

1-1-2001

Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Protection

Jennifer Moore

University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship



Part of the [Human Rights Law Commons](#)

Recommended Citation

Jennifer Moore, *Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Protection*, 13 *International Journal of Refugee Law* (2001).

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/369

This Article is brought to you for free and open access by the UNM School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsoane@salud.unm.edu, sarahrk@unm.edu.

Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection

JENNIFER MOORE*

1. Introduction

The international refugee definition does not discriminate between victims based upon the persecutor's affiliation or non-affiliation with the State. While the majority of asylum States recognize this principle of equal access under the 'protection theory,'¹ a minority of States, including France and Germany, currently subscribe to a much more restrictive concept of agency. Under the 'accountability theory,' refugee status is limited to individuals who fear persecution at the hands of entities for whose abusive acts the State is deemed responsible. In accountability jurisdictions, so-called 'third-party refugees'² — those who fear persecution by non-State agents — are denied protection.

This article cautions that the accountability theory strikes at the very heart of international protection, by threatening the international consensus underlying the provision of asylum to refugees. Part 2 presents a conceptual analysis of the accountability theory and its fundamental inconsistency with the principle of refugee protection. This philosophical

* Associate Professor, University of New Mexico School of Law; B.A., Amherst College (1983); J.D., Harvard Law School (1987). The author presented a draft of this article at the 7th Annual Research and Advisory Panel of the International Association for the Study of Forced Migration in South Africa in January 2001. Thanks go to UNM law student Melissa Ewer for her valuable research assistance.

¹ The protection theory also may be referred to as the 'persecution theory'. The protection/persecution theory focuses on the *fact* of persecution and the *lack* of protection. In contrast, it is the *character* of the persecutor that is the overriding concern of the accountability theory.

² See *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293 [*Adan I*] at 306 A-B. Lloyd Berwick held that 'for those who are sometimes called "third party refugees" ... if the state is unable to provide protection ... the qualifications for refugee status are complete'. See below, n. 72.

approach is followed in Part 3 by a pragmatic examination of the impact of the accountability theory in the context of a regional burden-sharing regime that allows a European State, under certain circumstances, to return an asylum seeker to the country of first asylum. Part 3 concentrates on two asylum cases from the United Kingdom: *ex parte Adan and Aitseguer*,³ decided by the House of Lords, and *T.I. v. The United Kingdom*,⁴ a case ultimately brought before the European Court of Human Rights.

In *ex parte Adan and Aitseguer*, the House of Lords blocked the return of a Somali woman and an Algerian man to Germany and France, respectively, where they had previously sojourned. The Law Lords reasoned that both countries would likely return the asylum seekers to their countries of origin because they feared persecution by non-State agents.⁵

By contrast, in *T.I. v. United Kingdom*, the European Court of Human Rights refused to block the return of a Sri Lankan 'third-party refugee' to Germany, despite his previous denial of asylum by administrative bodies in that country for lack of State complicity in his feared persecution. Notwithstanding its endorsement of the protection theory, the Court permitted T.I.'s return to Germany based on its speculation that he might be eligible for an alternative temporary form of protection under the German Aliens Act.⁶

Taken together, *ex parte Adan and Aitseguer* and *T.I. v. United Kingdom* clarify that when an asylum seeker arrives in an accountability theory jurisdiction, first, and moves on to a protection jurisdiction, second, it matters little that a majority of States subscribe to the broader protection principle, if in fact, that person risks removal to a country that may return him or her to persecution by non-State agents. In a European legal climate which places severe limits on 'forum-shopping' by refugees, the protection theory cannot afford to be embraced by a mere majority of States. Rather, protection for victims of both State and non-State persecution should be the consensus of all members of the international community. Moreover, protection theory adherents must refuse to return asylum seekers to accountability jurisdictions until such time that the protection theory has universal application.

³ *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer* (U.K. House of Lords, 19 December 2000; [2001] 2 W.L.R. 143); reprinted below, 202–29, [hereinafter *ex parte Adan and Aitseguer*], affirming *R v. Secretary of State for the Home Department, ex parte Adan, Subaskaran and Aitseguer* (U.K. Court of Appeal, 23 Jul. 1999; [1999] 3 W.L.R. 1274) [hereinafter *Ex parte Adan et al.*].

⁴ *T.I. v. The United Kingdom*, European Court of Human Rights, 7 Mar. 2000; 12 *IJRL* 244 (2000).

⁵ *ex parte Adan and Aitseguer*, opinion of Lord Hutton, para. 7.

⁶ *T.I. v. United Kingdom*, 17–18.

2. The protection theory and the accountability theory: Thesis and antithesis

The definition of a refugee set forth in Article 1 of the 1951 Convention relating to the Status of Refugees does not define the character of the actor whose persecution is feared by the asylum seeker. A refugee is someone outside their country of origin with 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', who is either *unable or unwilling* to avail themselves of the protection of that country.⁷ The United Nations High Commissioner for Refugees (UNHCR), the agency responsible for providing protection and assistance to refugees worldwide, instructs that the silence of the Refugee Convention regarding the agency of persecution must be read expansively, such that 'offensive acts . . . committed by the local populace . . . can be considered as persecution . . . if the authorities *refuse, or prove unable*, to offer effective protection.'⁸

As Goodwin-Gill indicates in his treatise on international refugee law, 'the issue of State responsibility for persecution . . . is not part of the refugee definition.'⁹ Further, Goodwin-Gill explains, 'there is no basis in the 1951 Convention . . . for requiring the existence of effective operating institutions of government as a pre-condition to a successful claim to refugee status.'¹⁰ Thus, according to both conventional international law and scholarly interpretation, the State is *not* the necessary agent of persecution, *nor* is a functional State backdrop to persecution a prerequisite to the provision of surrogate international protection to refugees.¹¹

Despite international legal dictates regarding the agency of persecution, State practice differs considerably regarding the recognition of the equal claim to international protection on the part of refugees fearing non-State agents of persecution. A majority of Western asylum States, including Australia, Belgium, Canada, the United Kingdom and the United States, subscribe to the so-called 'protection theory' which encompasses victims of unofficial and official persecution alike.¹² However, a minority of European States, including Germany and France, have crafted the more

⁷ Art. 1(A)(2) CSR51; emphasis added.

⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, [hereinafter the UNHCR *Handbook*], para. 65; emphasis added.

⁹ Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford: Oxford University Press, 2nd edn., 1996, 73.

¹⁰ *Ibid.*, 73-4.

¹¹ See also, Atle Grahl-Madsen, *The Status of Refugees in International Law*, A.W. Sijthoff-Leyden, vol. 1, 1966, 191, 192; James Hathaway, *The Law of Refugee Status*, Butterworths Canada Ltd., 1991, 124. See generally, Jennifer Moore, 'From Nation State to Failed State: International Protection for Human Rights Abuses by Non-State Agents,' 31 *Columbia Human Rights Law Review* 82, Fall, 1999.

¹² *ex parte Adan and Aitseguer*, opinion of Lord Slynn of Hadley, para. 3 and opinion of Lord Steyn, para. 6. See also, Moore, above n. 11, at 108 n. 70.

restrictive 'accountability theory,' which bars protection to refugees fleeing persecution by certain non-State actors.

The accountability theory as a basis for the denial of refugee status has a more limited application to the specific context of a so-called 'failed State,' as demonstrated by Germany's denial of asylum to refugees from Somalia and Afghanistan in recent years.¹³ However, it has also been applied more generally by France and some of its neighbours to refugees from any State, embattled yet functional, which is unable to provide protection in a given circumstance, often due to internal armed conflict.¹⁴

In the case of the broadest application of the accountability theory, refugee protection will only be granted in two situations: either the State must be the persecutor, or the State must be *unwilling but able* to protect against persecution by non-State agents.¹⁵ Where the State lacks the capacity to prevent or punish persecution by other entities, whether insurgents, clans, subclans or criminals, a legalistic interpretation places the victims of such persecution outside the refugee definition. The technical significance of the accountability theory is that it replaces the more embracing '*unable or unwilling* to protect' standard in paragraph 65 of the UNHCR Handbook¹⁶ with a more demanding '*unwilling but able* to protect' requirement. The human result is that refugees fleeing varying degrees of State dysfunction are left out in the cold.

While a denial of status to those refugees fleeing non-State persecution is a clear violation of the spirit of the 1951 Refugee Convention and a significant dilution of the availability of international protection in those States that subscribe to the accountability theory, unfortunately the problem is not so contained or containable. The tear in the fabric of international protection caused by the accountability theory becomes an unravelling hole in the context of a regional burden-sharing regime in

¹³ Bundesverwaltungsgericht [BverwG] 9 C 15/96, judgment of 15 Apr. 1997, and BverwG 9 C 38/96, judgment of 15 Apr. 1997 [Federal Administrative Court of the Federal Republic of Germany] (both involving Somali applicants); and BverwG 9 C 34/96, judgment of 4 Nov. 1997 [Federal Administrative Court] (group of Afghans). See also 'Sri Lankan Tamil Case,' decided by the German Federal Constitutional Court in 1989, below n. 15; *Ex parte Adan and Aitseguer*, Lord Slynn's opinion, para. 3 and Lord Steyn's opinion, para. 7; J. Moore, above n. 11, at 108, n. 69.

¹⁴ *ex parte Adan and Aitseguer*, Lord Slynn's opinion, para. 6 and Lord Steyn's opinion, para. 11 (asylum seekers from Somalia and Algeria whose claims were previously denied by Germany and France, respectively). VwGH 11.03.1992, 93/18/008 (Austrian immigration authority denying asylum to applicant for feared so-called private persecution).

¹⁵ This restrictive definition of agents of persecution was set out in 1996 in a non-binding instrument of the European Union. See Joint Position 96/196/JHA Defined by the Council on the Basis of Article K.3 of the Treaty of the European Union on the Harmonized Application of the Definition of the Term 'Refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, 1996 O.J. (L63/2), para. 5.2, suggesting that persecution requires human rights abuses perpetrated, 'encouraged or permitted' by the State. It is also reflected in the so-called 'Sri Lankan Tamil Case' decided by the German Federal Constitutional Court [FCC] in 1989. See BVerfGE 80, 315, decision of 10 July 1989, 2 BvR 502/86, 1000/86, 961/86, in which the Court held that political persecution requires persecution by the State.

¹⁶ Above, n. 8.

which a European Union member may return an asylum seeker to the first Union member through whose territory he or she transited.¹⁷ It is the combination of the accountability theory and the application of the first asylum country concept that is most threatening to both abstract principles of refugee protection and the very practical plight of individual refugees. The threat is particularly evident at present to those asylum seekers in Europe who happen to pass through Germany or France before seeking asylum in a country such as the United Kingdom.

3. Recent jurisprudence in the United Kingdom under the Dublin Convention and the 1966 Asylum and Immigration Appeals Act

Two recent asylum cases in the United Kingdom deal with one or more individuals fearing non-State-sponsored persecution, and both involve the possible removal of one or more asylum seekers to Germany or France as provided under UK law. In the first case, the UK House of Lords, affirming the Court of Appeal, protected the asylum seekers concerned from return to Germany and France, respectively.¹⁸ In the second, the European Court of Human Rights allowed the United Kingdom to return an asylum seeker to Germany.¹⁹ In both cases, the United Kingdom recognized that the accountability theory was in violation of the spirit of the 1951 Convention, and yet this finding did not consistently prevent return to a country found to commit such a violation. The differential outcome of the two asylum cases argues powerfully that the availability of refugee protection to victims of State and non-State persecution alike is a core value of the 1951 Refugee Convention that must be recognized by all members of the international community.

3.1 *R v. Secretary of State, ex parte Adan et al*

The cases of Adan, Subaskaran and Aitseguer were consolidated and decided by the U.K. Court of Appeal in July 1999, in a judgment that affirmed the protection principle as the correct interpretation of the international refugee definition.²⁰ The House of Lords then granted leave to appeal in the cases of Adan and Aitseguer, and decided their cases in

¹⁷ See Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the [European] Community [Dublin Convention], 16 June 1990, art. 7(1) ['The responsibility for examining an application for asylum shall be incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States . . . '].

¹⁸ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, paras. 24 and 23, affirming *ex parte Adan et al* in the Court of Appeal at 9; above, n. 3.

¹⁹ *T.I. v. the United Kingdom* at 19; above n. 4.

²⁰ *ex parte Adan et al*, Court of Appeal, at 16.

