, the development of the EASO has been very gradual. For instance, the Court was initially unable to rely on the first report on Afghanistan dated from July 2012 and drawn up by the EASO. Indeed, there were some uncertainties and controversies with the UNHCR, especially on the issue of forced recruitment by the Taliban of their armed forces... It was only at the end of 2012 that the CNDA was able to make full use of the documentation produced by the EASO.
- **2012-2021** : this period marks a crystallization of the CNDA's jurisprudence based on the EASO's COI. In this respect, the last major panel of 19 November 2020 on Afghanistan expressly recognizes the central role of EASO in the production of reliable, objective and relevant sources...

2. An evolving hierarchy of sources over the last 10 years (3/4)

- **CNDA, GF 19 november 2020, n°19009476**

« [...] On entend ainsi par information sur les pays d'origine (COI, Country of origin information) des informations publiquement accessibles, indépendantes, pertinentes, fiables et objectives, précises, cohérentes et actuelles, corroborées, transparentes et traçables. Conformément aux dispositions précitées de l'article 10 de la directive « Procédure », il y a lieu de s'appuyer sur différentes sources d'information sur les pays d'origine émanant, notamment, des organisations internationales et intergouvernementales, des organisations non gouvernementales, des institutions gouvernementales ou juridictionnelles, des organismes législatifs et administratifs ou encore des sources médiatiques ou académiques. »

- Thus, the EASO is today interposed in the above-mentioned hierarchy of sources and more or less reaches the UN level.

2. An evolving hierarchy of sources over the last 10 years (4/4)

- It should also be noted that in the area corresponding of the Council of Europe and in particular in the Balkans and/or the Caucasus, the contribution of the Parliamentary Assembly and of the Council of Europe's COI has proved itself useful, especially in the Chechen cases that I have had to judge :

Chechnya Decision No. 09002103 of 4 July 2011 partly took up and commented the Parliamentary Assembly of the Council of Europe's report resulting from the Marty Commission of Inquiry: in this context, I have tried to prioritize the sources without neglecting the precisions provided by NGOs with correspondents on the ground.

les déclarations du requérant quant à l'existence d'enlèvements et de détentions extrajudiciaires assortis de mauvais traitements en Tchétchénie sont corroborées par les informations publiées dans les rapports annuels récents de plusieurs organisations gouvernementales et non gouvernementales, telles que le Département d'Etat américain et Amnesty international, notamment dans le rapport de ladite ONG (Organisation Non Gouvernementale) Amnesty international « Russian Federation :Human rights Violations in the North Caucasus » (pages 21-22) publié en juillet 2009, rapport qui établit que les familles des membres supposés des groupes armés hostiles au gouvernement de Ramzan Kadyrov font l'objet d'intimidations, informations encore précisées et synthétisées par les informations actuelles, pertinentes et publiquement disponibles contenues dans le rapport de l'assemblée parlementaire de M. Dick Marty du Conseil de l'Europe en date du 29 septembre 2009 intitulé « Situation dans la région du Caucase du Nord :sécurité et droits de l'homme »,

- Finally, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status + the Guidelines on the Use of COI (2004) is a less “normative” source and falls under the doctrinal sources, even though the UNHCR is a UN organization with a presence in the judgment panels.

The issue of the current approach of COI by the asylum judge

3

The issue of the current approach of COI by the asylum judge

>> The issue of the currency of sources : the Chechen cases

In order to analyze the facts of the case, it is necessary to distinguish and/or combine the full contentious powers of the asylum judge from/with the problem of the quality or relevance of the sources : the most relevant sources are often the oldest ones.

- Regarding the relevance of the sources in order to analyze the events that took place between 2008 and 2013 - which correspond to the most violent persecutions of Chechen political opponents and their families- the parliamentary enquiry reports of the Council of Europe of that time and of some Russian NGOs (such as Memorial) shed the light on the nature and gravity of the persecutions. Since then, these NGOs have been weakened and persecuted in Chechnya, where they can no longer work. Moreover, the Council of Europe is often paralyzed by administrative restrictions imposed by the Chechen Republic and the Russian Federation.
- **Regarding the timeliness of concerns for the CNDA cases from 2016-2021**, the relatively poor quality of sources and the weakening of the political opposition tend to suggest that persecutions would be less severe except for the LGBTI community in Chechnya. Many applicants still refer to the events that occurred between 2008 and 2013.
- **The problem of the cessation of the international protection : CJEU Abdullah judgment 2 March 2010 case** on the application of Article C5 of the Geneva Convention on the change in circumstances. In this case, the assessment of the real and lasting nature of the change in circumstances is crucial. A default in COI would lead to an error of law and a major failure of the international protection.

The issue of the current approach of COI by the asylum judge

>> The issue of the reality of persecutions and the rareness of sources:

This is a current issue, that is nevertheless not always perceived by asylum judges.

A very good recent example of the rareness of sources arose before the CNDA regarding the conflict in Tigray since November 2020. Until the end of 2020, the lack of source did not allow for an assessment of the level of violence in the armed conflict. One of the main reasons was the Ethiopian government's desire to prohibit the presence of humanitarians and observers on its ground, including journalists. Some of UN documents were only published in spring 2021 along with an EASO summary on 31 March 2021: thus, it took 5 months to obtain a source that was at the top of the hierarchy of COI sources in the jurisdiction. As a result, the CNDA did not produce a classified case-law on violence in the Tigray region until the end of April 2021 (**CNDA, Mr B 30 April 2021 C+**). This delay could have been prejudicial to the protection of Ethiopian applicants from the Tigray province.

→ The rareness of sources is not at all synonymous with the absence of persecution. One might even question whether the organized rareness of sources by a potential persecuting agent could constitute an indication of persecution.

The issue of the current approach of COI by the asylum judge

>> **The issue of the abundance of sources and its hierarchy: does not too many sources kill the source ?**

The paradoxical case of Afghanistan in 2020: On the one hand, the entire hierarchy of sources was represented in this case. Thus, the question of the relevant source could arise. On the other hand, in war situations and in the hypothesis of the applicability of subsidiary protection 3 or c), aren't they ultimately correlated with an overabundance of sources due to the proliferation of structures and/or international actors on the ground?

The weakest legal protection is the one that benefits from the overabundance of sources. Sources are likely to become scarce in Afghanistan, while the urgency of conventional protection will become crucial.



Thank you for your attention.

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