December 2000, affirming the judgment of the Court of Appeal.²¹ The opinion of the Court of Appeals sheds light on the relevant facts and background of the case, and arguably takes a somewhat more qualified approach to the protection principle than that articulated by the House of Lords. For these reasons, the Court of Appeal decision is first analyzed, followed by an examination of the decision by the House of Lords.

3.1.1 *The judgment of the Court of Appeal*

ex parte Adan et al was a consolidated case heard by the Court of Appeal in 1999, involving three asylum seekers from three different countries for whom the United Kingdom was not the first country on whose territory they sought protection. In each case, the U.K. Secretary of State had summarily dismissed their claims, having certified that each applicant was returnable to either Germany or France as a safe country of first asylum under the Dublin Convention and the 1996 Asylum and Immigration Appeals Act [hereinafter 1996 Act].²² Each applicant appealed the dismissal of his or her claim, and the Court of Appeal combined their cases.

The asylum seekers in *ex parte Adan et al* were Lul Adan, Sittampalan Subaskaran and Hamid Aitseguer. Adan, a Somali woman, alleged past persecution and the fear of future persecution by a rival clan in a situation of total governmental collapse in her native country. The German authorities had denied her asylum claim before she reached the United Kingdom.²³ Subaskaran, a Sri Lankan man, claimed past and future persecution by the insurgent guerrilla force known as the LTTE or Tamil Tigers. His application had also been denied previously in Germany.²⁴ Finally, Aitseguer, an Algerian man, had experienced and feared persecution by Islamic fundamentalists; he passed through France on his way to applying for asylum in the United Kingdom.²⁵

Adan, Subaskaran and Aitseguer all lodged asylum applications with the United Kingdom Home Office, and their applications were all similarly dismissed without consideration of their merits under s. 2(2)(c) of the 1996 Act; this allows the Home Secretary to remove an asylum seeker to a country if assured 'that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the [Refugee] Convention.'²⁶ In each case, that 'other country,' Germany for Adan and Subaskaran, and France for Aitseguer, had accepted responsibility for ultimately resolving the case

²¹ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 23.

²² *ex parte Adan et al*, Court of Appeal, 6-7.

²³ *Ibid.*, 2.

²⁴ *Ibid.*, 3.

²⁵ *Ibid.*, 2-3.

²⁶ *Ibid.*, 2-3, 7, citing 1996 Act.

under the terms of the Dublin Convention as the country of first asylum.²⁷

All three applicants appealed on the following grounds. Because both Germany and France subscribe to the accountability theory of refugee status, their claims would be wrongfully denied by either country, and hence they would be returned to their country of origin in a manner 'otherwise than in accordance with the [Refugee] Convention.'²⁸ Indeed, the claims of Adan and Subaskaran had already been denied by Germany.²⁹

When the facts are examined more closely, it appears that Adan feared that, because a rival clan had killed other members of her clan, the same fate awaited her upon return. Under Germany's version of the accountability theory, Somalia's status as a failed State with 'no de jure or de facto State authority' made her 'fall outside the Convention.'³⁰ Next, Subaskaran attested to a fear of persecution by the Tamil Tigers, an insurgent movement whose broad-based military campaign against the Sri Lankan State had successfully challenged its de facto if not its de jure authority. On this basis, Subaskaran was similarly not in a position to enjoy Convention protection in Germany.³¹ Finally, Aitseguer, because he feared human rights abuses by Islamic extremists whom the Algerian government could not control, would be denied protection in France.³²

In practical terms, the basis for the applicants' petition to the United Kingdom Court of Appeal was the possibility, and indeed the legal *necessity*, of a different treatment of their cases in the United Kingdom. This was the essential, if implied, basis of their appeal. Despite the fact that Adan, Subaskaran and Aitseguer were or would likely be denied asylum under the accountability theory, the result might be different under the protection theory. In fact, for the very reason that these individuals had no prospect of effective protection by a de facto governing authority in their countries of origin, all three arguably had a special claim to asylum under the protection theory, because while the accountability theory requires a State of origin with the ability to protect, the protection theory does not.

The Court of Appeal in *ex parte Adan et al* set out a consolidated analysis of the relevant legal standards applicable to all three cases. The judgment first identified the United Kingdom as an adherent to the protection principle, like the majority of States party to the Refugee Convention,

²⁷ Ibid., 2–3, citing the Dublin Convention, above n. 17 and related text.

²⁸ Ibid., 7, 9, citing 1996 Act, s. 2(2)(c). Essentially the three applicants argued that neither Germany nor France could be fairly characterized as safe countries of first asylum as required under the terms of the 1996 Act. Compare *ex parte Adan et al* with *T.I. v. United Kingdom*, below n. 86 and related text.

²⁹ Ibid., 2, 3.

³⁰ Ibid., 2, 10.

³¹ Ibid., 3, 10.

³² Ibid., 2–3, 10.

and consistent with the advice of UNHCR.³³ The analysis then characterized both Germany and France as proponents of the minority accountability theory, clarifying that where Germany only disqualifies asylum seekers from so-called failed States where there is 'no possibility of protection',³⁴ France rejects asylum seekers even if the State is nominally functional, so long as it 'is unable to provide protection' under given circumstances.³⁵

The heart of the Court of Appeal's decision lies in its principled assessment of the protection and accountability theories. The Court clarified that the problem with returning Adan, Subaskaran and Aitseguer to Germany and France was *not* that those countries have an interpretation of the Refugee Convention 'at variance with the English jurisprudence'.³⁶ Rather, the Court insisted that there is 'a range of tolerance' that permits States party to adopt different approaches to treaty provisions based on their respective legal cultures. The problem with the German and French accountability theories, and the Court did not put too fine a point on its characterization, is that they are 'at variance with the Convention's true interpretation'.³⁷ In denying protection to victims of non-State persecution, the Court ruled, these third countries are failing in their fundamental duties to 'apply the Convention's international meaning [and] ... the Convention's core values'.³⁸

In finding both the German and French variants of the accountability theory to be in violation of the treaty, the United Kingdom Court of Appeal declared the protection theory to be required by the Refugee Convention. In so concluding, the Court provided a very clear articulation of the protection theory itself:

... the issue we must decide is whether or not, as a matter of law, the scope of Art. 1A(2) extends to persons who fear persecution by non-State agents in circumstances where the State is not complicit in the persecution ... whether because it is *unwilling or unable* ... to provide protection. We entertain no doubt that such persons ... are entitled to the Convention's protections.³⁹

The Court even went so far as to declare that if a State were to utilize the accountability theory, because it is an incorrect interpretation of the Refugee Convention as a matter of law, it would signify that 'the Convention was not being applied at all'.⁴⁰

In light of the distance that the Court of Appeal was willing to go in

³³ Ibid., 9. See also above, Part 1 and nn. 7, 8 and 12 and related text.

³⁴ *ex parte Adan et al*, Court of Appeal, 9–10.

³⁵ Ibid., 10.

³⁶ Ibid., 11.

³⁷ Ibid., 15.

³⁸ Ibid., 13.

³⁹ Ibid., 16; emphasis added.

⁴⁰ Ibid., 15.

condemning the accountability theory, it is significant, if not discouraging, to proponents of the protection theory that the ultimate standard articulated by the Court was more modest. The Court phrased its final holding in a manner that arguably constrains the judicial mechanism for blocking the transfer of victims of non-State persecution from the United Kingdom to accountability theory jurisdictions.

In what might be characterized as an academic discussion offered to assist future adjudicators in determining the application of the 1996 Act's safe country provisions,⁴¹ the Court of Appeal cited one of its own earlier decisions regarding third country transfers, declaring that '[w]hat is required is that there should be *no real risk* that the asylum seeker would be sent to another country otherwise than in accordance with the Convention.'⁴² The Court then proceeded to find that the accountability theory is 'as a matter of law at variance with the Convention's true interpretation.'⁴³ However, the Court chose to culminate its decision, not with this broad-based invalidation of the accountability theory, but with the more qualified statement that 'the Secretary of State, in administering s. 2(2)(c) of the Act of 1996, is only concerned with the question whether there exists a *real risk* that the third country will refole the refugee in breach of the Convention.'⁴⁴

One possible reading of the Court's reasoning in *ex parte Adan* is that there is inherently and necessarily a 'real risk' that returning an asylum seeker to a country utilizing the accountability theory will result in he or she being returned from there to a situation of persecution; hence, such third country transfers will be categorically ruled out. However, this seems to involve a certain stretching of the 'real risk' standard, from a pro-protection theory standpoint. While the 'real risk' test was satisfied in the case of *Adan*, *Subaskaran* and *Aitseguer*, the standard is significantly less stringent towards the Secretary of State than one which would forbid the return of an asylum seeker from the United Kingdom to an accountability theory jurisdiction under *any* circumstances.

In fact, counsel for the Secretary of State had argued in *ex parte Adan et al* that Germany and France had alternative legal forms of relief from refolement that would ensure that the Convention was not violated in practice, despite any denial of formal refugee status under the accountability theory. Fortunately from the perspective of the applicants, counsel was not able to provide meaningful evidence of 'the efficacy of the[se] other forms of protection.'⁴⁵ For this reason, the Court was not

⁴¹ See above, discussion in Part 2 and n. 26.

⁴² *Ibid.*, 14, citing *ex parte Canbolat* (Court of Appeal) [1997] 1 W.L.R. 1569, 1579A-C; emphasis added.

⁴³ *ex parte Adan et al*, Court of Appeal, at 15.

⁴⁴ *Ibid.*, 19. Emphasis added.

⁴⁵ *Ibid.*

required to resolve affirmatively whether the availability of temporary or lesser forms of protection in lieu of asylum in third countries would satisfy the United Kingdom's obligations under the Convention or the 1996 Act.⁴⁶ Rather, the Court of Appeal was able to conclude that the Secretary of State must entertain the merits of the asylum applications of Adan, Subaskaran and Aitseguer, and could not return them to Germany and France.

3.1.2 *The judgment of the House of Lords*

3.1.2.1 *Failed States, embattled States and the accountability theory.* After the Court of Appeal ruled in favour of Adan, Subaskaran and Aitseguer, the Secretary of State sought leave to appeal the cases of Adan and Aitseguer in the House of Lords,⁴⁷ not in order to effect the removal of Adan and Aitseguer to Somalia and Algeria, respectively, but rather in order to secure guidance from the House as to future cases involving alternative applications of the accountability theory.⁴⁸ As Lord Steyn specified,

the House gave leave to appeal in the cases of Adan and Aitseguer ... [to] consider *whether there is a material difference between a state where governmental authority has collapsed (as is the case in Somalia) and a state where governmental authority exists but is too weak to provide effective protection against persecution by non state actors (as is the case in Algeria).*⁴⁹

The two applications of the accountability theory considered by the House of Lords in *ex parte Adan and Aitseguer* might be termed the 'failed State' and 'embattled State' alternatives.⁵⁰ Under the failed State variant, Germany denies asylum to applicants such as Adan from a handful of dysfunctional and ungoverned countries like Somalia.⁵¹ In contrast, the

⁴⁶ A UK court had occasion to assess the sufficiency of temporary protective measures in Greece, in a later case in which two Algerian asylum seekers had alleged persecution by non-State agents; see *R v. Secretary of State for the Home Department, ex parte Bouheraoua and Kerkeb* (Queen's Bench Division, 22 May 2000). In *Bouheraoua*, the High Court found that the temporary relief from removal available under Greek law was insufficient to meet the standards of the 1951 Convention, and on that basis reversed the Secretary of State's previous certification of the applicants' return from the United Kingdom to Greece. *Ibid.*, 8. The Court recognized that Algerian asylum claims were almost universally denied in Greece (*ibid.*, 2) and, moreover, that there was 'no evidence of any case in which asylum has been granted to persons claiming non-state persecution' by Greek immigration authorities. *Ibid.*, 6. Most significantly, the Court found *no* evidence that the relevant temporary protection available to denied asylum seekers — so-called 'humanitarian status' — had ever been granted to an Algerian. *Ibid.*, 7–8. On this basis, the Court concluded that 'there [was] a real risk that asylum seekers who can establish a real risk of persecution from non-state agents ... may not be permitted to stay in Greece on humanitarian grounds until that risk has passed.' *Ibid.*, 8.

⁴⁷ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 11. Leave was not sought in Subaskaran's case.

⁴⁸ *Ibid.* Subaskaran's case was deemed to have 'added nothing to the issues' raised on appeal in the other two cases. *Ibid.*, para. 12.

⁴⁹ *Ibid.*, para. 11. Emphasis added.

⁵⁰ See above, Part 2, nn. 13, 14, 15, 34 and 35 and related text.

⁵¹ See the April and November 1997 judgments of the German Federal Administrative Court, above Part 2, nn. 13 and 34 and related text. Such dysfunctional countries will likely lack international recognition as States. See also *ex parte Adan and Aitseguer*, Lord Slynn's opinion, paras. 2 and 6.

broader embattled State alternative is the basis for the denial of asylum in France and other accountability jurisdictions to applicants, such as Aitseguer, from States like Algeria which, while functional, are unable to provide individuals with effective protection from persecution by non-State agents.⁵² Of the two accountability alternatives, Germany's failed State approach has a more limited application, and would serve to deny asylum to refugees only when they feared persecution by non-State agents in countries in which State authority was not only ineffective but also non-existent.⁵³ Having posed the question, the House held that the two variants of the accountability theory are equally incorrect interpretations of the international refugee definition. As Lord Steyn concluded:

The relevant autonomous meaning of article 1(A)(2) of the Refugee Convention is therefore as explained in *Adan [I]*. Like the Court of Appeal I would hold that there is no material distinction between a country where there is no government (like Somalia) and a country [where] the government is unable to afford the necessary protection to citizens (such as Algeria). Both are covered by article 1(A)(2).⁵⁴

Therefore with regard to the primary issue framed by Lord Steyn, the House quite succinctly dismissed the accountability principle by directly citing its own 1999 precedent in *Adan I* and squarely affirming the Court of Appeal in *ex parte Adan, Subaskaran and Aitseguer*.

3.1.2.2 Third-country transfers under the 1951 Convention. In light of the relative ease with which the House framed and resolved the main issue on appeal in *ex parte Adan and Aitseguer* as described above, it is noteworthy that the Law Lords also grappled extensively with what at first blush was a more abstract and peripheral issue. Throughout all four of the separate opinions, their Lordships probed the protection and accountability principles in light of the so-called 'proper interpretation' of the Refugee Convention.⁵⁵

As a threshold matter, they clarified their duty to interpret the Refugee Convention and to instruct the Secretary of State as to their determination.⁵⁶ On this basis, the Law Lords repeatedly stressed that

⁵² See the 1992 decision of the Austrian immigration authority, above Part 2, nn. 14 and 35 and related text. Under the French approach, refugees from so-called embattled States will only be granted asylum if their government 'tolerates or encourages the persecution by non-State agents': *ex parte Adan and Aitseguer*, Lord Slynn's opinion, para. 6.

⁵³ See above nn. 13, 14, 34 and 35 and related text.

⁵⁴ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 23, referring to the earlier decision in *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293 [hereinafter '*Adan I*']. Lord Steyn's opinion, characterized *Adan I* as 'authoritatively reject[ing] the accountability theory and adopting the persecution theory.'

⁵⁵ *ex parte Adan and Aitseguer*, Lord Slynn's opinion, para. 14.

⁵⁶ *Ibid.*, Lord Slynn's opinion, para. 13: the Secretary of State 'must carry out his obligation in the way in which he is advised or told by the courts is right.' See also Lord Hobhouse's opinion, para. 14: the court's interpretation of an international instrument 'must be respected'; Lord Hobhouse's opinion, para. 8: in the absence of an interpretation of the Refugee Convention by the International Court of Justice, the House of Lords' decision is 'determinative'.

the Conventional refugee definition has 'one true meaning',⁵⁷ a 'true construction',⁵⁸ 'one autonomous interpretation',⁵⁹ 'an authoritative interpretation',⁶⁰ and an 'international meaning'.⁶¹ The Court then affirmed the 'proper interpretation' of the Convention '[t]hat persecution may be by bodies other than the State' as 'accepted in *Adan [I]*'.⁶²

Through a close reading it becomes clear that the essential ruling in *ex parte Adan and Aitseguer* was not simply that the House of Lords would continue to reject the accountability principle and would recognize third-party refugees from both failed and embattled States under the *Adan I* protection principle. Rather, the Court also felt compelled to address a deeper question: Was the United Kingdom prohibited from sending third-party refugees to accountability jurisdictions on the strength of that same protection principle? With regard to the cases of *Adan* and *Aitseguer*, the Law Lords responded with a resounding 'yes.'

The Secretary of State had argued before the House that there was 'a permissible range of interpretations' of the Refugee Convention,⁶³ notwithstanding his agreement that *Adan I* was the proper rule in Great Britain.⁶⁴ Given this margin of appreciation, he maintained that he was permitted to return *Adan* and *Aitseguer* to Germany and France as safe countries of first asylum under s. 2(2)(c) of the 1996 Asylum and Immigration Act, despite the likelihood that their claims would be denied on accountability grounds.⁶⁵ The Lords rejected the Home Secretary's reasoning, most pointedly in the opinion of Lord Steyn:

The Secretary of State wrongly proceeded on the twin assumption that there is a band of permissible meaning of article 1A(2) and that the practice hitherto adopted in Germany and France falls within the permissible range. The Secretary of State materially misdirected himself. His decisions must be quashed.⁶⁶

⁵⁷ Ibid., Lord Steyn's opinion, para. 17.

⁵⁸ Ibid., Lord Steyn's opinion, para. 21, citing Lord Lloyd of Berwick in *Adan I* at 305 C-D.

⁵⁹ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 22; see also Lord Steyn's opinion, para. 16.

⁶⁰ Ibid., Lord Hutton's opinion, para. 7, citing the Court of Appeal in *ex parte Adan et al* at 1295-6.

⁶¹ *ex parte Adan and Aitseguer*, Lord Hobhouse's opinion, para. 11, citing Lord Woolf in *Kermouche v. Home Secretary* [1997] Imm. AR 610.

⁶² *ex parte Adan and Aitseguer*, Lord Slynn's opinion, paras. 14 and 12; see also Lord Steyn's opinion, para. 23.

⁶³ Ibid., Lord Steyn's opinion, para. 1.

⁶⁴ Ibid., Lord Steyn's opinion, para. 22.

⁶⁵ Ibid., Lord Steyn's opinion, para. 7. See also above nn. 26-28 and related text. Cf. *Ex parte Adan and Aitseguer, T.I. v. U.K.*, below n. 86 and related text.

⁶⁶ Ibid., Lord Steyn's opinion, para. 24. Also worthy of note is the Court's response to the reliance placed by the Secretary of State on the 1996 Joint Position of the European Union on the harmonized application of the definition of the term refugee. The Joint Position tends to a pro-accountability approach, requiring 'persecution by third parties' to be encouraged or permitted by the authorities if it is to fall within the scope of the Geneva Convention ...': para. 5.2. Lord Steyn economically responded that '[c]ounsel [for the Secretary of State] put too much weight on this document': *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 18. See also above n. 15. Lord Steyn's view is supported by the position of the European Council on Refugees and Exiles [ECRE] in its analysis of 'Non-State Agents of Persecution and the Inability of the State to Protect — the German

By addressing the practical exigencies of prospective third-country transfers under domestic law, the House of Lords applied the *Adan II*/protection principle in a new context. In so doing, the Court confronted the prospect of 'chain-reaction *refoulements*,' finding such indirect forced returns in violation of article 33 of the 1951 Convention.⁶⁷ In the words of Lord Steyn:

it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution ... it would be equally unlawful to return him to a third country which it is known will return him to his country of origin.⁶⁸

Lord Hutton went even further in proclaiming the *non-refoulement* principle as 'an important human right ... notwithstanding that the State ... is not complicit in [the feared] persecution.'⁶⁹ He then concluded that section 2 of the 1996 Act could not serve 'to take away that right from Ms. Adan and Mr. Aitseguer,' and therefore that the Secretary of State was prohibited from returning them to either Germany or France.⁷⁰

3.1.3 *ex parte Adan and Aitseguer* — *Unfinished business?*

While unanimously affirming the lower court's decision regarding Adan and Aitseguer, it is significant that the House of Lords did not reiterate the Court of Appeal's reasoning in all respects. Specifically, the House of Lords did not rely upon the 'real risk' test cited by the lower court.⁷¹ Rather, the Law Lords unambiguously rejected the accountability principle and overturned the Secretary of State's decisions to return Adan and Aitseguer to Germany and France. In so doing, the Court clarified that the protection theory is the correct interpretation of the Convention, and protects third-party refugees from non-State persecution in both

Interpretation' (London, Sept. 2000) [ECRE NSA Report]: 'Apart from its non-binding nature, the Joint Position can hardly be adduced as showing a consistent common state practice that favours the strict application of the accountability theory': ECRE NSA Report at nn. 60–62 and related text. Moreover, with regard to the potential negative impact of the House's decision on the EU harmonization process, or as 'an implicit criticism of the judicial departments of Germany and France,' Lord Steyn responded that '[t]he sky will not fall in.' 'National courts can only do their best to minimize the disagreements. But ultimately they have no choice ... The House is bound to take into account the obligations of the United Kingdom government ...' (Lord Steyn's opinion, para. 18).

⁶⁷ Art. 33 CSR51: 'No contracting State shall expel or return (*'refouler'*) a refugee ... to the frontiers of territories where his life or freedom would be threatened ...'

⁶⁸ *ex parte Adan and Aitseguer*, Lord Steyn's opinion, para. 14.

⁶⁹ *Ibid.*, Lord Hutton's opinion, para. 11.

⁷⁰ *Ibid.*, Lord Hutton's opinion, paras. 11 and 12.

⁷¹ While Lord Hutton indicated that the Secretary of State did not contest the 'real risk' that Adan and Aitseguer would be returned by the German and French authorities to Somalia and Algeria, respectively, the Lords did not set forth the 'real risk' test as the basis for their decision: Lord Hutton's opinion, para. 7. Lord Steyn also commented on the insufficient evidence regarding alternative forms of protection to asylum in Germany and France: Lord Steyn's opinion, para. 25.

failed and embattled States.⁷² Moreover, *ex parte Adan and Aitseguer* discourages ‘chain-reaction *refoulements*’ of refugees to likely persecution by non-State agents by prohibiting indirect returns through accountability jurisdictions.⁷³

Nevertheless, the ‘real risk’ test cited by the Court of Appeal — affirming its earlier decision in *ex parte Canbolat*⁷⁴ — is largely untouched by the House of Lords in *ex parte Adan and Aitseguer*.⁷⁵ Therefore, despite the success of the appellants in fighting their returns to Germany and France, and the notable validation and extension of the protection theory by the House of Lords, there may be a small but important piece of unfinished business in the aftermath of *ex parte Adan and Aitseguer*.

The ‘real risk’ test re-articulated by the Court of Appeal in *ex parte Adan et al* remains a factor in cases involving the possible transfer of asylum seekers to third countries, particularly those which may have specific measures for temporary protection falling short of the durable status of asylum. The real risk test would appear to contemplate a case-based investigation of a State’s interpretation and application of the Refugee Convention which may, in practice, tolerate returns to accountability theory jurisdictions.⁷⁶ Because the House of Lords felt it was in no position to evaluate the claimed alternative forms of protection in Germany, arguably the real risk analysis became moot in *Adan and Aitseguer*’s case.⁷⁷ However, it was the very claim of meaningful alternatives to asylum in Germany that led to a different outcome when another third-party refugee petitioned the British Secretary of State, and ultimately the European Court of Human Rights.

3.2 *T.I. v. The United Kingdom*

T.I. v. The United Kingdom involved a Sri Lankan who alleged past persecution by both the LTTE insurgents and the Sri Lankan government, as well as a fear of future persecution by both State and non-State agents were he to be returned to Sri Lanka.⁷⁸ According to T.I.’s testimony, he was first captured, interrogated and forced into servitude by the Tamil Tigers over a two-year period. In 1995, after escaping from an LTTE settlement, he was arrested by Sri Lankan soldiers on two different

⁷² *Ibid.*, Lord Steyn’s opinion, paras. 24, 23; see also para. 20, citing Lord Lloyd of Berwick in *Adan I* at p. 306 A-B: ‘for those who are sometimes called “third party refugees” . . . if the state is unable to provide protection . . . the qualifications for refugee status are complete’. See also above nn. 2 and 54 and related text.

⁷³ See above section 3.1.2.1.

⁷⁴ See above n. 42.

⁷⁵ See above n. 71.

⁷⁶ See *ex parte Adan et al*, Court of Appeal, 14 and 19; see also *ex parte Adan and Aitseguer*, Lord Steyn’s opinion, para. 24: ‘cases under the Refugee Convention are always particularly fact-sensitive’.

⁷⁷ Lord Steyn’s opinion, para. 25.

⁷⁸ *T.I. v. United Kingdom*, above n. 13, 3–4.

occasions, both leading to his interrogation regarding suspected LTTE affiliation and numerous instances of torture, including severe beatings, whippings and burnings.⁷⁹ A doctor involved in the treatment of torture victims issued a report on T.I.'s behalf concluding that his extensive scars as well as his psychological attributes were characteristic of survivors of torture, and moreover that his testimony regarding the detention centres in which allegedly he had been incarcerated in Sri Lanka were consistent with descriptions given by other Sri Lankan asylum seekers.⁸⁰

T.I. alleged a prospective fear of persecution upon return to Sri Lanka, based upon ongoing suspicions that government officials likely would form as to his LTTE association. In this context, his testimony graphically highlighted the potential impact of his extensive scars, were he to be returned to Sri Lanka. Not only might his scars brand him as a victim of past torture and imputed involvement in insurgent activities, but they might in turn provoke further suspicion and inhuman treatment in the future.⁸¹

T.I. claimed asylum in Germany in 1996 and his application was denied, first by the State refugee status determination authority in 1996, and then by an Administrative Court in Bavaria in 1997.⁸² The first decision was grounded in the finding that T.I.'s alleged torture, if it occurred, was due to 'excesses of isolated organs [that] ... cannot be imputed to the Sri Lankan State.'⁸³ The Administrative Court's denial, on the other hand, was based on an unwillingness to attribute persecutory acts by the Tamil Tigers to the Sri Lankan State, as well as an adverse finding regarding T.I.'s credibility.⁸⁴

With reference to the United Kingdom Court of Appeal's decision in *ex parte Adan*, it may be noted that where Sittampalan Subaskaran⁸⁵ claimed a fear of non-State persecution, T.I. alleged both State and non-State persecution, which might be thought to strengthen his prospects in an accountability jurisdiction. However, the German authorities not only refused T.I. protection due to the non-State character of the Tamil Tigers' abuse, as in *Adan*, but also out of an apparent refusal to attribute acts by State officials to the State.

After the second adverse decision in his case, T.I. left Germany for Italy and then the United Kingdom, where he claimed asylum in September 1997. Analogous to the early stages of the asylum case of Subaskaran, T.I.'s asylum claim was denied in 1998 by the Secretary of

⁷⁹ Ibid., 3–4.

⁸⁰ Ibid., 5–6.

⁸¹ Ibid., 5–6, 10.

⁸² Ibid., 4.

⁸³ Ibid., 4.

⁸⁴ Ibid., 4.

⁸⁵ See above Part 2, and nn. 24 and 31.

State without consideration on the merits, based on a finding under section 2 of the 1996 Asylum and Immigration Act that he was returnable to Germany as a safe country of first asylum.⁸⁶

Unlike Mr Subaskaran, however, when T.I. appealed to the Court of Appeal later in 1998, the Court upheld the Home Secretary's determination, finding that he 'was entitled to conclude that the German authorities do not adopt an approach . . . outside the range of responses of a Contracting State acting in good faith to implement its obligations under the [Refugee] Convention.'⁸⁷ When T.I. was denied leave to appeal to the House of Lords, he sought 'leave to remain . . . on compassionate grounds,' further judicial review on medical grounds, and a request for reconsideration of his case based on the Court of Appeal decision in *ex parte Adan et al.*, all unsuccessfully.⁸⁸

After being denied asylum by the Secretary of State and losing in the Court of Appeal, T.I. petitioned the European Commission of Human Rights in September 1998. He claimed that the United Kingdom, in finding him removable to Germany, had violated a number of provisions of the European Convention on Human Rights, including Article 3's prohibition against torture and inhuman treatment.⁸⁹ The Commission transferred competence to examine T.I.'s application to the European Court of Human Rights, and the Court's decision was rendered on 7 March 2000.⁹⁰

Although asylum is not a subject of the European Convention, Article 3 has been interpreted by the Court to bar a country from returning an individual to torture and inhuman treatment, in much the same way as the Refugee Convention prohibits *refoulement* to likely persecution.⁹¹ In fact, in *Ahmed v. Austria*, the European Court in 1996 blocked the return of a Somali national to his country of origin, where he feared persecution by a paramilitary faction led by the warlord General Aideed.

Ahmed is an important decision for the European Court, given that no less than three vital legal principles emanate from this case. The Court concluded in *Ahmed* that: (1) Article 3's prohibition against inhuman treatment serves as protection against certain forms of persecution; (2) in addition to prohibiting affirmative inhuman acts by a signatory, Article 3 also bars a signatory from returning an individual to a jurisdiction in

⁸⁶ *T.I. v. United Kingdom*, 4-5; also above nn. 26-8 and 65 and related text.

⁸⁷ *T.I. v. United Kingdom*, 5.

⁸⁸ *Ibid.*, 5-6. T.I. made his request before the decision by the House of Lords to consider the appeal of the Court of Appeal's decision in *Ex parte Adan et al.* Moreover, the UK Secretary of State sought leave to appeal in the House of Lords, with respect to Adan and Aitseguer only, and not in the case of Subaskaran.

⁸⁹ *Ibid.*, 1, 12. Art. 3, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR50), 4 Nov. 1950, 213 *UNTS* 222, ETS No. 5.

⁹⁰ *T.I. v. United Kingdom*, 1.

⁹¹ *Ibid.*, 15. Art. 33 CSR51.

which such inhuman treatment may occur; and (3) Article 3 protects against inhuman treatment by non-State agents as well as State officials.⁹² The third *Ahmed* ruling is particularly significant, in that it borrows the protection principle from international refugee law and applies it in the context of human rights law and the European Convention.⁹³

Affirming its willingness to apply the second *Ahmed* principle to T.I.'s threatened return to Germany, the Court held in *T.I. v. U.K.*, 'that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.'⁹⁴ Moreover, the Court recognized the inconsistency between its own jurisprudence regarding protection from non-State human rights abuses, namely, the third principles in the *Ahmed* case, and the accountability theory as utilized by Germany to deny refugee protection where the State is not complicit in the alleged persecution.⁹⁵

Despite its apparent favourable application of *Ahmed*, as well as its implicit condemnation of the German accountability theory, the European Court refused to block the United Kingdom's removal of T.I. to Germany. The reason for the Court's decision was ostensibly its finding that T.I. would not *necessarily* be returned by Germany to Sri Lanka, despite his denial of asylum. The Court examined several provisions of the German Aliens Act, and concluded that T.I. might be eligible for one or more alternative forms of protection which are not limited to victims of State-sponsored persecution.

In particular, the Court examined section 53(6) of the Aliens Act, 'which grants a discretion to the [German] authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of an alien. This applies to concrete individual *danger resulting from either State or private action*.'⁹⁶ The European Court found that T.I. would be eligible to seek section 53(6) protection, and that 'the apparent gap in protection resulting from the German approach to non-State agent risk is met, at

⁹² See generally, *Ahmed v. Austria*, 24 E.H.R.R. 278 (1996), paras. 10, 21, 35 and 41–47. See also *T.I. v. United Kingdom*, 15, citing *Ahmed*. See also *Soering v. United Kingdom*, 16 E.H.R.R. (1989), para. 82, clarifying that a party to the European Convention is obligated 'not to put a person in a position where he will or may suffer [inhuman] treatment or punishment'.

⁹³ Compare *Ahmed*, above note, with *ex parte Adan and Aitseguer*, above nn. 3 and 12.

⁹⁴ *Ibid.*, 16.

⁹⁵ *Ibid.*, 9 and 10, citing the decision of the German Federal Administrative Court decision of 15 April 1997 and *Ahmed*. See also above n. 13.

⁹⁶ *Ibid.*, 10, emphasis added. The Court goes on to specify that in early 1999, twenty-four Sri Lankans benefited from section 53(6) protection, all of whom alleged non-State sources of danger. Unlike T.I., however, none of these individuals had sought temporary protection after being denied asylum in the first instance. *Ibid.*, 18.

least to some extent, by the application by the German authorities of section 53(6).⁹⁷

In order to reconcile the Court's willingness to apply Article 3 of the Convention to block deportations that may result in inhuman treatment in another country, with its unwillingness to block T.I.'s return to Germany, it may be useful to examine the Court's qualification of its earlier statement of *Ahmed* principle #2. Like the UK Court of Appeal in *ex parte Adan et al*, the European Court does not state that the mere possibility of treaty violations is sufficient to find that individuals may never be returned to a particular jurisdiction. Rather, the Court states that Article 3 'imposes an obligation on the Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a *real risk* of being subjected to treatment contrary to Article 3.'⁹⁸

Just as it articulates the *Ahmed* principle in the form of a 'real risk' test, the Court phrases its final determination that T.I. may be returned to Germany in terms of a negative assessment of his likelihood of return by Germany to Sri Lanka: 'the Court finds that it is not established that there is a *real risk* that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention.'⁹⁹

The good news in *T.I.* is that Article 3 of the European Convention is still held to prohibit return to persecution by non-State agents [*Ahmed* principle #3], and that the Court requires a signatory State like Germany to provide alternatives to asylum in the case of victims of non-State agents of persecution. The more sobering news is that the Court was willing to deny protection to T.I. on the basis of a purely discretionary form of relief from deportation, despite the fact that the German government had 'not provided any example of section 53(6) being applied to a failed asylum seeker in a second asylum procedure.'¹⁰⁰ Moreover, the Court does not address the very real disadvantage that even if section 53(6) protection were provided to T.I., it amounts to a temporary suspension of deportation, rather than a conference of durable legal status on a par with asylum.

⁹⁷ *Ibid.*, 17–18. The European Council on Refugees and Exiles does not share the confidence of the European Court regarding the efficacy of section 53(6) of the German Aliens Act. In its recent study of German policy regarding third-party refugees, it noted that '[i]n 1999, of the applicants for political asylum in Germany . . . [o]nly 1.55% were granted the temporary suspension of deportation pursuant to Section 53 of the Aliens Act.' 2000 ECRE NSA Report at n. 6 and related text. See also above n. 66.

⁹⁸ *T.I. v. United Kingdom*, 15, citing *Ahmed*, paras. 39–40; emphasis added. Compare *ex parte Adan et al* at 14, above n. 42.

⁹⁹ *T.I. v. United Kingdom*, 19, emphasis added.

¹⁰⁰ *Ibid.*, 18. See also above nn. 71 and 97.

4. Conclusion

T.I. v. The United Kingdom — together with the domestic proceedings in the United Kingdom that preceded it — illustrates the vulnerability of a refugee protection regime that lacks consensus regarding the status of victims of non-State agents of persecution. The abstract right of all refugees to protection may be proclaimed, and the withholding of asylum to victims of non-State agents may be officially condemned, while *de facto* returns to persecution are tolerated. So long as the accountability theory is applied, even in a limited number of jurisdictions, the rights of third-party refugees may be honoured in the breach.

The ‘real risk’ in allowing returns to accountability jurisdictions lies not only in the very real possibility of chain-reaction returns to persecution in the case of individual asylum seekers, but also in the propagation and perpetuation of a double standard that will negatively impact far greater numbers of refugees. The principle of non-discrimination, enshrined in the Refugee Convention and international human rights law more generally,¹⁰¹ does not tolerate an interpretation of the refugee definition that forces victims of non-State persecution to rely on the discretionary kindness of temporary relief from forced return rather than the durable protection of asylum. Thus the strongest principled and practical statement that protection adherents can make in the face of accountability doctrine is in refusing to return asylum seekers to accountability jurisdictions, as demonstrated by the House of Lords in *ex parte Adan and Aitseguer*.¹⁰²

¹⁰¹ Art. 3 CSR51. See also art. 2 ICCPR66; art. 14 ECHR50.

¹⁰² See *ex parte Adan and Aitseguer*, Lord Steyn’s opinion, para. 24. In this regard, *ex parte Bouheraoua* is another favourable indication of the United Kingdom’s willingness to bar the removal of victims of non-State persecution to accountability jurisdictions, at least where the available form of temporary protection in the country of first asylum is denied to members of a particular nationality on a categorical basis. See above n. 46.